A/CN.4/SER.A/1999

# YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

# 1999

*Volume I*

*Summary records*
*of the meetings*
*of the fifty-first session*
*3 May-23 July 1999*

UNITED NATIONS
New York and Geneva, 2003

## NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...,* followed by the year (for example, *Yearbook ... 1998*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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This volume contains the summary records of the meetings of the fifty-first session of the Commission (A/CN.4/SR.2565-A/CN.4/SR.2611), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

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## MEMBERS OF THE COMMISSION

| *Name* | *Country of nationality* |
|---|---|
| Mr. Emmanuel Akwei ADDO | Ghana |
| Mr. Husain AL-BAHARNA | Bahrain |
| Mr. Awn AL-KHASAWNEH | Jordan |
| Mr. João Clemente BAENA SOARES | Brazil |
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| Mr. Doudou THIAM | Senegal |
| Mr. Peter TOMKA | Slovakia |
| Mr. Chusei YAMADA | Japan |

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## OFFICERS

*Chairman*: Mr. Zdzislaw GALICKI

*First Vice-Chairman*: Mr. Raul Ilustre GOCO

*Second Vice-Chairman*: Mr. Emmanuel Akwei ADDO

*Chairman of the Drafting Committee*: Mr. Enrique CANDIOTI

*Rapporteur*: Mr. Robert ROSENSTOCK

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*Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, represented the Secretary-General and Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General.*

## AGENDA

The Commission adopted the following agenda at its 2565th meeting, held on 3 May 1999:

1. Filling of casual vacancies (article 11 of the statute).
2. Organization of work of the session.
3. State responsibility.
4. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities).
5. Reservations to treaties.
6. Nationality in relation to the succession of States.
7. Diplomatic protection.
8. Unilateral acts of States.
9. Jurisdictional immunities of States and their property.
10. Programme, procedures and working methods of the Commission, and its documentation.
11. Cooperation with other bodies.
12. Date and place of the fifty-second session.
13. Other business.

## ABBREVIATIONS

| | |
|---|---|
| ACABQ | Advisory Committee on Administrative and Budgetary Questions |
| GATT | General Agreement on Tariffs and Trade |
| IDB | Inter-American Development Bank |
| ICJ | International Court of Justice |
| ICSID | International Centre for Settlement of Investment Disputes |
| ILA | International Law Association |
| ILO | International Labour Organization |
| MERCOSUR | Southern Cone Common Market |
| NATO | North Atlantic Treaty Organization |
| OAS | Organization of American States |
| OAU | Organization of African Unity |
| OPEC | Organization of Petroleum Exporting Countries |
| OSCE | Organization for Security and Co-operation in Europe |
| PCIJ | Permanent Court of International Justice |
| UNHCR | Office of the United Nations High Commissioner for Refugees |
| UNIDROIT | International Institute for the Unification of Private Law |
| UNEP | United Nations Environment Programme |
| UNITAR | United Nations Institute for Training and Research |
| WTO | World Trade Organization |

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|---|---|
| *I.C.J. Reports* | ICJ, *Reports of Judgments, Advisory Opinions and Orders* |
| *P.C.I.J. Series A* | PCIJ, *Collection of Judgments* (Nos. 1-24: up to and including 1930) |
| *P.C.I.J., Series A/B* | PCIJ, *Judgments, Orders and Advisory Opinions* (Nos. 40-80: beginning in 1931) |
| RGDIP | *Revue générale de droit international public* |
| UNRIAA | United Nations, *Reports of International Arbitral Awards* |

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In the present volume, the "International Tribunal for the Former Yugoslavia" refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; and the "International Tribunal for Rwanda" refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.

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### NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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The Internet address of the International Law Commission is www.un.org/law/ilc/index.htm.

## CASES CITED IN THE PRESENT VOLUME

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| *Ahmadou Sadio Diallo* | *(Republic of Guinea* v. *Democratic Republic of the Congo), Order of 25 November 1999, I.C.J. Reports 1999.* |
| *Air Service Agreement of 27 March 1946* | *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 443 et seq.). |
| *Anglo-Iranian Oil Co.* | *Judgment, I.C.J. Reports 1952*, p. 93. |
| *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* | *Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 3; and ibid., *Order of 13 September 1993, I.C.J. Reports 1993*, p. 325.<br>*Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595.<br>*Counterclaims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 243. |
| *Belilos* | European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 132, *Belilos* v. *Switzerland, judgment of 29 April 1988* (Council of Europe, Strasbourg, 1988). |
| *Celebici* | *Prosecutor* v. *Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, case No. IT-96-21, International Tribunal for the Former Yugoslavia, Trial Chamber II quater, judgment of 16 November 1998. |
| *Certain Phosphate Lands in Nauru* | *(Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240. |
| *Delagoa Bay Railway* | Decision of 29 March 1900 (Martens, *Nouveau Recueil général de Traités*, 2nd series, vol. XXX, pp. 329 et seq.) |
| *Delimitation of the Maritime Boundary in the Gulf of Maine Area* | *Judgment, I.C.J. Reports 1984*, p. 246. |
| *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* | *Advisory Opinion, I.C.J. Reports 1999*, p. 62. |
| *Diversion of Water from the Meuse* | *Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 4. |
| *East Timor* | *(Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90. |

| TITLE | NATURE OF THE DECISION |
|---|---|
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| *English Channel* | *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decisions of 30 June 1977 and 14 March 1978 (UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 3 and 271). |
| *Factory at Chorzów* | *Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9.* |
| *Fisheries Jurisdiction* | *(Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432. |
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| *Gabčíkovo-Nagymaros Project* | *(Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7. |
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| *Interpretation of article 24 of the Treaty of Finance and Compensation of 27 November 1961* | *Case concerning the Interpretation of article 24 of the Treaty of Finance and Compensation of 27 November 1961 between Austria and the Federal Republic of Germany*, decision of 15 January 1972 (UNRIAA, vol. XIX (Sales No. E/F.90.V.7), pp. 3 et seq.). |
| *Kasikili/Sedudu Island* | *(Botswana/Namibia), Order of 24 June 1996, I.C.J. Reports 1996*, p. 63. |
| *Klöckner* v. *Cameroon* | *Klöckner Industrie-Anlagen GmbH and others* v. *Republic of Cameroon,* Award on the Merits *(ICSID Reports* (Cambridge University Press, Grotius, 1994), vol. 2, p. 3). |
| *Lac Lanoux* | UNRIAA, vol. XII (Sales No. 63.V.3), p. 281. |
| *LaGrand* | *(Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 9. |
| *Land and Maritime Boundary between Cameroon and Nigeria* | *Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996*, p. 13.<br>*Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275. |
| *Legal Status of Eastern Greenland* | *Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22. |
| *Legality of the Threat or Use of Nuclear Weapons* | *Advisory Opinion, I.C.J. Reports 1996*, p. 226. |

| TITLE | NATURE OF THE DECISION |
|---|---|
| *Legality of Use of Force* | *(Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 124.<br>*(Yugoslavia* v. *Canada),* ibid., p. 259.<br>*(Yugoslavia* v. *France),* ibid., p. 363.<br>*(Yugoslavia* v. *Germany)*, ibid., p. 422.<br>*(Yugoslavia* v. *Italy),* ibid., p. 481.<br>*(Yugoslavia* v. *Netherlands)*, ibid., p. 542.<br>*(Yugoslavia* v. *Portugal)*, ibid., p. 656.<br>*(Yugoslavia* v. *Spain)*, ibid., p. 761.<br>*(Yugoslavia* v. *United Kingdom)*, ibid., p. 826.<br>*(Yugoslavia* v. *United States of America)*, ibid., p. 916. |
| *Military and Paramilitary Activities in and against Nicaragua* | *(Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14. |
| *Minquiers and Ecrehos* | *Judgment, I.C.J. Reports 1953*, p. 47. |
| *M/V "Saiga"* | (Saint Vincent and the Grenadines *v.* Guinea), dispute concerning the prompt release of the M/V "Saiga" and its crew, judgment of 4 December 1997 of the International Tribunal on the Law of the Sea. |
| *Namibia* | *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16. |
| *North Sea Continental Shelf Cases* | *(Federal Republic of Germany* v. *Denmark) (Federal Republic of Germany* v. *Netherlands), Judgment, I.C.J. Reports 1969*, p. 3. |
| *Nottebohm* | *Second Phase, Judgment, I.C.J. Reports 1955*, p. 4. |
| *Nuclear Tests* | *(Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253.<br>*(New Zealand* v. *France)*, ibid., p. 457. |
| *Oil Platforms* | *(Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803<br>*(Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 199*8, p. 190. |
| *Papamichalopoulos and Others* v. *Greece* | European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 260-B, *Judgment of 24 June 1993 (*Council of Europe, Strasbourg, 1993), pp. 58 et seq. |
| *Phosphates in Morocco* | *Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 10. |
| *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* | *(Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 3.<br>*(Libyan Arab Jamahiriya* v. *United States of America)*, ibid., p. 114. |
| *Rainbow Warrior* | UNRIAA, vol. XIX, pp. 197 et seq. |
| *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections | *(Nigeria* v. *Cameroon), Judgment, I.C.J. Reports 1999*, p. 31. |

| TITLE | NATURE OF THE DECISION |
|---|---|
| *Restrictions to the Death Penalty* | *(arts. 4(2) and 4(4) American Convention on Human Rights)*, Inter-American Court of Human Rights Advisory Opinion OC-3/83 of 8 September 1983, Series A, No. 3. |
| *Savarkar* | UNRIAA, vol. XI (Sales No. 61.V.4), p. 252. |
| *South West Africa* | *Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319. |
| | *Second Phase, Judgment, I.C.J. Reports 1966*, p. 6. |
| *Sovereignty over Pulau Ligitan and Pulau Sipadan* | *(Indonesia/Malaysia), Order of 10 November 1998, I.C.J. Reports 1998*, p. 429. |
| *S.S. "Wimbledon"* | *Judgments, 1923, P.C.I.J., Series A*, *No.1.* |
| *Temeltasch* | Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Application No. 9116/80, *Temeltasch* v. *Switzerland*, vol. 31 (Strasbourg, 1983), pp. 138-153. |
| *Temple of Preah Vihear* | *Merits, Judgment, I.C.J. Reports 1962*, p. 6. |
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| *United States Diplomatic and Consular Staff in Tehran* | *Judgment, I.C.J. Reports 1980*, p. 3. |
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| Vienna Convention on Consular Relations (Vienna, 24 April 1963) | Ibid., vol. 596, p. 261. |
| European Convention on State Immunity (Basel, 16 May 1972) | Ibid., vol. 1495, No. 25699, p. 181. |
| HUMAN RIGHTS | |
| Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948) | Ibid., vol. 78, No. 1021, p. 277. |
| Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950) | Ibid., vol. 213, No. 2889, p. 221. |
| Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (Strasbourg, 11 May 1994) | Council of Europe, *European Treaty Series*, No. 155. |
| Convention (No. 107) concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries (Geneva, 26 June 1957) | United Nations, *Treaty Series*, vol. 328, No. 4738, p. 247. |
| International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) | Ibid., vol. 993, No. 14531, p. 3. |
| International Covenant on Civil and Political Rights (New York, 16 December 1966) | Ibid., vol. 999, No. 14668, p. 171. |
| Convention (No. 169) concerning indigenous and tribal peoples in independent countries (Geneva, 27 June 1989) | Ibid., vol. 1650, No. 28383, p. 383. |
| Convention on the Rights of the Child (New York, 20 November 1989) | *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 49*, resolution 44/25, annex. |
| International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990) | Ibid., *Forty-fifth Session, Supplement No. 49*, resolution 45/158, annex. |

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| Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings (Paris, 12 January 1998) | Ibid., No. 168. |
| NATIONALITY | |
| European Convention on Nationality (Strasbourg, 6 November 1997) | Ibid., No. 166. |
| INTERNATIONAL TRADE AND DEVELOPMENT | |
| General Agreement on Tariffs and Trade (Geneva, 30 October 1947) | United Nations, *Treaty Series*, vol. 55, p. 187. |
| Protocol modifying certain provisions of the General Agreement on Tariffs and Trade (Havana, 24 March 1948) | Ibid., vol. 62, p. 30. |
| Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington, 18 March 1965) | Ibid., vol. 575, No. 8359, p. 159. |
| United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980) | Ibid., vol. 1489, No. 25567, p. 3. |
| CIVIL AVIATION | |
| Convention on International Civil Aviation (Chicago, 7 December 1944) | Ibid., vol. 15, No. 102, p. 295. |
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| Rome Statute of the International Criminal Court (Rome, 17 July 1998) | Document A/CONF.183/9. |
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| Geneva Conventions on the Law of the Sea (Geneva, April 1958) | |
| Convention on the Continental Shelf (Geneva, 29 April 1958) | United Nations, *Treaty Series*, vol. 499, p. 311. |
| Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958) | Ibid., vol. 516, p. 205. |
| Convention on the High Seas (Geneva, 29 April 1958) | Ibid., vol. 450, p. 11. |

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| Treaty of Peace between Sweden and the Empire (Osnabruck, 24 October 1648) | *The Consolidated Treaty Series* (Dobbs Ferry, New York, Oceana Publications, 1969), vol. 1 (1648-1649), pp. 119 et seq. |
| Treaty of Peace between France and the Empire (Munster, 24 October 1648) | Ibid., pp. 271 et seq. |
| Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919) | *British and Foreign State Papers, 1919*, vol. CXII (London, H. M. Stationery Office, 1922), p. 1. |
| Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye) (Saint-Germain-en-Laye, 10 September 1919) | Ibid., p. 317. |
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| Treaty of Peace between the Allied Powers and Turkey (Treaty of Sèvres) (Sèvres, 10 August 1920) | Ibid., p. 652. |
| Geneva Conventions for the protection of war victims (Geneva, 12 August 1949) | United Nations, *Treaty Series*, vol. 75, pp. 31 et seq. |
| Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field | Ibid., p. 31. |
| Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea | Ibid., p. 85. |
| Geneva Convention relative to the Treatment of Prisoners of War | Ibid., p. 135. |
| Geneva Convention relative to the Protection of Civilian Persons in Time of War | Ibid., p. 287. |

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| Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977) | Ibid., vol. 1125, Nos. 17512-17513, pp. 3 and 609. |
| State Treaty for the Re-establishment of an Independent and Democratic Austria (Vienna, 15 May 1955) | Ibid., vol. 217, No. 2949, p. 223. |
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| Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) | Ibid., vol. 1155, p. 331. |
| Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978) | *Official Records of the United Nations Conference on Succession of States in Respect of Treaties, Vienna, 4 April-6 May 1977 and 31 July-23 August 1978*, vol. III (United Nations publication, Sales No. E.79.V.10). |
| Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (Vienna, 8 April 1983) | United Nations, *Juridical Yearbook 1983* (Sales No. E.90.V.1), p. 139. |
| Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986) | Document A/CONF.129/15. |
| LIABILITY | |
| Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960) | United Nations, *Treaty Series*, vol. 956, No. 13706, p. 251. |
| International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969) | Ibid., vol. 973, No. 14097, p. 3. |
| DISARMAMENT | |
| Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water (Moscow, 5 August 1963) | Ibid., vol. 480, No. 6964, p. 43. |
| Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco) (with annexed Additional Protocols I and II) (Mexico, Federal District, 14 February 1967) | Ibid., vol. 634, No. 9068, p. 281 and ibid., vol. 1894, pp. 335-337. |
| Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, 1 July 1968) | Ibid., vol. 729, No. 10485, p. 161. |

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| South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga) (Rarotonga, 6 August 1985) | Ibid., vol. 1445, No. 24592, p. 177. |
| Protocol 2 | *Status of Multilateral Arms Regulation and Disarmament Agreements*, 4th ed. (1992), vol. 1 (United Nations publication, Sales No. E.93.IX.11 (Vol. 1)), p. 280. |
| Comprehensive Nuclear-Test-Ban Treaty (New York, 10 September 1996) | Document A/50/1027, annex. |
| Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997) | Document CD/1478, annex. |
| ENVIRONMENT AND NATURAL RESOURCES | |
| Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987) | United Nations, *Treaty Series*, vol. 1522, No. 26369, p. 3. |
| Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington, 2 June 1988) | *International Legal Materials* (Washington, D.C.), vol. XXVII (1988), p. 868. |
| Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989) | UNEP, *Selected Multilateral Treaties in the Field of the Environment* (Cambridge, England, 1991), vol. 2, p. 449. |
| Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako, 30 January 1991) | *International Legal Materials* (Washington, D.C.), vol. XXX, No. 3 (May 1991), p. 775. |
| Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991) | ECE, *Environmental Conventions*, United Nations publication, 1992, p. 95. |
| United Nations Framework Convention on Climate Change (New York, 9 May 1992) | United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 165. |
| Convention on Biological Diversity (Rio de Janeiro, 5 June 1992) | *Juridical Yearbook 1992* (Sales No. E.97.V.8), p. 359. |
| Convention on the Law of the Non-Navigational Uses of International Watercourses (New York, 21 May 1997) | *Official Records of the General Assembly, Fifty-first session, Supplement No. 49,* resolution 51/229, annex. |

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| Antarctic Treaty (Washington, 1 December 1959) | United Nations, *Treaty Series*, vol. 402, No. 5778, p. 71. |
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| Treaty on European Union (Maastricht Treaty) (Maastricht, 7 February 1992) | Ibid., vol. 1757, No. 30615, p. 3. |
| Inter-American Convention against Corruption (Caracas, 29 March 1996) | Document E/1996/99. |
| Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (Amsterdam, 2 October 1997) | *Official Journal of the European Communities,* No. C 340 (10 November 1997), p. 145. |
| Criminal Law Convention on Corruption (Strasbourg, 27 January 1999) | Council of Europe, *European Treaty Series*, No. 173. |

# CHECKLIST OF DOCUMENTS OF THE FIFTY-FIRST SESSION

| *Documents* | *Title* | *Observations and references* |
|---|---|---|
| A/CN.4/478/Rev.1 | Fourth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur, annex: Bibliography | Reproduced in *Yearbook ... 1999*, vol. II (Part One). |
| A/CN.4/492 | State responsibility: comments and observations received from Governments | Idem. |
| A/CN.4/493 [and Corr.1] | Nationality in relation to the succession of States: comments and observations received from Governments | Idem. |
| A/CN.4/494 and Add.1-2 | Filling of casual vacancies (article 11 of the statute): note by the Secretariat | Idem. |
| A/CN.4/495 | Provisional agenda | Mimeographed. For agenda as adopted, see p. ix above. |
| A/CN.4/496 | Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-third session of the General Assembly | Mimeographed. |
| A/CN.4/497 | Nationality in relation to the succession of States: memorandum by the Secretariat | Reproduced in *Yearbook ... 1999*, vol. II (Part One). |
| A/CN.4/498 and Add.1-4 | Second report on State responsibility, by Mr. James Crawford, Special Rapporteur | Idem. |
| A/CN.4/499 | Fourth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur | Idem. |
| A/CN.4/500 and Add.1 | Second report on unilateral acts of States, by Mr. Victor Rodríguez Cedeño, Special Rapporteur | Idem. |
| A/CN.4/501 | Second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) | Idem. |
| A/CN.4/L.572 | Nationality in relation to the succession of States: report of the Working Group | Mimeographed. |
| A/CN.4/L.573 [and Corr.1] | Nationality in relation to the succession of States. Titles and texts of draft articles adopted by the Drafting Committee on second reading | See summary record of the 2579th meeting (para. 4). |
| A/CN.4/L.574 [and Corr.1 and 3] | State responsibility. Titles and texts of draft articles adopted by the Drafting Committee: articles 16 to 26 bis (chapter III), 27 to 28 bis (chapter IV) and 29 to 35 (chapter V) | See summary record of the 2605th meeting (para. 4). |
| A/CN.4/L.575 | Reservations to treaties. Titles and texts of the draft guidelines adopted by the Drafting Committee: guidelines 1.1.1 [1.1.4], 1.1.5 [1.1.6], 1.1.6, 1.2, 1.2.1 [1.2.4], 1.2.2 [1.2.1], 1.3 [1.3.1], 1.3.1 [1.2.2], 1.3.2 [1.2.3], 1.4, 1.4.1 [1.1.5], 1.4.2 [1.1.6], 1.4.3 [1.1.7], 1.4.4 [1.2.5], 1.4.5 [1.2.6], 1.5, 1.5.1 [1.1.9], 1.5.2 [1.2.7], 1.5.3 [1.2.8] and 1.6 | See summary record of the 2597th meeting (para. 1). |
| A/CN.4/L.576 | Report of the Working Group on jurisdictional immunities of States and their property | Reproduced in *Yearbook ... 1999*, vol. II (Part Two), document A/54/10, annex. |
| A/CN.4/L.577 and Add.1 | Report of the Planning Group: Programme, procedures and working methods of the Commission, and its documentation | Mimeographed. |
| A/CN.4/L.578 [and Corr.1] | Draft report of the International Law Commission on the work of its fifty-first session: chapter I (Organization of the session) | Idem. For the adopted text, see *Official Records of the General Assembly, Fifty-fourth session, Supplement No. 10* (A/54/10). The final text appears in *Yearbook ... 1999*, vol. II (Part Two). |

| *Documents* | *Title* | *Observations and references* |
|---|---|---|
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| A/CN.4/L.580 | Idem: chapter III (Specific issues on which comments would be of particular interest to the Commission) | Idem. |
| A/CN.4/L.581 and Add.1 | Idem: chapter IV (Nationality in relation to the succession of States) | Idem. |
| A/CN.4/L.582 and Add.1-4 | Idem: chapter V (State responsibility) | Idem. |
| A/CN.4/L.583 and Add.1-5 | Idem: chapter VI (Reservations to treaties) | Idem. |
| A/CN.4/L.584 and Add.1 | Idem: chapter VII (Jurisdictional immunities of States and their property) | Idem. |
| A/CN.4/L.585 and Add.1 | Idem: chapter VIII (Unilateral acts of States) | Idem. |
| A/CN.4/L.586 | Idem: chapter IX (International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)) | Idem. |
| A/CN.4/L.587 and Add.1 | Idem: chapter X (Other decisions and conclusions of the Commission) | Idem. |
| A/CN.4/L.588 | Unilateral acts of States: report of the Working Group | Mimeographed. |
| A/CN.4/L.589 | Long-term programme of work: interim report of the Working Group | Idem. |
| A/CN.4/SR.2565-A/CN.4/SR.2611 | Provisional summary records of the 2565th to 2611th meetings | Idem. The final text appears in the present volume. |

# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE FIFTY-FIRST SESSION

*Held at Geneva from 3 May to 23 July 1999*

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### 2565th MEETING

*Monday, 3 May 1999, at 3.25 p.m.*

*Outgoing Chairman*: Mr. João BAENA SOARES

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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#### Opening of the session

1. The OUTGOING CHAIRMAN declared open the fifty-first session of the International Law Commission and extended a warm welcome to members. He wished Mr. Mikulka, a former member of the Commission who was at the current time Director of the Codification Division and Secretary to the Commission, a rewarding first session in his new capacity.

2. Reporting on his own activities in pursuance of mandates from the Commission, he said he had represented it at the fifty-fourth session of the Inter-American Juridical Committee, held at Rio de Janeiro from 18 to 29 January 1999. He had been unable to attend the thirty-eighth session of the Asian-African Legal Consultative Committee, held at Accra from 19 to 23 April 1999, and, accordingly, Mr. Yamada had served as the representative of the Commission.

3. He had also attended the meetings of the Sixth Committee of the General Assembly, whose useful discussion on the report of the Commission on the work of its fiftieth session, in 1998, was set out in the topical summary (A/CN.4/496). The Commission's experiment with holding a split session at the fiftieth session had proved fruitful, facilitating more in-depth dialogue with the Sixth Committee and better cooperation with Governments. The fact that a Commission member, Mr. Opertti Badan, had been chosen to preside over the fifty-third session of the General Assembly was an honour for the Commission. Mr. Opertti Badan informed him that he would be joining the Commission later on in the session, owing to his functions as President of the Assembly.

*The meeting was suspended at 3.30 p.m. and resumed at 4 p.m.*

#### Election of officers

*Mr. Galicki was elected Chairman by acclamation.*

*Mr. Galicki took the Chair.*

4. The CHAIRMAN thanked the members of the Commission for the honour they had done him and said he would make every effort to deserve their trust and to make the session a success. There was much to be done, but he looked forward to working with the members of the Commission in order to ensure that all its duties were fulfilled.

*Mr. Goco was elected first Vice-Chairman by acclamation.*

*Mr. Addo was elected second Vice-Chairman by acclamation.*

*Mr. Candioti was elected Chairman of the Drafting Committee by acclamation.*

*Mr. Rosenstock was elected Rapporteur by acclamation.*

### Adoption of the agenda (A/CN.4/495)

5. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/495).

*The agenda was adopted.*

### Filling of casual vacancies (article 11 of the statute) (A/CN.4/494 and Add.1 and 2)

[Agenda item 1]

6. The CHAIRMAN announced that the Commission was required to fill three casual vacancies created by the election of Mr. Ferrari Bravo to the European Court of Human Rights and of Mr. Bennouna to the International Tribunal for the Former Yugoslavia[1] and the appointment of Mr. Mikulka as Director of the Codification Division. The curricula vitae of the four candidates for the vacancies were contained in documents A/CN.4/494/Add.1 and Add.2. After a brief procedural discussion in which Mr. GOCO, Mr. HE, Mr. Sreenivasa RAO, Mr. ROSENSTOCK and the Secretary to the Commission took part, he suspended the meeting in order to enable members to hold informal consultations and, in a closed meeting, to fill the casual vacancies.

*The meeting was suspended at 4.35 p.m. and resumed at 6.05 p.m.*

7. The CHAIRMAN announced that the Commission had elected Messrs Giorgio Gaja, Maurice Kamto and Peter Tomka to fill the casual vacancies that had arisen. On behalf of the Commission, he would inform the newly elected members and invite them to join the Commission as soon as possible.

*The meeting rose at 6.10 p.m.*

[1] Reference texts are reproduced in *Basic Documents, 1995* (United Nations publication, Sales No. E/F.95.III.P.1).

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## 2566th MEETING

*Tuesday, 4 May 1999, at 12.10 p.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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### Organization of work of the session

[Agenda item 2]

1. The CHAIRMAN invited the Commission to consider the work plan proposed by the Enlarged Bureau for the first two weeks of the session. Besides the plenary meetings, all of which would be allocated to the topic of State responsibility, the work plan envisaged several meetings of the Working Group on nationality in relation to the succession of States. The Enlarged Bureau was of the view that the Working Group should be re-established in order to make recommendations about the next steps to be taken in respect of that topic. The object was to complete the second reading of the first part of the topic (nationality of natural persons in relation to the succession of States) at the present session. Since the Chairman of the Working Group and Special Rapporteur on the topic was no longer a member of the Commission and since he himself had always taken a lively interest in matters of nationality, he was prepared to take over the chairmanship of the Working Group. Upon completing its work on the first part of the topic, the Commission would have to consider the question of the appointment of a special rapporteur on the second part (nationality of legal persons in relation to the succession of States).

2. Mr. DUGARD said that he had been a member of the Working Group ex officio in his capacity as Rapporteur of the Commission. Now that he was no longer Rapporteur, he wished to withdraw from the Working Group.

3. The CHAIRMAN said that the Working Group on nationality in relation to the succession of States was open to all members interested in the topic.

4. Mr. GOCO said that special circumstances arose with regard to some other topics as well. Thus, the Special Rapporteur on unilateral acts of States had become Chairman of the Drafting Committee and the Chairman of the Working Group on diplomatic protection and Special Rapporteur on that topic was no longer a member of the Commission.

5. The CHAIRMAN said that the Commission had not yet reached a stage in connection with those two topics where it was necessary to re-establish the respective working groups or to appoint special rapporteurs. That could always be done if the need arose.

6. The work plan proposed by the Enlarged Bureau also provided for two meetings of the Planning Group. The Commission had to consider the question of split sessions, a point which needed to be dealt with very carefully in view of the request by the General Assembly in paragraph 9 of resolution 53/102 that the Commission should examine the advantages and disadvantages of such sessions and of the General Assembly's decision to return to the matter at its fifty-fourth session.

7. Mr. SIMMA recalled that the Commission had discussed the matter at length at its two preceding sessions and had placed enough arguments in favour of the split sessions approach before the General Assembly. The opponents of the approach should, in his view, recognize that they were in a minority. It would be helpful to have a background document reflecting the consideration of the question by the General Assembly.

8. Mr. MIKULKA (Secretary to the Commission) said that the secretariat would prepare such a background document with the assistance of the Chairman of the fiftieth session, who had attended the debate in the General Assembly. In any event, the Assembly had clearly not accepted the Commission's request for split sessions as from the year 2000, since it asked the Commission for additional information and intended to return to the matter.

9. Mr. ECONOMIDES said that the present international situation raised a number of new issues which were almost of an emergency nature. The Commission should therefore perhaps adopt a procedure similar to the one which it had adopted at the fiftieth session and which would enable it to propose new subjects to the General Assembly.

10. Mr. HERDOCIA SACASA said that he supported that proposal.

11. The CHAIRMAN said that new subjects formed part of the formulation of the Commission's long-term programme of work, a task which was part of the Planning Group's mandate. Any proposal that might be made would therefore have to be considered by the Planning Group.

12. The Commission also had to take a decision on the response to be given to the request by the General Assembly in paragraph 2 of resolution 53/98 relating to the draft articles on jurisdictional immunities of States and their property and to the appointment of a new special rapporteur on the topic of diplomatic protection. The Enlarged Bureau recommended that those decisions should be taken by the end of the current week at the latest. He invited the Chairman of the Drafting Committee and the First Vice-Chairman of the Commission, as Chairman of the Planning Group, to compose the membership of those two bodies.

13. Mr. MIKULKA (Secretary to the Commission) recalled that the Commission usually appointed the Drafting Committee, whose membership might change from one topic to another, before the Planning Group, which was generally composed of members of the Commission not on the Drafting Committee. It might perhaps be wise to maintain that practice.

14. The CHAIRMAN said that, at the current session, the Drafting Committee must concentrate on the topic of State responsibility and then turn to that of nationality in relation to the succession of States. The Drafting Committee might also take up the topic of reservations to treaties once it had received the relevant report of the Special Rapporteur.

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

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

15. Mr. CRAWFORD (Special Rapporteur) said that, before submitting his second report on State responsibility (A/CN.4/498 and Add.1-4), he wished to refer to the response to his first report[4] and to the topic of State responsibility in general both within the Sixth Committee of the General Assembly during its fifty-third session and outside the United Nations.

16. The discussion held in the Sixth Committee, which was outlined in paragraphs 107 to 127 of the topical summary (A/CN.4/496), had been extremely constructive, even though some issues remained very clearly in abeyance, particularly with regard to article 19 of part one of the draft. The Sixth Committee was aware of the fact that the Commission was to revert to those issues and was awaiting its conclusions with interest. No specific criticism had been offered on the other draft articles which had been adopted by the Drafting Committee at the fiftieth session, [5] and the general view was that they could be approved without major alteration.

17. Following the fifty-third session of the General Assembly, he had organized a number of seminars in Wellington, Sydney, Tokyo, Kyoto, Beijing, Cambridge and London and intended to organize one soon in The Hague. Discussion groups had been set up in the United States of America and Japan, particularly by ILA, and those should give rise to comments that could be put to good use by the Commission in its work. The *European Journal of International Law* had published a special issue on State responsibility which was soon to be made available to the members of the Commission and could also fuel their thinking.[6]

18. A number of comments and observations had been received from Governments, the most recent being those from the Governments of Greece and Japan (A/CN.4/492). None of them appeared to contradict the decisions adopted by the Commission at its fiftieth session on articles 1 to 15 bis and A. The entire set of draft articles would have to be reconsidered before the end of the current quinquennium on the basis of any additional comments and observations received.

19. Introducing his second report, he explained that chapter I of the report consisted of four sections. Section A, relating to chapter III of part one of the draft articles,

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

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

[3] Ibid.

[4] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/490 and Add.1-7.

[5] For the text of the draft articles, see *Yearbook ... 1998*, vol. I, 2562nd meeting, para. 72.

[6] *European Journal of International Law* (Oxford University Press), vol. 10 (1999), No. 2.

dealt with the breach of an international obligation; section B, relating to chapter IV of part one of the draft articles, dealt with the implication of a State in the internationally wrongful act of another State; section C focused on a range of extremely important questions relating to chapter V of part one, namely, circumstances precluding wrongfulness. The annex to the report contained a brief comparative review of the delicate and so far unexplored question of interference with contractual rights, a question that was related to chapter IV of part one of the draft articles. Those documents were now available in the Commission's working languages, or would be very soon.[7]

20. He also intended to submit an informal document on the approach to be adopted for the consideration of the draft articles on second reading and, more specifically, five sets of questions concerning which he would like to receive guidance from the Commission at the current session. The questions relating to article 19 of part one that remained outstanding were: what was an obligation to the international community as a whole; what treatment should be given to countermeasures in part two; dispute settlement; what might be the content of a part three; and what form might be taken by the draft articles.

21. He expressed the hope that, at the current session, the Commission could provisionally adopt the entire set of articles in part one and the commentary thereto.

22. Mr. ROSENSTOCK requested the Special Rapporteur to give the broad outlines of the issues to be discussed.

23. Mr. CRAWFORD (Special Rapporteur) said that they could be divided into three major categories. The first related to the articles setting out the fundamental principles involved in the breach of an international obligation, in other words, former articles 16, 17, 18 (paras. 1 and 2) and 19 (para. 1). The second was the distinction between obligations of conduct and obligations of result and where obligations of prevention fell in that context (arts. 20, 21 and 23). The third entailed the fine distinctions to be drawn among the various categories of wrongful acts or breaches: the distinction between completed and continuing wrongful acts, the distinction between a continuing act, a composite act and a complex act, the application of the principles of intertemporal law in the light of those distinctions (art. 18, paras. 3 to 5, arts. 24, 25 and 26) and the issue of the exhaustion of domestic remedies (art. 22).

*The meeting rose at 1.05 p.m.*

[7] Section D was submitted at a later date.

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## 2567th MEETING

*Wednesday, 5 May 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. CRAWFORD (Special Rapporteur), continuing the presentation of his second report on State responsibility (A/CN.4/498 and Add.1-4), said that chapter III (Breach of an international obligation) of part one of the draft articles sought to elaborate on the basic principle set out in article 3 (Elements of an internationally wrongful act of a State), provisionally adopted by the Commission, whereby responsibility arose on the basis of two—and only two—conditions: first, that the conduct in question, whether an act or an omission, was attributable to the State (attribution being dealt with in chapter II); and secondly, that it constituted a breach by that State of an international obligation. Curiously, in marked contrast to the literature in national law systems, which often treated the subject of breach quite extensively, the literature on State responsibility had very little to say on the matter. Consequently, the formulation of chapter III had constituted something of a pioneering effort by the then Special Rapporteur, Mr. Roberto Ago, who had had little more than the work of the Hague Codification Conference of 1930 on which to base himself. Thus, the fact that more than 20 years after the adoption of most of the articles on first reading[4] it was now possible to criticize them and to suggest alternatives, implied no special criticism of the effort itself. Much in the articles, and more in the commentaries, was of value and should be retained.

2. Nevertheless, of the chapters comprising part one, chapter III was the one most criticized by Governments, on the grounds that it was over-refined, unduly complicated and sometimes difficult to follow. In dealing with chapter III it was necessary to penetrate its intellectual world. Accordingly, while his own treatment of the subject in his second report might itself appear over-refined and complex, that was necessary if justice was to be done to the issues.

3. Before the articles were discussed individually, mention should be made of some general questions. The first was the basic distinction between primary and secondary

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

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

[3] Ibid.

[4] *Yearbook ... 1980*, vol. II (Part Two), pp. 26-63.

obligations. The draft articles dealt with the primary obligations generated by international law processes of treaty-making, and of law-making more generally, and also concerned themselves with the situation that arose when a State failed to comply with them—as it were, the secondary obligation of responsibility arising from breach. Hence, a large part of the subject of breach could be presumed to be inevitably a matter for determination by the primary obligation. More accurately, it was a question of the application of the primary obligation, which lay by definition outside the scope of the draft articles, to a particular factual situation, the result being a determination that a breach had occurred.

4. Of course, the distinction between primary and secondary obligations, or even rules, in the field of responsibility was bound to be somewhat uneven, because there must be some overlap between the two, an overlap that was to be found chiefly in chapter III. Nonetheless, problems would arise if, in the course of formulating the secondary rules of responsibility in relation to breach, one strayed too far into the field of the primary obligations. The distinction was difficult to draw and raised complex issues of judgement. If a narrow view was taken, the scope of the rules of State responsibility might dwindle almost to nothing, leaving only the question of reparation and restitution. If, on the other hand, a broad view was taken of the scope of the secondary rules, they would incorporate an enormous amount of primary material.

5. The second general issue was the relationship between chapters I, III, IV and V. While the relationship between chapters II (The "act of the State" under international law) and III was clearly articulated in article 3, the question arose how chapters IV (Implication of a State in the internationally wrongful act of another State) and V (Circumstances precluding wrongfulness) fitted into that framework. Chapter IV was concerned with the question to what extent a State was responsible for conduct of its own—and therefore attributable to it—which produced a breach by another State of an obligation of that other State—that is to say, with the implication of State A in the internationally wrongful conduct of State B. To speak of the "implication of State A in the internationally wrongful conduct of State B" itself gave rise to a problem, at least with respect to article 28 (Responsibility of a State for an internationally wrongful act of another State). If State B was coerced by State A into committing an act which would, in the absence of coercion, be an internationally wrongful act of State B, then chapter V might actually give State B a defence: the circumstance of force majeure would preclude the wrongfulness of the act of State B. So a problem already arose with chapter IV in its treating the conduct of the acting State (State B) as internationally wrongful. Such conduct might not be wrongful, precisely because of chapter V. Article 3 made no reference either to the issues raised by chapter IV or to those raised by chapter V.

6. The problem of the relationship between chapters IV and III could probably be resolved by the Drafting Committee. The relationship between chapters III and V, however, posed a more serious problem of articulation. Chapter III appeared to say that there was a breach of an international obligation whenever a State acted otherwise than in conformity with the obligation. Chapter V, on the other hand, said that a range of circumstances, for example, distress, force majeure and necessity, precluded wrongfulness. In those circumstances, the State's conduct would therefore not be wrongful. But it was very difficult to say that the State was acting in conformity with the obligation when it was acting in a situation of distress or necessity. It would be more appropriate to say that the State was not acting in conformity with the obligation but that, in the circumstances, it was excused—possibly conditionally—for its failure to do so.

7. The point to be stressed at the present juncture was that chapters III, IV and V of part one were somewhat disconnected in comparison with chapters II and III, which were linked by the basic principle set forth in article 3. That problem might be resolved in the Drafting Committee, or it might prove more fundamental. His provisional view was that the most appropriate approach might be to regard chapters III, IV and V as a connected treatment of the subject of breach, with chapter III dealing with general principles; chapter IV dealing with the special cases where a State's conduct in relation to another State involved a breach even if it would not otherwise do so, in other words, even though it was not a breach under chapter III alone; and chapter V dealing with situations where, despite an apparent disconformity, the State was nonetheless justified or excused and there was no breach or, in other terms, no responsibility. The conceptual structure of part one might become clearer if such an approach were adopted. The question whether to label chapter V "Circumstances precluding wrongfulness" or "Circumstances precluding responsibility" would need to be discussed at a later stage.

8. In any event, the best course was to begin by dealing with the existing articles in chapter III one by one, so as to reveal the thought processes that had led him to the rather startling conclusion that the 11 articles in chapter III should be rendered down to some 5 articles with a rather different formulation, albeit broadly similar in content.

9. The first of the general principles laid down in chapter III was formulated in article 16 (Existence of a breach of an international obligation), which stated: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation." That ostensibly very basic statement was not problematic and constituted an essential introduction to the chapter. It nonetheless concealed some underlying problems, partly because of what was said in the commentary and partly in the light of a number of issues raised by Governments.

10. The first was the problem, referred to by France, in the comments and observations received from Governments on State responsibility,[5] of conflicting international obligations, where State A had directly conflicting obligations vis-à-vis State B and State C. It had been claimed that in a coherent legal system such conflicts could not occur. At one level that was clearly true: a general legal system could not simultaneously require an individual subject to do something and not to do it. Thus, with

[5] See *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/488 and Add.1-3.

respect to any *jus cogens* or *erga omnes* obligation, such inconsistencies could not arise. Where there was an apparent contradiction between two peremptory norms, then one must prevail over the other, and legal systems had ways of determining which of the two would prevail.

11. However, the draft articles covered a much wider range of obligations, since—as article 17 (Irrelevance of the origin of the international obligation breached) made clear—they applied to all international obligations, including those arising under bilateral treaties. Consequently, conflicts of obligation might arise that could not be resolved by general legal processes. Such had been the conclusion reached by the Commission in drafting the law of treaties, because in its treatment of the problem of the relationship between different treaties it had decided that coexisting bilateral—or even, in some circumstances, multilateral—obligations by one State to different States did not result in the invalidity of the underlying treaty, but were to be resolved within the framework of State responsibility. Article 73 of the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention") reflected that understanding, as did the provisions of its article 44, dealing with the relationship between treaty obligations. Thus, State A might simultaneously be under a valid obligation to State B not to do something, and to State C to do it.

12. In its comments, France was of the view that the draft articles should seek to resolve that issue and referred to the special case of Article 103 of the Charter of the United Nations. The first point to be made in that regard was that Article 103 of the Charter was reserved by article 37 (*Lex specialis*) of the draft articles. Admittedly, article 37 currently applied only to part two but it was already envisaged that it would ultimately apply to the draft as a whole. The problem of Article 103 of the Charter was thus resolved. It was also worth noting that the commentary treated Article 103 as invalidating inconsistent treaty obligations. That seemed to him to be a misreading of the article, which merely stated that the Charter prevailed over other obligations.

13. To what extent should the draft articles deal with the problem of conflicting obligations? Two separate cases arose. In the first, the performance of an obligation by State A to State B would produce responsibility in the relationship between State A and State C, but State A's conduct would in no respect be excused by the coexistence of the obligations. If the obligations were of equal status for example, if both were set forth in bilateral treaties, State A clearly could not defend itself as against State B by reference to its obligation to State C; this was a consequence of the *pacta tertiis* rule. The outcome was that State A was responsible to State C for its failure to comply. That issue plainly arose for the purposes of part two, but seemed to have no effect in the framework of part one. State A was not responsible to State B, because it had complied with the obligation, but it was responsible to State C because it had not. The only question was what form, in the circumstances, restitution or reparation should take.

14. The position was slightly different, however, where State A sought to rely on the conflict in order to avoid responsibility arising in the first place. Normally it could do so only where the other obligation had a prior character, which was not the case under article 44 of the 1969 Vienna Convention. If State A invoked *jus cogens*, the effect would normally be to invalidate the conflicting obligation: there would no longer be a conflicting obligation and the issue of breach simply would not arise.

15. It followed from that analysis that—generally speaking and subject to a qualification to which he would turn in due course—either the problem of conflicting obligations was resolved at a stage prior to the issue of responsibility arising—as in the case of a conflict between a *jus cogens* norm and a bilateral obligation—or it related to the question of reparation and restitution. One other situation which could still arise was that of an "occasional conflict" between a State's obligation under a bilateral agreement—or even under general international law—and some superior obligation. For example, where a State having a general obligation to allow overflight, transit through a strait or passage over its territory was confronted with a situation in which another State asserted a right to overflight, transit or passage for the purposes of carrying out an international crime, a conflict could arise, not with the underlying norm, but by virtue of the circumstances that had arisen. That issue continued to lurk beneath the surface of the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* although the particular occasion for it—the potential conflict between the sanctions operation and the right of self-defence asserted by Bosnia and Herzegovina—had now disappeared.

16. Despite the fourth report on the law of treaties by the Special Rapporteur, Sir Gerald Fitzmaurice,[6] those aspects relating to non-performance of treaties had largely been set aside by the Commission to be dealt with in the framework of State responsibility, but that report did not appear to have been used by Mr. Ago in developing chapter III. Yet the report had contained some important suggestions on the question that required further consideration. For example, the fact that the performance of an obligation would be inconsistent with a peremptory norm was, according to Fitzmaurice, a circumstance precluding wrongfulness. That issue should be considered in the context of chapter V. With that proviso, all other questions of conflicting international obligations did not raise problems for the purposes of part one—either being resolved prior to part one by the general legal processes of one norm prevailing over another or of interpretation, or because they did not prevent the responsibility relationship from arising.

17. The second general question raised by article 16 was that of the relationship between wrongfulness and responsibility. Article 16 said that there was a breach of an international obligation by a State when an act of that State was not in conformity with what was required of it by that obligation. But there were other circumstances—especially those in chapter V—which prevented wrongfulness from arising, notwithstanding disconformity. Paragraphs 12 and 13 of the second report analysed the way in which various tribunals faced with that problem had sought to formulate it. His own preference was for the formula used by the Arbitral Tribunal in the *Rainbow Warrior* arbitration, which had referred to "the determina-

[6] *Yearbook ... 1959*, vol. II, p. 37, document A/CN.4/120.

tion of the circumstances that [might] exclude wrongfulness (and render the breach only apparent)".[7] That was what chapters III and V, taken together, implicitly produced. Otherwise, a situation would arise where conduct was a breach and simultaneously there was a circumstance precluding wrongfulness. As he had already pointed out, there was a problem of articulation between chapters III and V, but it could probably be resolved in the Drafting Committee. In passing, it should be stressed that the Commission was dealing with the substantive obligation, not with the entirely separate questions of jurisdiction or admissibility, which were excluded from the scope of the draft as a whole.

18. With regard to the drafting of article 16, he favoured replacing the wording "not in conformity with what is required" by some such formulation as "does not comply with". That again was a matter for the Drafting Committee. Subject to those remarks, article 16 should be retained.

19. Article 17 contained two separate propositions. The first, set out in paragraph 1, was that an act which constituted a breach was internationally wrongful regardless of the origin—customary, conventional or otherwise—of the international obligation breached. It was the basic assumption underlying the entire draft, which covered the whole range of international obligations of States, irrespective of whether those obligations arose under general international law, treaties or other law-making processes. That principle had been referred to by ICJ in the case concerning *the Gabčíkovo-Nagymaros Project* and seemed to him to be both right and essentially unchallenged. The draft articles were thus formulating a general law of obligations for the purposes of responsibility, rather than separate rules for treaties and for other sources. The common law, for example, had differing rules of responsibility for contracts and for torts, as well as additional categories such as restitution. So while national legal systems could split their law of obligations into subsections, international law had not done that and should not, for a number of reasons.

20. The most important reason was one of principle: the close and complex interrelations between treaty and custom in international law. If there were different rules of obligation for custom and treaties, significant problems of articulation would arise. Article 17, paragraph 1, should therefore be retained. In contrast to the reasoning provided for its retention in the commentary, his own view was that the provision was merely an explanation of article 16. He was therefore proposing that article 17, paragraph 1, should be combined with article 16 as an important clarification of the latter. His proposal was set out in paragraph 156 of the report.

21. Article 17, paragraph 2, said that the origin of an international obligation breached by a State did not affect the international responsibility arising from the internationally wrongful act of that State. That was ambiguous, however. It could be interpreted to mean that, once international responsibility had arisen, it did not matter whether it had arisen by reason of breach of a treaty or by other means. But it did matter, because under article 40 of the draft (Meaning of injured State), the definition of the injured State depended on whether the injury arose from a breach of a treaty or a breach of some other rule. The second interpretation was that the existence or non-existence of a breach was independent of the origin of the obligation. That was plainly wrong. The existence or non-existence of a breach could be very much affected by the way in which the obligation had come into being. Article 17, paragraph 2, thus created more problems than it resolved and he recommended deleting it.

22. Article 19 **(**International crimes and international delicts), paragraph 1, was in many respects similar to article 17, paragraph 1, inasmuch as it clarified the basic principle set out in article 16 and could thus be combined with that article. It said that an act of a State which constituted a breach of an international obligation was an internationally wrongful act, regardless of the subject matter of the obligation breached. That proposition was unchallenged. The reference to subject matter was nonetheless a cause for concern as it was a general term, whereas "content", which he favoured, focused on specifics. Some subject matters that were inherently international were more likely to generate international obligations than other domains.

23. He would again refer to paragraph 156, which set out his proposal for merging article 16, article 17, paragraph 1, and article 19, paragraph 1. Article 17, paragraph 2, would be deleted.

24. Article 18 (Requirement that the international obligation be in force for the State) dealt generally with the difficult subject of temporal aspects of obligations. When was a breach committed? Within what period of time? Paragraph 1 set out the general principle of inter-temporal law in the field of State responsibility. Paragraph 2 then set out an exception to that principle involving peremptory norms. Paragraphs 3 to 5 dealt with the inter-temporal consequences of breaches having a continuing character or involving composite and complex acts. Since such breaches and acts were dealt with in article 24 (Moment and duration of the breach of an international obligation by an act of the State not extending in time), he would prefer to discuss paragraphs 3 to 5 of article 18 in conjunction with that article.

25. The principle outlined in article 18, paragraph 1, was clearly correct: a State could be held responsible for a breach of an international obligation only if the obligation had been in force for the State at the time of the breach. In the case concerning *Certain Phosphate Lands in Nauru*, for example, the Trusteeship Agreement had been held to have terminated at the time of Nauru's accession to independence. Nauru had nonetheless asserted the international responsibility of Australia in respect of acts committed prior to that time, and no objection had been raised [see p. 255]. Similarly, in the *Rainbow Warrior* arbitration, the Arbitral Tribunal had held that the relevant bilateral treaty obligation had terminated with the passage of time but French responsibility for the earlier breach of the treaty continued.[8]

[7] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the* Rainbow Warrior *Affair*, Decision of 30 April 1990 (UNRIAA, vol. XX (Sales No. E/F.93.V.3), pp. 215 et seq.), p. 251.

[8] Ibid., pp. 265-266.

26. Were there any exceptions to the principle enunciated in article 18, paragraph 1? The 1969 Vienna Convention contained a provision on the effect of a treaty prior to its entry into force for a State: the obligation not to defeat the object and purpose of the treaty. But that was an obligation independent of the treaty obligation and thus did not form an exception to the inter-temporal law. It had also been asserted that human rights obligations had a progressive character and that therefore the inter-temporal principle did not apply to them. The interpretation of human rights obligations was not, however, the objective of the draft articles, for the reasons outlined in paragraphs 41 and the following of his report.

27. The principle in article 18, paragraph 1, should therefore be retained, but in paragraph 156 of his report he proposed to reword it as a positive guarantee ("No act of a State shall be considered internationally wrongful unless ..."), rather than a conditional statement ("An act of the State ... constitutes a breach ... only if ...").

28. Curiously, nowhere did the draft articles enunciate the broad principle that, once the responsibility of a State was engaged, it did not lapse merely because the underlying obligation had terminated. He proposed to remedy that omission with an article to be included in chapter II or III, and would formulate it for submission to the Commission in due course.

29. Article 18, paragraph 2, dealt with the emergence, subsequent to the occurrence of a breach, of a new peremptory norm actually requiring that an act that had previously constituted a breach should be performed. The act was thus no longer considered internationally wrongful. A number of complex questions were posed by such situations, but in his view, article 18, paragraph 2, merely confused the issues without helping to deal with the inter-temporal problem. The commentary to the article referred to the emergence in the nineteenth century of the prohibition of slavery. If, for example, a seizure of slaves occurred at a time when slavery had not been unlawful, then the slaves would have to be returned to the proprietors. But if a peremptory norm prohibiting slavery came into effect, there could obviously be no restoration of slaves.

30. Another possibility was the emergence of a new peremptory norm that was clearly designated as having retroactive effect. Article 64 of the 1969 Vienna Convention assumed that new peremptory norms would not have retroactive effect. If they did, then retroactivity would be part of their peremptory character, and they would apply outside the framework of the draft articles. Accordingly, article 18, paragraph 2, was inconsistent with article 64 of the Convention.

31. A third possibility was that, at the time an international obligation was performed, there was a conflict with a peremptory norm, and not necessarily one that had emerged recently. Under the 1969 Vienna Convention, in the event of a conflict between a part of a treaty and a peremptory norm, the entire treaty was invalidated. The invalidation of treaties ought to be minimized, however, and there was a need for a principle that would avert conflicts between the performance of treaty obligations and the demands of peremptory norms. He proposed to deal with that problem in the context of chapter V. Since article 18, paragraph 2, confused a number of issues without advancing the question of inter-temporal law, it should be deleted. The basic principle of inter-temporal law should nevertheless be retained and he had proposed a formulation accordingly.

32. Articles 20 (Breach of an international obligation requiring the adoption of a particular course of conduct) and 21(Breach of an international obligation requiring the achievement of a specified result) set out the distinction between obligations of conduct and obligations of result and article 23 (Breach of an international obligation to prevent a given event) dealt with obligations of prevention. Article 20 formulated a principle about the breach of an international obligation requiring the adoption of a particular course of conduct. Article 21 dealt in a more complex way with obligations of result. Paragraph 1 paralleled article 20 almost exactly. Paragraph 2 established an additional category of obligations, one he would call the extended obligation of result. Under that paragraph, a breach of an international obligation at a specific moment could yield a result equivalent to that required under the obligation by virtue of the subsequent conduct of the State. There was some ambiguity, however, in the phrase "situation not in conformity" with the result required by an international obligation. That ambiguity could be illustrated by the *aut dedere aut judicare* principle in extradition law, which gave the State a choice of either extraditing or trying an individual. If the individual was a national of a State that had a law or a constitutional provision precluding it from extraditing its nationals, and it accordingly refused an extradition request, no breach of the *aut dedere aut judicare* principle had at that point been committed. The breach arose only at the point when it became clear that the State was not complying with the obligation to submit the case to the proper authorities for prosecution. Yet it was not true that its conduct was not in conformity with its obligation simply by reason of its refusal to extradite. A State was entitled not to extradite, as long as it subsequently submitted the case for prosecution.

33. The obligation could thus be performed in one of two ways, and the exclusion of one way did not in itself amount to a breach. It was not necessary for that to be spelled out, as it was now, in article 21, paragraph 2. Nor was it the case that such an obligation had to be formulated as an obligation of result: the *aut dedere aut judicare* principle was probably an obligation of conduct.

34. A former Special Rapporteur, Mr. Roberto Ago, had articulated a position in the commentary to article 21[9] on when a breach of obligation was committed. The position was analysed in paragraphs 69 to 76 of the report and in the writings of Combacau[10] quoted in paragraph 69. In Combacau's view, a human rights obligation was breached only when the State failed to offer compensation or redress, not when it engaged in conduct that was inconsistent with the human rights norm. The offering of the

[9] For the commentaries to articles 20 and 21, see *Yearbook ... 1977*, vol. II (Part Two), pp. 11 et seq.

[10] J. Combacau, "Obligations de résultat et obligations de comportement : quelques questions et pas de réponse", *Mélanges offerts à Paul Reuter* (Paris, Pedone, 1981), pp. 181-204, at p. 191.

compensation was thus seen as the second stage of the extended obligation of result. However, that was an improper analysis of most obligations in the fields of both human rights and the treatment of aliens. In assuming an obligation not to torture individuals, a State was not undertaking to offer compensation for torture. Rather, it was undertaking not to commit torture: the subsequent duty of compensation had nothing to do with the initial breach of obligation not to torture. In many decisions of human rights courts and the Human Rights Committee cited in paragraphs 69 and the following, human rights obligations were not held to be breached exclusively at the point when there was a failure to provide reparation: in certain circumstances, the mere existence of a law that contradicted those rights was sufficient. The findings of those bodies reflected a broad conception of what constituted a breach. Tomuschat, in an analysis of what constituted a breach of a human rights obligation, had made that point very clear.[11]

35. He was not saying that it was impossible to formulate human rights obligations in such a way that a breach occurred prima facie on a given day yet was removed on the following day if reparation was offered. But that was not the normal way in which international obligations were formulated and, when they were, it was the result of a primary norm. It was not for the draft articles on State responsibility to say that primary norms had to assume a certain form. If States wished to say that they would in no circumstances torture individuals, for example, the draft articles must not require them to reformulate that obligation in another way. Article 21, paragraph 2, together with the commentary, came close to doing precisely that. He therefore believed that the provision should be deleted. As to the distinction drawn in article 20 and article 21, paragraph 1, between obligations of conduct and result, those terms had gained currency and wide acceptance in international law. The distinction between obligations of conduct and obligations of result derived from civil law systems and, more particularly, from French law, which treated the former as being in the nature of "best efforts" obligations—such as those of a doctor towards a patient—and the latter as being tantamount to guarantees of outcome. For instance, a structural engineer's obligation to construct a bridge that was adequate for certain purposes was an obligation of result. The distinction undoubtedly made some difference in terms of the burden of proof, but the articles under consideration were not concerned with that issue.

36. It was perhaps significant to note that, in borrowing the distinction from French law, the first Special Rapporteur, Mr. Ago, had reversed the consequences that were to be inferred from it. Whereas, in French law, an obligation of conduct was the less stringent of the two, the inference to be drawn from the scheme in articles 20 and 21 was that, if a negative result did not occur, there was no breach. In other words, the obligation of conduct was more stringent than the obligation of result. The criterion adopted by Mr. Ago was not, as in French law, that of risk but one of determinacy. That aspect of the issue was, perhaps, merely an intellectual curiosity, but it did imply that some uncertainty about the distinction had already arisen at an early stage.

37. A further problem was that the distinction appeared to have no consequences in terms of the rest of the draft articles. In that respect it was unlike the distinction between continuing and completed violations, which did have important consequences in that breaches in the former category gave rise to the obligation of cessation. In proposing the deletion of a distinction that, although familiar, was somewhat uncertain and, moreover, did not seem to entail any consequences within the framework of the draft articles, he was not proposing that the distinction should not be used at all, but rather that it should be transferred to the area of primary rules.

38. As to article 23, there seemed to be no reason to treat obligations of prevention, at least prima facie, as anything other than negative obligations of result. That was the interpretation given to the concept in article 22, paragraph 2, of the Vienna Convention on Diplomatic Relations, but not the one adopted by ICJ in the case concerning *United States Diplomatic and Consular Staff in Tehran*. The inference to be drawn from those conflicting interpretations would seem to be that the obligation of prevention was neither an obligation of conduct nor an obligation of result. It could be either, depending on the circumstances of the particular case. The *Trail Smelter* arbitration, referred to in paragraph 87 of the report, provided another interesting example. Attempts to force international obligations into one category or another might, in his view, lead to confusion, and he therefore believed that there was a definite case for deleting article 21, paragraph 2. As for articles 20, 21, paragraph 1, and 23, it was particularly gratifying to note that both the French Government, in the comments and observations received from Governments on State responsibility, and French authors were, like himself, in favour of dropping the basic distinctions between obligations of conduct, result and prevention. His proposal for a new article 20 was also set out in paragraph 156 of the report. Paragraph 1 reflected article 20 as adopted on first reading and paragraph 2 reflected article 21, paragraph 1. The notion of prevention was incorporated, for the moment at least, as a form of obligation of result. The new article was placed in square brackets because it might be thought to relate to the classification of primary rules and because its further consequences in terms of the rest of the draft articles remained unclear.

39. Article 18, paragraphs 3 to 5, and articles 24, 25 (Moment and duration of the breach of an international obligation by an act of the State extending in time) and 26 (Moment and duration of the breach of an international obligation to prevent a given event) had to be considered together as a group, but he was not, at the present stage, proposing to focus on the inter-temporal law issues arising in connection with article 18. Rather, he wished to concentrate on articles 24 to 26. Article 25 differentiated between "composite" and "complex" acts, and he was not convinced that the distinction was helpful in the present context. The first question to be answered was whether or not a breach had occurred. The decision of ICJ in the case concerning the *Gabčikovo-Nagymaros Project,* referred to in some detail in paragraphs 103-106 of his report, pro-

[11] C. Tomuschat, "What is a 'Breach' of the European Convention on Human Rights?", *The Dynamics of the Protection of Human Rights in Europe—Essays in Honour of Henry G. Schermers*, vol. III (Dordrecht/Boston/London, Martinus Nijhoff, 1994), pp. 315-355.

vided an example of a situation where the fine distinction drawn in paragraphs 2 and 3 of article 25 would not seem to be relevant.

40. With regard to the question of the moment of time at which a breach occurred, relatively few breaches of international law took place in the twinkling of an eye; even acts of torture or killing were bound to be of some duration. The use of the word "moment" was therefore unfortunate. The distinction between a completed act and a continuing one was far more relevant and should be retained, although, once again, its precise application would depend on the nature of the primary obligation involved and on the circumstances of the case.

41. A problem arose in the case of situations where it was clear that an obligation was going to be breached but the actual moment of breach had not yet occurred. That situation, described as "anticipatory breach" in United Kingdom law and treated as a positive breach in German law, was subsumed under the notion of repudiation, or refusal to perform a treaty, dealt with in article 60 of the 1969 Vienna Convention. Although a case might be made out for an equivalent definition in the context of the draft articles, he did not, on balance, think that such a definition was needed. Use of the word "occurs", without going into further detail, would be sufficient.

42. A further and more problematic distinction was that between continuing complex acts, which might or might not extend in time, and continuing composite acts, which could not occur at one particular moment although they could be completed by a certain moment. A composite act consisted of a series of actions relating to what article 25 called "separate cases" which, taken together, constituted a breach, regardless of whether each action individually constituted a breach. The classic example was the adoption of the policy of apartheid by means of a combination of laws and administrative acts amounting to apartheid. Certain crimes against humanity would also be composite acts in that sense. Individual violations of human rights could constitute individual breaches, but taken together they might also amount to a consistent pattern of gross breaches of human rights.

43. There was, of course, the case when the primary obligation focused on an act that could only be defined as composite, for example, genocide as distinct from a simple act of murder. But the draft articles as they stood were not limited to obligations characterizing conduct as wrongful by reason of its composite or collective nature: crimes against humanity were defined by reference to the aggravated nature of a course of conduct, yet the notion of a composite act in the draft could apply to any obligation breached by a series of actions relating to different cases. That might seem odd. Clearly, the obligations in international law that prohibited conduct by reference to its aggravated nature and to its effects on a human group, such as genocide, were extremely serious and the problem of treating them as a collective act raised serious questions. On the other hand, it was not at all clear that there was a need to treat in that way composite acts which were composite only accidentally but related, for instance, to a rule prohibiting conduct causing serious harm by air pollution. Such conduct might well constitute a composite act, but there was no reason why that should make any particular difference. At a certain point, the harm crossed a threshold and a breach was committed. From that standpoint, there was no reason to treat composite acts any differently from other kinds of act.

44. A problem also arose with the "accidental" conception of a composite act, that is to say, with what constituted the case. In the air pollution example, was the case the causing of the air pollution as such or the construction of 20 or 30 different factories that together caused the pollution? It was hard to tell. But when the primary obligation spelled out certain conduct as being aggravated by reason of its composite character, it was clear what the case was.

45. Accordingly, it was useful to retain the notion of a composite act, but such an act should be confined to cases where the primary obligation defined the conduct as composite, and it should be made clear that problems of the moment and duration of breaches of obligations ("simple obligations" perhaps) did not require any further elaboration in the case of breaches that happened to be composite but where that fact was not the essence of the wrong. Paragraph 121 of the report cited the example of a State exceeding its water quota, when it made no difference whether the water was taken in a single lot or in 120 separate lots. But a different analysis was needed in the case of those obligations that singled out conduct as unlawful by reason of its composite character.

46. Complex acts were different from composite acts in that they occurred in relation to the same case. For example, a series of acts against an individual which, taken together, amounted to discrimination constituted a complex act. The first Special Rapporteur, Mr. Ago, had needed the notion of a complex act in order to fit it in with his construction of the exhaustion of local remedies rule. Where that rule applied, the failure of local remedies was the last step in the complex act constituting the wrong. That was known as the "substantialist" theory of the exhaustion of local remedies. The orthodox view of exhaustion was the procedural view, namely, that the wrong might have occurred but no international action could be taken by way of a diplomatic claim or human rights complaint prior to the exhaustion of local remedies. That was the view taken in article 22 (Exhaustion of local remedies), which treated exhaustion as part of the complex act constituting the wrong and therefore as the culmination of the wrong. Indeed, the article had to do so, for otherwise the *Phosphates in Morocco* case had been decided rightly, because the only event after the critical date had been the failure to exhaust the local remedies.

47. The problem was that, according to the normal understanding, where an obligation was breached and the exhaustion rule applied, the applicable international law was the law applicable at the time the harm was done and not at the time the local remedies were exhausted. Such times were difficult to specify because of the different ways in which local remedies could be exhausted or cease to exist. Having treated complex acts as occurring only at the time of the last act in the series, the draft could achieve that result only by backdating the complex act to the first act in the series. Article 18, paragraph 5, meant that the act occurred only at the end, but that the applicable law was the law in force at the beginning.

48. The notion of a complex act did not refer to an act defined as complex in a rule but rather to an act that happened to be complex. Hence, the question of the existence of a complex act was a question of degree. There were far fewer complex acts, as defined in article 25, than there were composite acts. Composite acts were defined as wrongs in very important norms, in the Convention on the Prevention and Punishment of the Crime of Genocide for example. That was not true of complex acts: they were a new creation that had been incisively criticized by Salmon.[12]

49. He would therefore delete the notion of complex acts entirely: problems of breach could be resolved without it, and the extraordinarily convoluted structure of the inter-temporal law as it applied to such acts could also be done away with. It followed that article 22 had to be examined on its merits as the formulation of the exhaustion of local remedies rule.

50. The Commission was now left with a distinction between completed and continuing acts and with the notion of composite act. It had to solve the problem of the inter-temporal law as it applied in those two cases, that is to say, the problem dealt with in article 18, paragraphs 3 and 4, the question of complex acts (art. 18, para. 5) having been deleted. The solutions adopted in the draft articles for the application of the inter-temporal law to continuing and composite acts were essentially right, and he had incorporated in them a proposal of the French Government, in the comments and observations received from Governments on State responsibility, that the applicable inter-temporal principles should be tied in with the relevant draft articles.

51. To sum up, the new article 24 would draw a distinction between completed and continuing wrongful acts, and paragraph 1 would incorporate what had previously been in article 18, paragraph 3. But paragraph 1 had to be contrasted with continuing wrongful acts, which remained breaches for as long as the international obligation remained in force. The reason for including the proviso "Subject to article 18" in paragraph 2 was that a situation might arise in which a continuing wrongful act had begun prior to the entry into force of the substantive obligation and had continued thereafter. Obviously the act became wrongful only when the obligation came into force. Paragraph 2 incorporated the substance of articles 25 and 18, paragraph 4, as adopted on first reading.

52. As to the obligation of prevention and the duration of a breach thereof (art. 26), such obligations could normally be analysed as obligations of result, but the point was probably irrelevant for present purposes. Article 26 treated breaches of such obligations as necessarily being continuing wrongful acts. That was a mistake: some breaches might be continuing acts but others not, depending on the context. For example, if there was an obligation to prevent the disclosure of a piece of information, the disclosure of the information marked the end of the matter. There was no reason for treating anything occurring subsequently as a wrongful act. In other cases, such as an obligation to prevent intrusions into diplomatic premises, the breach would obviously be a continuing one. The new article 24, paragraph 3, therefore dealt with the question of continuing breaches of obligations of prevention; it would also have to be subject to article 18.

53. The new article 25 dealt with the notion of composite acts as now more narrowly defined, adopting the solution to the inter-temporal problem set out in paragraph 2, and again subject to article 18. The problem was a complicated one and he hoped that the new text was sufficiently clear.

54. In the original conception, the exhaustion of local remedies was the last step of the complex act constituting the breach, and the breach therefore occurred only after exhaustion. But the failure of local remedies might not be an independent breach of international law at all. The national court denying a remedy might be acting fully in accordance with domestic law: the breach had already occurred and the court was merely confirming that there was nothing more that it could do. However, that was not always the case, and he would therefore be reluctant to treat the article 22 debate as a split between the "proceduralist" and the "substantialist" understandings. In some cases the failure of local remedies was itself part of the breach, for example if it constituted a further or culminating instance of discrimination; in other cases it was not. The Commission need not take a position on the point. The normal understanding was that the exhaustion of local remedies was a prerequisite to an international claim in certain cases, but the Commission was not required to define those cases in detail in the draft articles on State responsibility. It would have to do so in the case of diplomatic protection, which was a specific arena for the exhaustion rule. However, it was not the only such arena, for the rule might also apply to breaches of human rights obligations involving individual complaints but not involving breaches of such obligations defined as composite acts. In its work on diplomatic protection the Commission would have to deal with the range of questions raised by the exhaustion rule. On the basis of the "proceduralist" understanding it might be argued that the rule had no place in the present draft articles, but to drop it might be regarded as provocative. It should therefore be kept, but in the form of a saving clause. No one had proposed that it should be deleted, but several Governments, in the comments and observations received from Governments on State responsibility, had argued against the way in which it was presented in the original chapter III. He had therefore retained article 22 as a "without prejudice", provisionally placed at the end of chapter III as article 26 bis.

55. The comment had been made that his second report was very long, and had produced a rather small set of articles. Each issue had to be treated on its merits and he had looked for new things to say about the breach of an international obligation (paras. 149 et seq.). But by and large the question of whether a breach had occurred should be referred to the primary rule and to its interpretation and application. For most purposes the question whether a breach had occurred arose, as it were, prior to the draft articles. That explained the sense of artificiality experienced in reading the original chapter III. In any event, his proposed chapters IV and V were bigger than the original ones. Chapter III was a classic example of the over-refine-

[12] J. J. A. Salmon, "Le fait étatique complexe : une notion contestable", *Annuaire français de droit international*, *1982* (Paris), vol. XXVIII, pp. 709-738.

ment of draft articles and it would benefit from a simpler approach.

56. The CHAIRMAN thanked the Special Rapporteur for his introductory comments, which had provided the Commission with excellent guidance through the complicated matters dealt with in the draft articles. Before initiating a formal discussion, he would invite the members of the Commission to raise points of clarification.

57. Mr. HAFNER said he agreed with the Special Rapporteur that the Commission should not deal with the classification of primary rules if there were no consequences in secondary rules. The Special Rapporteur had cited the example of obligations of conduct and of result as having no secondary consequences. However, article 22 still contained legal consequences only for one of the two categories. Was the Special Rapporteur's position an anticipation of his view on the exhaustion of local remedies rule?

58. Mr. CRAWFORD (Special Rapporteur) said it was not accurate to say that the exhaustion of local remedies rule applied only to obligations of result; it also applied to obligations of conduct in the case of diplomatic protection. For example, a specific obligation towards an alien not to expropriate particular property would certainly be subject to the rule. The fact that article 22 was limited to obligations classified as obligations of result, and especially as extended ones, was another reason for eliminating it.

59. Mr. BROWNLIE said that the Special Rapporteur had gone far in purging the faults in chapter III deriving from the fact that the first Special Rapporteur, Mr. Ago, had adopted the vehicle of distinction between primary and secondary rules and then propounded a number of articles which confused the two types of rule. The current Special Rapporteur had therefore dumped the concept of complex acts. However, he had been less than thorough in his purge: the concept of continuing acts faced exactly the same problems as did some of the concepts already eliminated or fenced in. Could the Special Rapporteur explain why he had halted his purge?

60. Mr. CRAWFORD (Special Rapporteur) said that the point was a legitimate subject of debate. The notion of continuing acts did have a consequence in State responsibility in the context of cessation. To leave it out of the draft articles might be thought odd. Nevertheless, he was not convinced that there was not an extended obligation of cessation, or perhaps an active mode of restitution; the distinction between cessation and restitution was very difficult to draw. He therefore reserved the possibility of further development of the question in part two.

61. Mr. AL-KHASAWNEH said that he would like the Special Rapporteur to clarify his explanation of the relativity of the distinction between continuing and completed acts. The problem was that the moment of completion was never an isolated moment. If the Commission intended to refine the concepts to such an extent, it might fall into the trap of not leaving anything to the judges.

62. Mr. CRAWFORD (Special Rapporteur) said that his answer was essentially the one he had just given to Mr. Brownlie. Those questions were relative but part of the conceptual framework of the way people thought about breach; it was worth keeping them in play even if almost all matters of their interpretation and application were to be referred to the primary rules and to the persons applying those rules.

*The meeting rose at 1 p.m.*

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## 2568th MEETING

*Thursday, 6 May 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN, recalling that the Special Rapporteur had proposed considering his second report on State responsibility (A/CN.4/498 and Add.1-4) under three clusters of articles, invited the Commission to begin with the first cluster, consisting of articles 16 (Existence of a breach of an international obligation) and 18 (Requirement that the international obligation be in force for the State), corresponding to articles 16, 17 (Irrelevance of the origin of the international obligation breached), 19 (International crimes and international delicts), paragraph 1, and 18, paragraphs 1 and 2, adopted by the Commission on first reading.

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

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

[3] Ibid.

ARTICLES 16 TO 19

2. Mr. ROSENSTOCK said that the second report on State responsibility was a magnificent piece of work and that the Special Rapporteur had already greatly simplified matters, but that he himself would like to see them simplified further still. For example, it did not seem absolutely essential to retain article 16, even as a *chapeau* article. There was no need for such an article in order to convey the idea that a violation might exist even if the act of the State was only partly in contradiction with an existing international obligation. Furthermore, it would make little sense to add the words "under international law" at the end of article 16, as the entire set of draft articles fell within the sphere of international law. In addition, as the Special Rapporteur himself noted in paragraph 6 of the report, it was preferable not to apply the terms "subjective" and "objective" to the elements of responsibility, so as to avoid creating confusion.

3. Article 17 was a curious combination of an unnecessary paragraph 1 and a paragraph 2 that was positively misleading. The whole article was unnecessary and confusing and, if the idea set forth in its paragraph 1 was to be retained, it would be acceptable to do so by adding to the end of article 16 the words "regardless of the source [...] of the obligation", as suggested by the Special Rapporteur; but nothing useful would be accomplished thereby. The Special Rapporteur's comment in paragraph 24 of his second report was less than persuasive, for it appeared to mix up the substance of the obligation and the regime. With regard to article 19, paragraph 1, it would perhaps be wise to temper the effect of the advisory opinion of ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua* cited in the report, by the knowledge that the author of that paragraph had been an influential member of the Court. That being said, he could perfectly well envisage accepting the new article 16 proposed to replace articles 16, 17 and 19, paragraph 1, although he did not see why it could not simply be omitted.

4. As far as paragraphs 1 and 2 of article 18 were concerned, he thought that Switzerland, in the comments and observations received from Governments on State responsibility,[4] had hit the nail on the head in stating that the basic principle was self-evident and did not need to be explained. Furthermore, it was true, as the Special Rapporteur stated in paragraph 43, that the advisory opinion of ICJ in the *Namibia* case did not violate the principle set forth in article 18, paragraph 1, and that the inter-temporal principle did not entail that treaty provisions were to be interpreted as if frozen in time. It was because article 18, paragraph 1, was not in conflict with those realities that it was only desirable, but not imperative, to delete it; but that was not a reason for retaining it. If it was necessary to retain certain aspects of it for any reason, the new formulation proposed by the Special Rapporteur in paragraph 44 seemed to merit serious consideration by the Drafting Committee.

5. Article 18, paragraph 2, referred to situations so unlikely as to be barely conceivable. Furthermore, in paragraph 51 of his second report, the Special Rapporteur pointed out some of the difficulties to which it might lead. In any case, it would be better to consider that type of situation in the context of part two.

6. In conclusion, he again congratulated the Special Rapporteur on his excellent work and endorsed the five strategic issues that he had identified and which would be helpful, as would the organization of the discussion in three clusters.

7. Mr. KUSUMA-ATMADJA said that the second report of the Special Rapporteur was of excellent quality, but that, in some respects, it was far too detailed. As another speaker had noted, some latitude must be left to the judge, for, in some systems, while the judge reflected the position of the legislator through his decision, he also created law.

8. Mr. SIMMA said that, like Mr. Rosenstock, he thought the draft articles might be simplified still further. The work of pruning already accomplished was to be welcomed, but in certain respects the commentary was still far too extensive. It raised issues which few members of the Commission would have connected with the articles commented on and those issues were often discussed at great length and without any real necessity. That was particularly true of the problem of treaty obligations raised by one country with reference to Article 103 of the Charter of the United Nations and of the question of the validity of a dynamic or evolutionary interpretation of human rights treaty provisions. Similarly, while agreeing with the Special Rapporteur that the terms "subjective" and "objective" were confusing when applied to the elements of responsibility, he thought that the long statement on the question that occupied the whole of paragraph 6 of the report was not justified. It might perhaps be appropriate to include, as a *chapeau* article for the entire set of draft articles on State responsibility, an introductory text setting out the methodology and scheme of the articles as a whole and to include a few lines in that text on the distinction between the terms "subjective" and "objective".

9. Furthermore, at the end of article 16, he saw no need to add the words "under international law", as proposed by France,[5] for nothing would be gained by so doing. Paragraph 9 dealing with the issue of conflicting international obligations was far too long and, given that the Special Rapporteur himself noted in subparagraph (*c*) that those cases, however interesting they might be for other purposes, raised no special difficulties for article 16, he saw no reason for tackling them in the context of that article. In his view, they should be considered under chapter V of the draft articles. Consideration could be given to the question whether a State might be justified in not implementing a treaty it had concluded with State A because it was bound by another treaty with State B or with the international community as a whole, if the obligation under the latter treaty prevailed over the purely bilateral obligation. Would such a circumstance mean that non-performance of the bilateral obligation was not a wrongful act? The question of the relationship between disconformity with an obligation, wrongfulness and responsibility, dealt with in paragraphs 10 to 14, might also best be raised in an introductory text serving as a

[4] See 2567th meeting, footnote 5.

[5] Ibid.

*chapeau* to the draft articles as a whole. If that question was considered, it would be interesting to take a closer look at the distinctions which existed in German law, and no doubt also in other legal systems, and which involved three levels of analysis. For example, at the first level of analysis, if a rule existed prohibiting the use of force, any use of force by a State constituted, prima facie, a breach. At the second level, one would look for a reason, such as self-defence, precluding the unlawfulness or wrongfulness of the act. At the third level, in the absence of a justification, one would look for "subjective" circumstances connected with the mental state of the person or State body that had committed the act. Lastly, he thought that the proposal contained in paragraph 15, to replace the words "is not in conformity with" by some other formulation, for example, "does not comply with", was acceptable, but was more a stylistic improvement than a change of substance.

10. With regard to article 17, paragraphs 1 and 2, he suggested that it could be made clearer in the commentary that, in the event of a breach, the respective provisions of the law of treaties, such as articles 60 and 65 of the 1969 Vienna Convention, on the one hand, and the law of State responsibility, on the other, should always be interpreted and applied in concert. It seemed strange to him that, in some decisions or arbitral awards, the parties had attempted to keep those two levels of law separate. Article 73 of the Convention provided a perfect conjunction of those two sets of rules of international law. He also noted that it should perhaps be made clear that the example cited in the penultimate sentence of paragraph 23 of the report was drawn from domestic law, not from international law.

11. Turning to article 19, he said it was interesting that, in paragraph 30 of the report, the Special Rapporteur expressed surprise that the commentary[6] did not cite the important statement of PCIJ in the case concerning the *S.S. "Wimbledon"*, where the Court had affirmed that "the right of entering into international engagements [sc., on any subject whatever concerning that State] is an attribute of State sovereignty" [see page 25]. He himself often quoted that statement in his courses in support of the hypothesis that the assumption of treaty obligations was an expression of sovereignty, so that it could be said that the more treaty obligations a State had, the more sovereign it was. But he had never thought to apply it in the context referred to by the Special Rapporteur. It was significant, moreover, that, to make things clear, the phrase "on any subject whatever concerning the State" had been placed in square brackets. The comments made in paragraphs 30 and 31 were another example of slightly excessive commentary that could be deleted without any loss to the text. With regard to paragraph 32, he agreed with the Special Rapporteur that it would be preferable to speak of "content" rather than "subject matter", since there were rules on important subject matters that were not really fundamental.

12. On article 18, he said that material in paragraphs 41 to 43 had no place in the commentary. He agreed with what was said about the contrast between evolutionary and static interpretations of treaty provisions, even though the commentary on that subject was too brief. It should either be deleted or supplemented with reasoning to show why ICJ had been correct in its advisory opinion in the *Namibia* case. It could also be pointed out that certain terms of a treaty were necessarily open. For instance, if South Africa had agreed in 1920 that it was under an obligation to do everything for the "well-being" of the indigenous population of South-West Africa, it would be nonsensical to say, 50 years later, that "well-being" had to be interpreted according to its 1920 meaning. A term like "well-being" had to be interpreted dynamically. But that was not an issue that had to be taken up in the context of article 18. He did not see what was meant by the words "Interpretation of legal instruments over time is not an exact science" in paragraph 43 and thought that they should be deleted. Those were merely details, however, and he fully agreed with the Special Rapporteur's conclusions.

13. Mr. CRAWFORD (Special Rapporteur) said that, with a view to preventing any possible misunderstanding, the document under consideration was not the Commission's commentary on the draft articles, but merely his own thinking on the issues in the light of the comments made by States. The commentary would be produced once the Drafting Committee had considered the articles and would then be submitted to the Commission. In the meantime, it was very helpful to hear the comments of the members of the Commission on the substance of the report in order to get an idea of what they would like to see or would not like to see in the commentary.

14. Mr. HAFNER said that the length of the report by the Special Rapporteur was not in itself a bad thing. States often resorted to such reports to find explanations for State behaviour in international law. The Commission was dealing with a very complicated, theoretical part of the topic that nevertheless had to be accommodated to practice. The combination of the "continental European" concept of law reflected in the work of the first Special Rapporteur, Mr. Ago, and the more pragmatic "common law" approach of the present Special Rapporteur would certainly lead to general acceptance of the Commission's work on the topic.

15. With regard to the first part of the report, he agreed with most of the conclusions reached by the Special Rapporteur, who had been quite right in emphasizing the need for a holistic approach in order to identify the relationships among the different articles and parts of the draft. As to the thorny problem of the relationship between primary and secondary rules, the difficulty lay in the lack of an agreed definition of the distinction. Starting from a highly theoretical distinction between norms and metanorms, it might be concluded that primary norms could contain elements that were undoubtedly of a secondary nature. The problem also led to the very useful discussion of the relationship between responsibility and wrongfulness. He would prefer the solution of distinguishing between conduct or result as prescribed by a primary norm and the obligation flowing therefrom, since the obligation was shaped not only by the primary norm, but also by the secondary rules defining further the required conduct. For example, the obligation to protect diplomatic missions could not be understood as grounded solely in the relevant article of the Vienna Convention on Diplo-

[6] For the commentaries to articles 16 to 19, see *Yearbook ... 1976*, vol. II (Part Two), pp. 78 et seq.

matic Relations, but must be seen in the full context of the secondary norms. From that viewpoint, the breach of an obligation and, hence, responsibility would not come into play if wrongfulness was precluded. The Special Rapporteur rightly pointed out that, in practice, other expressions were used, with little consistency, and one had to live with certain imperfect solutions.

16. The problem of conflicting international obligations was an important one owing to the fragmentation of international law. He could add a further example to those cited by the Special Rapporteur in the sense that certain conduct could be considered a breach of an obligation by one mechanism, such as dispute settlement or non-compliance mechanisms, but not by another. For that reason, he was not in favour of the French suggestion, in the comments and observations received from Governments on State responsibility, that the words "under international law" should be added at the end of article 16, as that would sometimes require such mechanisms to broaden the basis of their judgements, contrary to the basic instruments which defined their jurisdiction. That risk must be avoided. As to the source of the obligation, no attempt should be made to define the sources of international law. As the Special Rapporteur had indicated, certain distinctions should be cited and used only in connection with the legal consequences, but that was not the case in the draft articles. Even the reference to international law could raise the question whether part of the basis for an obligation actually came within the category of sources of international law.

17. As to article 18, paragraph 1, the Special Rapporteur had been right to refer to the temporal relativity of international law and to express that in an article. He was going perhaps a bit too far, however, in paragraph 43 of his report, when he referred to the "progressive" or evolutionary interpretation of international law. That mode of interpretation was not generally accepted in contrast to other modes of interpretation recognized in the 1969 Vienna Convention. With regard to article 18, paragraph 2, the Special Rapporteur was right to suggest it could be deleted. It dealt neither with the effect of peremptory norms of international law nor with their content and the commentary to the first version of that provision showed that it was in fact an exception. Its deletion would simplify the text, to the benefit of those who would have to apply it in future.

18. Mr. GOCO asked whether the risk mentioned by Mr. Hafner of incorporating the words "under international law" might not be allayed if the first part of article 16 were amended to read: "There is a breach of an international obligation by a State when an act of that State is not in conformity with that international obligation."

19. Mr. HAFNER pointed out that there were a number of drafting problems with the English version of article 16, including whether it could be said that the act of a State could comply with something. The words "under international law" could give rise to substantive problems, however, of which two examples could be given. First, if a European or other court of human rights had to decide whether there had been a breach of a convention on human rights did it also have to establish that there had been a breach of general international law and apply not only that convention on human rights, but also the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, something which was certainly not within its jurisdiction? Secondly, would the International Tribunal for the Former Yugoslavia or the International Tribunal for Rwanda be entitled to apply a convention on human rights in order to determine whether a State had complied with its obligations under a given Security Council resolution? Those problems had already been raised, but had not been solved and it would be better to avoid them altogether by not including the words "under international law".

20. Mr. MELESCANU said that the words "under international law" might indeed create problems, but that they were still useful in preventing the provisions of domestic law from being used to characterize an international obligation. If those words were not included in article 16, they should be incorporated in the commentary or elsewhere in the draft articles.

21. Mr. CRAWFORD (Special Rapporteur) said that he had three points to make. First, the draft articles in no way affected the jurisdiction of courts. A court established by virtue of a treaty could deal only with cases submitted to it under that treaty. Secondly, such a court, whose jurisdiction was strictly limited to the treaty, could nevertheless go outside the four corners of the treaty and invoke general international law in applying the rules set forth in the treaty. For example, an international court having jurisdiction under a bilateral trade treaty might well find itself in a situation of having to apply rules of general international law in order to determine whether conduct alleged to constitute a violation of the treaty was indeed wrongful. Thirdly, a court whose jurisdiction was entirely self-contained and limited to the four corners of a particular instrument was possible, but such a regime would fall within the scope of *lex specialis*.

22. Mr. SIMMA said that he agreed with the Special Rapporteur's remarks on the interrelatedness of specific treaties and general international law. He personally had interpreted the French proposal as an attempt to solve the problem of conflicting treaty obligations; with the proposed addition, article 16 would tell the parties not to limit themselves to bilateral obligations, but also to invoke other rules of international law, such as Article 103 of the Charter of the United Nations and *jus cogens*. If, however, the intention was to prevent the involvement of domestic law, while there had certainly been a risk of that happening in connection with the rules on attribution discussed at the fiftieth session, no such risk arose in the context of article 16, which clearly came exclusively within the scope of international law.

23. Mr. HAFNER said that the rules that had to be interpreted and applied by a particular mechanism should be seen in the context of the secondary rules of international law. If the reference to international law was also applicable at the level of primary rules, a situation might arise where a breach of a certain treaty was found to exist, but could not be considered in the full context of international law because of the limited competence of the mechanism, and the act in question would therefore not be considered a breach of an international obligation under the draft articles. Such a situation could be open to misinterpreta-

tion and might completely rule out the application of the draft articles. It therefore seemed preferable not to include the words "under international law" in that context.

24. Mr. DUGARD said that, like the Special Rapporteur, he was in favour of pruning the articles wherever possible and especially in chapter III of the draft. He therefore agreed to the proposal that articles 16, 17 and 19, paragraph 1, should be merged into one article. It might, however, be appropriate to change the wording of the proposed new article to avoid enumerating the various sources of an international obligation.

25. With regard to article 18, he agreed with the Special Rapporteur that paragraph 1 should be maintained, subject perhaps to an exception in the case of continuing wrongful acts. He agreed with the Special Rapporteur that human rights obligations did not constitute an exception to the principle enunciated in article 18, paragraph 1. Referring to article 18, paragraph 2, he was interested in the examples given in the commentaries by Mr. Ago, and referred to in paragraph 45 of the report to illustrate the proposition that an act which had been unlawful at the time it had been committed should be considered lawful if that act was subsequently required by a peremptory norm of international law. The problem could be solved automatically by reference to the law of treaties and, in particular, to article 62 of the 1969 Vienna Convention dealing with a fundamental change of circumstances. Citing an example to illustrate such a possibility *a contrario*, he said that, when the Security Council had decided to place an embargo on arms deliveries to South Africa,[7] the problem had arisen of the continuing validity of the agreement concluded between the Union of South Africa and the United Kingdom of Great Britain and Northern Ireland[8] relating to the installation of a military base in South Africa and involving the delivery of a number of naval vessels and helicopters to that country. Since it had not been suggested at the time that supplying arms would violate a subsequent peremptory norm, the problem had been settled by negotiations, the question being raised as to whether a fundamental change of circumstances had or had not taken place. For that reason, as well as for those stated by the Special Rapporteur, he considered that article 18, paragraph 2, could be deleted.

26. Mr. SIMMA, reiterating the view that the law of State responsibility and the law of treaties were closely interrelated, and referring to Mr. Dugard's last point, said that to solve the problem of a treaty obligation conflicting with a new peremptory norm of general international law (*jus cogens*) by invoking article 62 of the 1969 Vienna Convention on a fundamental change of circumstances was to minimize the overriding importance and solemnity of *jus cogens* embodied in articles 53 and 64 of the Convention. Moreover, the Convention provided further on that, at the procedural level, the consequences of the invalidity, termination or suspension of the operation of a treaty for a specific reason were different from the consequences of the invalidity of a treaty arising from a conflict with a norm of *jus cogens*.

27. Mr. CRAWFORD (Special Rapporteur) said that there was another problem with solving a conflict between a treaty and a new peremptory norm of international law by invoking the law of treaties. The law of treaties was concerned with the treaty as a whole and, in the event of an inconsistency with a treaty, the effect of *jus cogens* would of course be to strike down the treaty as a whole. But the most common instances of inconsistency occurred in terms of the performance of the treaty. As ICJ had rightly noted in the case concerning the *Gabčikovo-Nagymaros Project*, the law of treaties determined whether there was a treaty, who were the parties to the treaty and in respect of what provisions and whether the treaty was in force. In that sense, the scope of the law of treaties differed from that of the law of State responsibility, even if those two branches of law were indeed closely interrelated. Necessity could not be invoked as grounds for the termination of a treaty.

28. Mr. PAMBOU-TCHIVOUNDA said that, after reading the learned report under consideration, he could not help wondering whether the Special Rapporteur intended to redefine the topic or to prepare the way for its consideration on second reading with a view to submitting a draft to the General Assembly before the end of the present quinquennium. So great was the density of the Special Rapporteur's proposals that the second of those alternatives was hard to imagine.

29. The current Special Rapporteur's approach bore some resemblance to that of Mr. Ago. Yet the Ago approach had yielded a text that the Commission had adopted on first reading, whereas the approach adopted by Mr. Crawford resulted in the proposals on chapter III, which were contained in paragraph 156 of the report, and were sometimes at variance with the contents of the body of the report. For example, the proposed wording of the new article 16 ("... when an act of that State does not comply with what is required of it ...") was different, in the French text, from that used for the same article in paragraph 34, the words *ne correspond pas* being used in one case and the words *n'est pas conforme* in the other. Failure to be in conformity was not at all the equivalent of failure to correspond. The former was a matter of legality and the latter, no doubt, a matter of perspective.

30. The tidying-up exercise undertaken by the Special Rapporteur should not, in his view, be considered synonymous with calling into question the articles adopted on first reading. The Commission must not lose sight of the fact that each of the draft articles of chapter III served a special purpose, even if that purpose formed part of the overall purpose of the chapter, whose value was not in doubt as the Special Rapporteur himself indicated in paragraph 4 of his report when he stated that "No comments call into question the need for chapter III as a whole"—in other words, the need for the Ago approach.

31. The merger of articles 16, 17 and 19, paragraph 1, proposed by the Special Rapporteur concealed the characteristics of a "breach of an international obligation", which was the title of chapter III, whereas Mr. Ago had thought it necessary to emphasize the characteristics or

[7] See Security Council resolutions 181 (1963) of 7 August 1963; 182 (1963) of 4 December 1963; and 191 (1964) of 18 June 1964.

[8] Exchange of letters (with annexes) constituting an agreement on defence matters (London, 30 June 1955) (United Nations, *Treaty Series*, vol. 248, No. 3495, p. 191).

nature and the content of the obligation breached or the breach of an international obligation, as well as the idea that an act not in conformity with an obligation in force constituted a breach of an international obligation by a State. Those definitions were key elements of the legal regime being built.

32. The original concept adopted by the Commission for the codification of the law of State responsibility had been an objective concept—which no one was, apparently, about to call into question—founded in law and intended to prevail over the highly subjective traditional concept based on the idea of fault. That concept ran throughout chapter III and he saw no reason why, on the basis of that concept, chapter III should not be an extension of the chapters that preceded it. Even if article 16 might seem simply to be a repetition of article 3 (Elements of an internationally wrongful act of a State), it was perfectly acceptable that it should extend article 3 by placing the emphasis on the substance and content of a breach of an international obligation.

33. Article 16 gave rise to two big problems. The first was connected with the French proposal, in the comments and observations received from Governments on State responsibility, to insert the phrase "under international law". But some members of the Commission had never stopped pointing out that the law of State responsibility always had to be assessed in the context of international law. The second problem related to the expression "what is required of it by that obligation", which he disliked. The first difficulty was to know who "required" and it was certainly not the obligation. And what, indeed, was required? The language was extremely vague, but the responsibility for that rested not with the Special Rapporteur, but with the Commission, which had written the law in that way during its consideration of the draft articles on first reading. What was required was a course of conduct, but conduct could also be a result, and it was difficult to tell in advance. All legal constructions, no matter how elaborate, were always affected by a factor of approximation, so that situations had to be considered case by case. When a judge was considering a question connected with the application or interpretation of a provision, he was free to state the content that seemed to him to suit the provision in question. It was legal precedents that would invest the provision with its consistency.

34. The reference standard advocated by the Special Rapporteur in article 16, that is to say, a failure to conform giving rise to a breach of an international obligation, was a difficult one to apply. It presupposed that such a situation of fact could in all respects present a profile that fitted in with the case described in the legal provision stated in the international obligation. In that sense, it was binding, although the Special Rapporteur had described it as flexible. The requirement of conformity was not a requirement of compatibility: conformity required a certain rigorousness, while compatibility allowed some room for manoeuvre. He therefore proposed that the words "by that obligation" should be replaced by the words "under that obligation". The problem of the repetition of the reference to international law would then be automatically resolved. It would be a question of a requirement of international law considered from the standpoint of the origins of the obligation—whether conventional or customary—and also of the parties to the dispute, in particular the injured party, which would rely on the obligation to seek reparation from the State committing the breach.

35. Turning to article 17, he said that paragraph 1 should be amended to read: "An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, including customary or conventional origin, of that obligation." Paragraph 2 could be deleted, for it served no real purpose.

36. In article 19, paragraph 1, it might perhaps be necessary to amend the words "regardless of the subject matter of the obligation breached". In the new version of article 16 proposed by the Special Rapporteur, the words "subject matter" had been replaced by the word "content". The Commission ought to consider that point in greater detail.

37. He had reservations about the usefulness of merging articles 16, 17 and 19, paragraph 1, into a single article. He still preferred, in fact, the approach taken by Mr. Ago.

38. He already thought that article 18 constituted a step forward in the legal regime and he was very much in favour of its paragraph 2.

39. Mr. ECONOMIDES congratulated the Special Rapporteur on his report, which was outstanding in all respects. However, he would prefer the Commission to retain as far as possible the substance of the draft articles considered on first reading and to change them only if there were very pertinent reasons for doing so. If the Commission wished to simplify, it could, for example, merge into a single article not only articles 16, 17 and 19, paragraph 1, but also articles 20 (Breach of an international obligation requiring the adoption of a particular course of conduct), 24 (Moment and duration of the breach of an international obligation by an act of the State not extending in time) and 25 (Moment and duration of the breach of an international obligation by an act of the State extending in time). The end of such an article would read: "... regardless of the origin, content and character of the obligation (of conduct or result or a mixture of the two) or the character of the act of the State (instantaneous act, continuing act or composite act) and its gravity." That would amount to an oversimplification that would impoverish the Commission's contribution. It must therefore proceed cautiously and with restraint with respect to simplifying the draft articles.

40. It did not seem wise in that connection to incorporate paragraph 1 of article 19 in the new article 16 proposed by the Special Rapporteur. The Commission had in fact decided to defer its consideration of the whole of article 19. Furthermore, it would perhaps be better to address the question of the "subject matter of the obligation breached" in the context of article 19. On the other hand, he was in favour of merging articles 16 and 17 and deleting article 17, paragraph 2, as the Special Rapporteur proposed in paragraph 25 of his report.

41. Turning to article 16, he said that the word "origin" was preferable to the word "source", which appeared in paragraph 34, since it was more general, less formal and less technical. There were also grounds for retaining the

term "under international law" in order to make it perfectly clear that a State could invoke in its defence any provision of international law, including Article 103 of the Charter of the United Nations or *jus cogens*. With regard to the origin of the obligation, the word "institutional" should be inserted before the words "customary" and "conventional", for that would take account of sources that had become the prevailing ones, in particular the Security Council in its resolutions. The words "or other" should also be retained in order to cover unilateral acts and the general principles of law.

42. Article 18, paragraph 1, adopted on first reading was more complete and clearer than the new article 18 proposed by the Special Rapporteur. That reworked version did not state clearly that only an act of a State which was not in conformity with an international obligation could be regarded as an internationally wrongful act. Furthermore, there was no need to state that the act was performed or continued; the important point was that the obligation in question must be in force with respect to the State in question. He therefore proposed retaining article 18, paragraph 1, although the Drafting Committee could of course make some minor drafting changes in it.

43. It was absolutely necessary to retain article 18, paragraph 2. He would have preferred it to appear in chapter III, but was not against moving it to chapter V.

44. Mr. HERDOCIA SACASA said that the Special Rapporteur's great achievement had been to increase the consistency of chapter III, rendering it more compact, freeing it from its isolation and linking it to the other parts of the draft. The main question was how to determine whether there had been a breach of an international obligation by a State. In that connection, the new article 16 must, for the most part, repeat the elements already stated in article 3, subparagraph (*b*), that is to say, the attribution of an act to a State and the breach of an international obligation of that State.

45. A third important element was that the wrongfulness of the act must be considered in a broader context and not in an isolated and abstract manner, for there could be circumstances that precluded wrongfulness. On that point, it seemed that the Special Rapporteur had tried to link article 16 to chapter V by adding the phrase "under international law". Since different positions had been taken in the Commission, it should continue to consider the point.

46. He agreed with the Special Rapporteur that the term "not in conformity with" could be replaced by another term which was closer to article 3, subparagraph (*b*), and that it would be preferable to speak, for example, of "non-compliance" or "breach". The whole of the Spanish version of the new article 16 should be revised, for it was not clear. For example, it was difficult to see what the pronoun *ello* referred to.

47. There were two other elements of particular interest: the emphasis on a breach of an international obligation regardless of "the source (whether customary, conventional or other)" and of "the content of the obligation". However, it was necessary to make clear what was meant by the words "or other" and, in the English and Spanish versions, to replace the words "source" and *fuente* by the words "origin" and *origen*, respectively.

48. The new article 18 rightly raised the substantive question whether the obligation had been in force at the relevant moment. He supported the proposal to delete article 17, paragraph 2, and to move article 18, paragraph 2.

49. The CHAIRMAN, speaking as a member of the Commission, said that he generally approved of the new article 16. He too thought that the word "source" should be replaced by the word "origin" in the English version, but there was no need to list the sources in question.

50. On the other hand, he found the new article 18 more problematical. It illustrated the risk of trying to oversimplify the text adopted on first reading. It should in fact be made clear, as had been done in article 18, paragraph 1, adopted on first reading, that the acts of a State referred to in that article were only those acts which did not comply with what was required of a State by an international obligation. Furthermore, the concept of an internationally wrongful act had not appeared in the original paragraph 1 of article 18. It was not logical to introduce it in the new version of that article before even having defined it.

51. Mr. ROSENSTOCK said that it was perhaps not absolutely necessary to say that an obligation could not be breached when it did not exist. That was roughly what article 18, paragraph 1, adopted on first reading said.

*The meeting rose at 1 p.m.*

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## 2569th MEETING

*Friday, 7 May 1999, at 10.10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

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

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN extended a warm welcome to Mr. Peter Tomka and congratulated him on his election to the Commission. He invited the Commission to continue its discussion of the Special Rapporteur's proposals for the first cluster of draft articles (arts. 16 to 19) contained in his second report on State responsibility (A/CN.4/498 and Add.1-4).

ARTICLES 16 TO 19 (*continued*)

2. Mr. YAMADA said that he supported the basic approach taken by the Special Rapporteur, that is to say, to trim the draft articles and retain only the essential elements. He had originally felt that article 16 (Existence of a breach of an international obligation) did not add anything to article 3 (Elements of an internationally wrongful act of a State), subparagraph (*b*), and could therefore be deleted, but he experienced no difficulty with the proposal for a new article 16 merging article 16 with article 17 (Irrelevance of the origin of the international obligation breached) and article 19 (International crimes and international delicts), paragraph 1. However, he was somewhat uneasy about the inclusion in the new article 16 of the phrase "when an act of that State does not comply with"; it would be clearer to say "when that State does not comply with", even though the focus must be on the concept of a specific act of the State. He hoped that the Drafting Committee would be able to find an appropriate expression. It was also inappropriate to add "under international law": the question of conflicting obligations cited by France, in the comments and observations received from Governments on State responsibility,[4] and dealt with in paragraphs 8 and 9 of the second report, as an example of the predominance of the Charter of the United Nations was dealt with in article 39 (Relationship to the Charter of the United Nations), and the exclusion of internal law in article 4 (Characterization of an act of a State as internationally wrongful). Such issues must be governed by the general articles that applied to all the articles in the draft. The inclusion of "under international law" in article 16 might lead the Commission to do likewise in other articles. On another point, he preferred "origin" to "source", for the latter term might raise complicated questions of what else could be regarded as a source of international law in addition to customary and conventional law.

3. The Special Rapporteur's proposal on the subject matter of the obligation, dealt with in article 19, paragraph 1, was an improvement. The deletion of article 17, paragraph 2, was acceptable, even though the text was of historical and academic significance, as explained in the commentary.[5] Most systems of internal law distinguished between the concept of obligations assumed by contract and the concept of tort. Yet the question was whether that distinction held good in international law. Sir Humphrey Waldock had proposed a draft article on breach of treaties,[6] but the Commission had decided that the 1969 Vienna Convention covered only a material breach of treaties (art. 60) and had left the general issue to the regime of State responsibility (art. 73). Accordingly, the Commission had not addressed the question whether there should be a distinction concerning responsibility arising from the different sources of an international obligation. Article 17, paragraph 2, confirmed that no such distinction existed in international law and it would therefore be advisable to record the point in the commentary.

4. He agreed with the Special Rapporteur that article 18 (Requirement that the international obligation be in force for the State), paragraph 2, should be considered in relation to part one, chapter V, and part two, but it was difficult to accept the notion of the retroactive effect of emerging peremptory norms. In any event, the case discussed in the commentary was a very rare one.

5. Mr. GOCO said that the problem of the phrase "when an act of that State does not comply with" would, of course, be settled by the Drafting Committee, but he wondered whether Mr. Yamada saw any material difference between the two versions he had mentioned.

6. Mr. YAMADA said that, as English was not his mother tongue, he would certainly prefer to leave the matter to the Drafting Committee.

7. The CHAIRMAN said he agreed that the personification of acts of the State might cause problems and that the matter should be settled by the Drafting Committee.

8. Mr. CRAWFORD (Special Rapporteur) said that the phrase "when an act of that State does not comply with" was indeed a matter for the Drafting Committee. Among other things, there was, of course, a need to make sure that all the language versions of the phrase sounded right. He was himself now persuaded that "origin" was better than "source".

9. Mr. HE said that the proposed new article 16 constituted a good amalgamation of articles 16, 17 and 19, paragraph 1; it was a good idea, in particular, to note the irrelevance of the source of the international obligation. The phrase "under international law" had two effects. As Mr. Melescanu had pointed out (2568th meeting), its use could block any involvement of domestic law, even though that might not really be necessary, because the topic was clearly one of international law. More relevant was the fact that it could help to deal with the problem of conflicting international obligations. The Special Rapporteur had listed in the commentary three situations, in two of which general international law or treaty provisions could resolve the conflict so that one obligation would prevail over the other. However, that was not true in the third example, when it might be impossible for a State to

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

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

[3] Ibid.

[4] See 2567th meeting, footnote 5.

[5] See 2568th meeting, footnote 6.

[6] *Yearbook ... 1963*, vol. II, p. 72, document A/CN.4/156 and Add.13, art. 20.

comply with both obligations. The inclusion of "under international law" indicated that the content of obligations was a systematic question under international law. The brackets should be removed from around the phrase "whether customary, conventional or other", as it was inappropriate to use brackets in a formal legal document.

10. The Special Rapporteur's reformulation of article 18, paragraph 1, was acceptable; the principle was self-evident and needed no explanation. He could also accept the proposals for article 18, paragraphs 2 to 5.

11. The revised draft articles were an improvement on the ones adopted on first reading: they were succinct and well structured and avoided the confusion and redundancies of the earlier version.

12. Mr. MELESCANU said that he accepted the Special Rapporteur's proposal for a new article 16. It was a good idea to make it clear that a breach of an international obligation did not depend on the source of the obligation, but a problem of conflict of obligations immediately arose if all sources of international law were treated on the same footing. He was not convinced by Mr. Yamada's argument concerning article 39 because there could be situations to which the Charter of the United Nations did not apply. For example, in 1996 Romania had concluded a treaty with the Federal Republic of Yugoslavia containing an undertaking that the two States would not make their territory available to a third State in the event of a conflict in which one of them was involved. In the debate in the Romanian Parliament on the use of Romanian airspace by NATO a clear conflict had emerged between the bilateral treaty and Romania's obligations to NATO. If the Security Council had taken a decision on the question there would have been no problem, but in order to cover such cases the draft articles should perhaps contain a provision setting out a hierarchy of different sources of international law. The best solution might be to include in chapter V a provision referring to obligations *erga omnes* or peremptory obligations under international law.

13. Again, it was useful to include the phrase "or the content of the obligation" because that solved a second difficult issue. However, the different obligations—of conduct, result and so forth—should be specified. Hence the content of article 17 was still of some relevance.

14. Two general comments were called for. First, the Special Rapporteur's great effort to simplify the draft articles was commendable, but the Commission must guard against the danger that oversimplification might create problems. Secondly, as the Special Rapporteur had pointed out, the commentary was concerned more with providing information about the practice and doctrine than with discussing the draft articles as such. The Commission should set itself more ambitious goals: the commentary should be designed to clarify the text of the draft articles and should also include the arguments needed to get them accepted.

15. Mr. CRAWFORD (Special Rapporteur) said that he would revert to the question of conflict of obligations raised by Mr. Melescanu when he responded to the whole debate. He agreed with what Mr. Melescanu had said about the commentary. Once the Drafting Committee had completed its consideration of the draft articles, commentaries would be produced and discussed in a working group before being submitted to the Commission.

16. Mr. ECONOMIDES, responding to the statement by Mr. Melescanu, said that all sources of international law were of equal value, but that three categories of rules—obligations under Article 103 of the Charter of the United Nations, *jus cogens* rules, and rules relating to the concept of international crimes—had a hierarchically higher status than did the normal rules of international law. International crimes had been set aside by the Commission for the time being by agreement of its members; the concept of *jus cogens* would be considered in the context of chapter V; and it only remained to consider, in the framework of article 39, whether a State was internationally responsible vis-à-vis another State with which it had concluded a bilateral or multilateral agreement, if the obligation set forth therein was breached because it was contrary to a Charter obligation.

17. Mr. GOCO said that, since the topic of State responsibility had been on the Commission's agenda for a considerable number of years, and had been assigned to a sequence of Special Rapporteurs, each of whom had adopted a different approach, it might be wise to reflect the views of previous Special Rapporteurs in the commentary, so as to make it abundantly clear to persons not members of the Commission why yet another version of the draft articles had had to be prepared.

18. Mr. SIMMA said he could not subscribe to Mr. Economides' view that international crimes constituted a third category of rules with superior force. The concept of international crimes had nothing to do with the hierarchy of norms. He also asked for some clarification as to how the Special Rapporteur wished to proceed in dealing with the question of crimes.

19. Mr. CRAWFORD (Special Rapporteur) said that Mr. Economides had given what was—except perhaps for the reference to crimes—a relatively classical, and constructive, statement on the matter of conflicting obligations, pointing out that the question of the Charter of the United Nations was resolved by the express provision in part two which would in due course apply to the whole of the draft articles; that the question of *jus cogens* would be dealt with in chapter V; and that the question of crimes had been deferred.

20. As to Mr. Simma's query, he certainly did not envisage holding another debate on crimes as such at the current session. Instead, he had in mind a debate on the basis of an informal paper, on the question of the extent to which the notion of obligations to the international community as a whole would sufficiently cover the issue. He proposed, in the context both of part one and of part two to outline the articles that might achieve that aim. It was absolutely essential, however, that the Commission should complete part one and the commentaries thereto—leaving aside for the moment the issues unresolved as a result of the debate on article 19 at the previous session—in time for submission to the General Assembly at the end of its current session. That was the priority.

21. Mr. ECONOMIDES said that—always assuming article 19 was adopted—the notion of international crimes was the highest norm of the international legal

order, because, while a rule of *jus cogens* could be amended, modified or derogated from by a new rule of *jus cogens*, there could be no derogation from the notion of international crimes.

22. Mr. SIMMA said he could not accept the proposition that the Commission could, by adopting article 19, create a category of rules superior even to those of *jus cogens* and of the Charter of the United Nations. Unlike *jus cogens* and the Charter, which were, to differing extents, broadly accepted, the issue of international crimes remained highly controversial.

23. Mr. ROSENSTOCK said he fully agreed with the statement just made by Mr. Simma, and also wished to applaud the effort made by the Special Rapporteur to prevent the Commission from becoming embroiled in a debate on the question of crimes before the time was ripe.

24. Mr. AL-KHASAWNEH said he fully agreed with the remarks just made by Mr. Economides. However, he wished to join Mr. Rosenstock in pleading that the controversial question of crimes should not be dealt with prematurely.

25. Mr. TOMKA said there appeared to be some confusion on the question of the hierarchy of norms: a crime was an unlawful act, not a norm; and an international crime was the most serious unlawful act breaching the norm.

26. Mr. ECONOMIDES confirmed that he had of course been referring, not to the criminal act itself, but to the whole range of rules of international law prohibiting international crimes.

27. The CHAIRMAN said that the debate on the first cluster of draft articles would continue at the next meeting.

## Articles 20, 21 and 23

28. Mr. HAFNER, referring to articles 20 (Breach of an international obligation requiring the adoption of a particular course of conduct), 21 (Breach of an international obligation requiring the achievement of a specified result) and 23 (Breach of an international obligation to prevent a given event), concerning the obligations of conduct, result and prevention, said he agreed with the Special Rapporteur's view that there was no need to introduce the distinction between obligations of conduct and result. Firstly, no different legal consequence would follow from that distinction. Of course, the existing text still made an important distinction insofar as the rule of the exhaustion of local remedies was said to apply only to obligations of result. Article 22 (Exhaustion of local remedies) would be dealt with at a later stage, but he wished to affirm in the current context that the distinction concerning the rule of exhaustion of local remedies was unjustified: he could not hide his impression that the previous Special Rapporteur had restricted that rule to obligations of result in order to be able to defend the theory of its substantive nature. However, he did not concur with that restriction. On the other hand, neither did he concur with the current Special Rapporteur that that rule was of a purely procedural nature since, if no local remedies were resorted to, the State could immediately resort to the consequences of State responsibility—such as, for instance, reprisal—although the wrongdoing State would have the means to rectify the situation. That was not the desired result, but it was certainly a matter for discussion later.

29. The second reason for his objection to the distinction was its vagueness and the inconsistency with which it was applied, to which specific reference was made in paragraph 68 of the second report. Thus, for instance, he had always regarded it as debatable whether the prohibition of expropriation was an obligation of conduct or of result.

30. The third reason was the fact that a number of primary norms contained both elements. To take, for instance, principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),[7] which was already considered to constitute a customary rule, certainly the correct interpretation was that it was an obligation of conduct even though the breach was effectuated by a certain result. But it must be construed as saying that States had to take the measures necessary to achieve the requisite result. Hence, he fully shared the view expressed in paragraph 79 of the report that obligations of conduct and obligations of result presented not a dichotomy but a spectrum. Lastly, the distinction was of no importance in the context: what counted was the related question of the moment at which the breach was completed.

31. As was spelled out in the report, the matter was also linked with the question whether the enactment of legislative acts as such could of itself constitute a breach. Paragraph 78 of the report solved that question by referring to the "content and importance of the primary rule". While he hesitated to recognize importance as an appropriate decisive criterion, he shared the general view in that regard. In the case concerning the *Interpretation of article 24 of the Treaty of Finance and Compensation of 27 November 1961*, Austria had claimed that, by enacting a certain law, Germany had acted contrary to international law and committed a breach of an international obligation, namely, that of non-discrimination—not vis-à-vis individuals, but vis-à-vis Austria as a State [see p. 19]. Owing to the restricted competence of the arbitral commission, it had been unable to deal with that issue; nevertheless, it had recognized that such claims could arise between States.

32. Again, he largely shared the Special Rapporteur's opinion about the nature of obligations of prevention. However, the last sentence of paragraph 87 gave the impression that damage might become the criterion triggering responsibility, though the Special Rapporteur did prudently stress that such a situation "might" occur. However, if the Commission addressed the issue of prevention as it had at its fiftieth session, it must come to the conclusion that responsibility could arise even if no damage had yet occurred. If, for instance, a State did not abide by the duty to take certain preventive measures, damage was not the necessary condition for responsibility—unless damage was conceived as also comprising the increased risk of damage that necessarily resulted from the absence of the preventive measures. Although it could also be argued

[7] *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

that, within the general duty of prevention, other obligations could arise which would fall within the categories of obligations of conduct or result, that merely showed that even the duty of prevention did not comprise one single type of obligation or duty, but different types of obligations.

33. Consequently, the draft articles now before the Commission dealt with primary rules without any real necessity for so doing, and tended to confuse the issue. In his view, theoretical issues had no place in the draft articles, which would have to be applied by practitioners. That must be a guiding principle for the Commission's work on the topic. Admittedly, the Special Rapporteur rightly referred to the existing use of those distinctions in practice, for instance, in various cases before ICJ. Nevertheless, that did not convince him of the need to include such distinctions in the draft on State responsibility. Whether an obligation was declared by the Court to be an obligation of conduct or of result was a matter relating to the primary norms, and, insofar as practice did not derive consequences for responsibility from it, it could be left to the discussion on those norms. State responsibility went to the heart of international law, but that did not mean consideration must be given to all aspects of international law, even those that had no impact on State responsibility.

34. Consequently, in response to the question posed in paragraph 92 of the report, he saw no need for a new article 20. If the Commission wished to retain it, it was doubtful whether the reference to the means was needed, particularly the second reference. It could raise the question of the link between means and result. Inasmuch as the means to be adopted were not specified, the result or lack of result could not be made dependent on whether or not the State had adopted the means. Hence, if it was the Commission's general wish, for one reason or another, to retain article 20 in the new form, the reference to means should in any case be deleted.

35. The CHAIRMAN said members would have an opportunity to respond to Mr. Hafner's statement during the forthcoming debate on the second cluster of draft articles.

## Nationality in relation to the succession of States[8] (A/CN.4/493 and Corr.1,[9] A/CN.4/496, sect. E, A/CN.4/497,[10] A/CN.4/L.572, A/CN.4/L.573 and Corr.1)

[Agenda item 6]

### Report of the Working Group

36. The CHAIRMAN, speaking in his capacity as Chairman of the Working Group on nationality in relation to the succession of States, presented the interim report of the Working Group. The Working Group established by the Commission at its 2566th meeting on 4 May 1999 had held three meetings, from 4 to 6 May. It had considered the comments and observations received from Governments (A/CN.4/493 and Corr.1) and oral comments made in the Sixth Committee regarding the draft articles adopted by the Commission on first reading on the basis of the memorandum by the Secretariat (A/CN.4/497).

37. At the outset, the Working Group had decided that it would deal first with the merits of the draft articles themselves, and only at a later stage would it address the issue of the form, structure and order to be given to them. It took the view that a number of points referred to by States in the Memorandum by the Secretariat were purely matters of drafting and could be taken up by the Drafting Committee.

38. So far, the Working Group had considered articles 1 to 13. No changes had been deemed warranted for the text of articles 1 to 5 and 7 to 13. Bearing in mind the observation contained in paragraph 47 of the Memorandum by the Secretariat, the Working Group intended to suggest an amendment to article 6 so that the retroactive attribution of nationality was limited to situations in which persons would be temporarily stateless during the period between the date of the State succession and the attribution of nationality of the successor State or the acquisition of such nationality upon exercise of the right of option.

39. The Working Group also intended to suggest the addition of a third paragraph to article 13. It should deal with the right of residence of persons concerned who had not acquired the nationality of the successor State. Full texts of those proposals would be included in the final version of the report of the Working Group to the Commission.

40. The Working Group considered that a more detailed elaboration of some of the commentaries to the draft articles was appropriate, but that task should be carried out in parallel with the consideration of those articles by the Drafting Committee. Suggestions in that regard would be included in the report of the Working Group.

## Organization of work of the session (*continued*)*

[Agenda item 2]

41. The CHAIRMAN said that Mr. Yamada had been conducting informal consultations on the question of how the Commission should deal with agenda item 9, "Jurisdictional immunities of States and their property", and wide support had been expressed for two proposals: (*a*) to establish a working group to be entrusted with the task of preparing preliminary comments as requested by the General Assembly in paragraph 2 of resolution 53/98; and (*b*) to appoint Mr. Hafner as Chairman of the Working Group on jurisdictional immunities of States and their property.

42. He said that, if he heard objection, he would take it that the Commission agreed to those proposals.

*It was so agreed.*

*The meeting rose at 11.25 a.m.*

[8] For the draft articles with commentaries thereto provisionally adopted by the Commission on first reading, see *Yearbook ... 1997*, vol. II (Part Two), p. 14, chap. IV, sect. C.

[9] See footnote 2 above.

[10] Ibid.

* Resumed from the 2566th meeting.

# 2570th MEETING

*Tuesday, 11 May 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

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

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 16 TO 19 (*concluded*)

1. Mr. RODRÍGUEZ CEDEÑO congratulated the Special Rapporteur on the way in which he had performed the very complicated task assigned to him. Among other things, he had succeeded in producing a clearer version of chapter III (Breach of an international obligation) of part one of the draft articles.

2. The new article 16 (Existence of a breach of an international obligation) proposed by the Special Rapporteur in his second report on State responsibility (A/CN.4/498 and Add.14) used some of the language of article 16 adopted on first reading and some elements from article 17 (Irrelevance of the origin of the international obligation breached) and article 19 (International crimes and international delicts), paragraph 1. In the Spanish and French versions, the wording of the new article in paragraph 34 of the report differed slightly from the wording in paragraph 156. He preferred the former to the latter. It would be for the Drafting Committee to settle the problem.

3. According to the new article 16, there was a breach of an international obligation by a State when an act of that State did not comply with what was required of it by that obligation. In the event of nullification or impairment of benefits resulting from such agreements as the Agreement on Trade-Related Aspects of Intellectual Property Rights,[4] the question arose as to whether it was possible to speak, if not of breach within the meaning of new article 16, then at least of non-respect likely to trigger the international responsibility of a State in the very specific context of agreements concluded under the auspices of WTO. He was thinking in particular of article XXIII, paragraph 1 (*b*), of the General Agreement on Tariffs and Trade 1994 (GATT 1994),[5] which dealt with the problem of the responsibility of a State party to an agreement in the event of nullification or impairment of a benefit for another contracting party when the State applied a measure which was, however, not expressly and clearly in conflict with an obligation which it had assumed under the said agreement.

4. Furthermore, article 64 of the Agreement on Trade-Related Aspects of Intellectual Property Rights stated that subparagraphs 1 *(b)* and 1 (*c*) of article XXIII of GATT 1994 did not apply to the settlement of disputes for a period of five years from the date of entry into force of the WTO Agreement. There was thus a link between the two provisions in the context of "dispute settlement" and he wondered whether the nullification or impairment of a benefit resulting from an agreement had some kind of link with non-respect of an obligation or whether it constituted a different degree of violation which the Commission did not cover in its study on State responsibility. There should be an express reference to the point either in article 16 itself or in the commentary.

5. It would be desirable in that connection to have interaction and convergence between the Commission and the other United Nations bodies which drafted legal instruments, in particular in the spheres of the environment, human rights and international trade law, in order to ensure that the terms used had the same meaning everywhere. For example, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal did not take the Commission's work fully into account.

6. It was essential to refer to international law, either in article 16 itself or in the accompanying commentary, in order to make it perfectly clear that the rules applicable to the international responsibility of States were the rules of international law and not the rules of the internal law of States.

7. Article 17 dealt with the irrelevance of the origin of the breached international obligation, a matter that ought perhaps to embrace the above-mentioned concept of the nullification or impairment of a benefit resulting from an agreement. The analysis of the international obligation was a fundamental element of the consideration of the international responsibility of States. Obligations could be classified according to their origin, content, scope or degree. The origin could be a customary or conventional rule or an independent unilateral act. A distinction must

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

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

[3] Ibid.

[4] See *Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakesh on 15 April 1994* (GATT secretariat publication, Sales No. GATT/1994-7).

[5] Ibid.

be made in that connection between "origin" and "source". As to the content, obligations could stem from positive law or *jus cogens*. Where the scope was concerned, it might come down to individual obligations or several subjects of international law or indeed *erga omnes* obligations. And a further distinction should be made between obligations of conduct and of result.

8. In new article 16, the Special Rapporteur rightly stressed that the origin of the obligation was not a relevant consideration. In that connection the brackets around the words "whether customary, conventional or other" should be removed. However, the words "or other" were too general and ambiguous. They referred in fact to unilateral acts, that is to say, to obligations which a State assumed unilaterally and independently and which it was required to fulfil pursuant to article 26 of the 1969 Vienna Convention and the *pacta sunt servanda* principle in the case of treaties and the *acta sunt servanda* principle in the case of unilateral acts. He would be ready to agree to keep the words "or other", provided that it was made clear in the commentary that the term referred to independent unilateral obligations.

9. The Special Rapporteur's proposal that the new article 18 (Requirement that the international obligation be in force for the State) should include the substance of paragraph 1 of article 18 adopted on first reading was acceptable. The other paragraphs of article 18 adopted on first reading were important and he endorsed the Special Rapporteur's proposal that they should be moved to other parts of the draft articles.

10. Mr. GOCO said that many countries which had ratified GATT 1994, including his own, were finding it difficult fully to discharge the resulting obligations. GATT 1994 contained provisions allowing for exceptions to those obligations. And indeed many States had submitted requests for exceptions. He wondered whether, if a State was not able to apply an agreement fully, it should be regarded as breaching an international obligation within the meaning of article 16, which stated a general principle: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation."

11. Mr. CRAWFORD (Special Rapporteur) said that a particular obligation resulting from any agreement might be subject to restrictions, limitations, exclusions or exceptions, but that was a matter anterior to the draft articles. The draft articles came into play when there was a conflict, in the form of a breach, with the primary obligation as established; that ought to alleviate Mr. Goco's fears. It was perfectly clear that the distinction between the primary obligation and the functioning of the law of State responsibility excluded that difficulty.

12. He urged the members of the Commission not to spend too much time on articles 16 and 18, which had already prompted many extremely valuable comments and were less controversial than the following articles.

13. Mr. HE said that the phrase "under international law" should be kept in new article 16. On the question of a conflict of international obligations, he shared the view of France, in the comments and observations received from Governments on State responsibility,[6] that the obligations imposed by the Charter of the United Nations took precedence over other conventional obligations, regardless of their origin. Of course, States had differing interpretations of the provisions of the Charter and the question should therefore be discussed in the commentary.

14. As a matter of State responsibility, he noted that the senseless attack on the Chinese Embassy in Yugoslavia, which had caused loss of human life and considerable material damage, constituted a violation of an international obligation.

15. Mr. ROSENSTOCK, speaking on a point of order, asked the previous speaker to explain to the Commission what that event had to do with the topic under consideration.

16. The CHAIRMAN said that he took it that the example given by Mr. He related to the question of the obligations of States under the Charter of the United Nations.

17. Mr. HE said that the act in question constituted a violation of an international obligation and of the Vienna Convention on Diplomatic Relations and that it could not be excused on any ground whatsoever. He felt profound sorrow for all the people who had been killed or injured during the attack. There would have to be a detailed investigation to determine whether the act had been deliberate or due to a mistake or carelessness.

18. Mr. ROSENSTOCK said that it was extremely regrettable that a member should try to involve the Commission in a debate of that kind. The members of the Commission were independent experts and not representatives of Governments. The speaker should be requested to stick to the documents before the Commission.

19. The CHAIRMAN requested Mr. He to limit his comments to the matters on the Commission's agenda.

20. Mr. HE said once again that there had been a breach of an international obligation and that those who had committed the act must take responsibility for the harm done to the embassy's staff.

21. Mr. ILLUECA congratulated the Special Rapporteur on his report, which was a genuine work of legal art. The Commission had set about considering draft articles 16 and 18 without prejudice to the conclusions that it might reach on article 19.

22. The merging into a single article of articles 16, 17 and 19, paragraph 1, raised a number of terminological problems that had to be resolved. For example, in the Spanish text of paragraph 156 of the report, the English title of article 16 had been translated as *Existencia de incumplimiento de una obligación internacional*, whereas the word "breach" should have been translated by the word *violación*, as in paragraph 34 of the report.

23. Similarly, the beginning of article 16 as adopted on first reading ("There is a breach of an international obligation by a State") had been correctly translated into Spanish as: *Hay violación de una obligación internacio-*

[6] See 2567th meeting, footnote 5.

*nal por un Estado.* In paragraph 34 of the report, however, that phrase had been translated as: *Un Estado viola una obligación internacional cuando un hecho suyo no cumple lo que debe hacer.*

24. In paragraph 34, the word "source" had been translated into Spanish by the word *origen* and, in paragraph 156 of the report, the words "when an act ... does not comply with" had been translated, curiously enough, by the phrase *cuando ello no se ajusta a*.

25. Before the Special Rapporteur's substantive proposals were considered, it should be recalled that, as stated in paragraph 107 of section D of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-third session prepared by the Secretariat (A/CN.4/496),

> "Many delegations ... expressed support for the Commission's efforts to amalgamate some provisions, or delete articles. It was observed that the draft articles provisionally adopted by the Commission on first reading had already had an impact on State practice and had recently been referred to by the International Court of Justice in a decision ... the view was also expressed that any major changes would undermine the growing authority that many of the draft articles were acquiring, and that revisions would create undesirable delay in finalizing the draft articles."

26. The Special Rapporteur's idea of merging articles 16, 17 and 19, paragraph 1, into a single article was undoubtedly useful in practice, but it altered the terminology by the use of the word "source" in new article 16, whereas the word "origin" had been used in article 17, paragraph 1, as adopted on first reading.

27. Mr. CRAWFORD (Special Rapporteur) said that the use of the word "source" instead of the word "origin" had been a mistake. In writing the report, he had used "source" but, after many members of the Commission had given their views, he had realized that that was not appropriate. If there were translation errors in versions of the report in languages other than English, corrections would be issued.

28. Mr. ILLUECA said it was important to be clear about terminology and that the Commission had already held a long discussion on the terms used in the article under consideration. At its twenty-seventh session, in 1975, the Commission had adopted a general plan for the draft articles on the topic of State responsibility[7] and, at that time, part one had been entitled "The origin of international responsibility". The provisional adoption on first reading of part one of the draft articles had subsequently given rise to a discussion on the words "source" and "origin" which was reflected in paragraph (25) of the commentary to article 17,[8] which indicated that: "The Commission as a whole finally adopted the word 'origin', but qualified it by adding, by way of example, the adjectives, 'customary, conventional or other', so as to leave no ambiguity."

29. The use of the term "origin" had been lent authority in the decision in the *Rainbow Warrior* arbitration, in which the Arbitral Tribunal had held that "Any violation by a State of any obligation, of whatever origin, gives rise to State responsibility".[9]

30. Another terminological problem arose in article 16. After asking, in paragraph 15 of his report, whether the words "not in conformity with what is required ... by that obligation" were apt to cover the many different kinds of breach, the Special Rapporteur had concluded that the phrase was flexible enough to cover the many permutations of obligation, and that any doubts could be sufficiently covered in the commentary. On the other hand, he admitted that it was slightly odd to talk of an act as not being "in conformity with" an obligation and that the Drafting Committee might wish to consider alternative formulations in the various languages (for example "does not comply with" for the English text). The latter comment was surprising because article 16 dealt not with an act of a State that "does not comply with an obligation", but with an act of a State that "is not in conformity with what is required ... by that obligation", and that placed the emphasis on the conduct of the State. Accordingly, there was nothing odd about the wording of article 16. That article had also been discussed at length and had been adopted on first reading in the context of the consideration of a topic that the Commission had had before it for over 20 years. As indicated in paragraph (4) of the commentary to article 16 as adopted on first reading:[10]

> The Commission ... considered that the wording "is not in conformity with what is required of it by that obligation" was the most appropriate to indicate what constitutes the essence ... of a breach of an international obligation by a State. Th[e] wording was found preferable to other expressions such as "is in contradiction with" or "is contrary to", because it expresses more accurately the idea that a breach may exist even if the act of the State is only partially in contradiction with an international obligation incumbent upon it.

To decide on a change of terminology now would deprive the Drafting Committee of precious time and might be perceived by the Sixth Committee as an invitation to reopen a discussion that had already been closed.

31. The inclusion in the proposed new article 16 of the phrase "regardless of the subject matter of the obligation breached" taken from article 19, paragraph 1, with the replacement of the words "subject matter" by the word "content", would also give rise to a problem. It would be better to leave article 19 aside for the moment, without prejudice to comments that the Commission might receive on that question in conformity with paragraph 5 of General Assembly resolution 51/160. He nevertheless thought that the French proposal for the addition of the words "under international law" at the end of article 16 was entirely justified.

32. The Special Rapporteur's proposals on article 18 were also acceptable. Paragraph 1 stated the important principle that, for responsibility to exist, the breach must have occurred at a time when the obligation had been in force for the State and set out the principle of inter-temporal law. That could be of great interest in a case of environmental damage, for example, when one of the parties had, in conformity with a treaty, contracted an obligation

[7] *Yearbook ... 1975*, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

[8] See 2568th meeting, footnote 6.

[9] See 2567th meeting, footnote 7.

[10] See 2568th meeting, footnote 6.

to take steps within a specified period. Paragraph 2 of article 18 was unnecessary and could be deleted, as proposed by the Special Rapporteur.

33. Mr. ADDO congratulated the Special Rapporteur and said that, in his opinion, article 16 added nothing new by comparison with article 3 (Elements of an internationally wrongful act of a State), subparagraph (*b*), and that there was no reason to add the phrase "under international law". Articles 3 and 4 provided all the elements required, since article 4 indicated that internal law could not prevail over international law and article 3, subparagraph (*b*), stated that there was an internationally wrongful act of a State when conduct attributable to the State under international law "constitutes a breach of an international obligation of the State". Like Mr. Rosenstock, he wondered whether article 16 should be retained. Nevertheless, he was greatly attracted by the Special Rapporteur's proposal that articles 16, 17 and 19, paragraph 1, should be merged into a single article, as long as the phrase "under international law" was not inserted. In English, he preferred the words "does not comply with" to the words "is not in conformity with".

34. He agreed that article 17, paragraph 2, should be deleted, since it was unnecessary and confusing. He was in favour of retaining article 18, paragraph 1, which set out an important general principle, for it was crucial that an act of a State should constitute a breach of an obligation only if that obligation had been in force for the State at the time when the act had been performed. For example, a State that had not signed or ratified a treaty must not be held responsible for a breach of international obligations flowing from that treaty. He had no objection to the deletion of article 18, paragraph 2, as proposed by the Special Rapporteur. He also agreed with Mr. Simma that the commentary to the articles would be improved by being pruned and simplified.

35. Mr. ELARABY said he also thought that the commentary should be shorter and more concise. He supported the Special Rapporteur's proposal that articles 16, 17 and 19, paragraph 1, should be redrafted as a single article and was in favour of the inclusion of the expression "under international law" in the new article for the sake of clarity. He preferred the wording "is not in conformity with" to the wording "does not comply with", as the former was broader in scope; and also preferred the word "origin" to the word "source".

36. The question of conflicts of international obligations was a particularly thorny one. Even if it was already considered to be covered by article 39, in the interests of maximum clarity, the Special Rapporteur might perhaps also include a reference to the peremptory rules of *jus cogens*. Consideration should also be given to the possibility of including some saving clauses to reflect existing priorities with regard to the rules of *jus cogens*. In that connection, he cited the example of the saving clauses included in the Treaty of Peace between the Arab Republic of Egypt and the State of Israel.[11]

37. With regard to the relationship between disconformity with an obligation, wrongfulness and responsibility, he referred to paragraph 12 of the report, which stated, with reference to the judgment of ICJ in the case concerning *United States Diplomatic and Consular Staff in Tehran*, that responsibility might have not two but three elements, attribution, breach and the absence of any "special" defence or justification, and he suggested that the third element should be set forth more explicitly.

38. Mr. ECONOMIDES, speaking on article 16, said that the words "in conformity with what is required of it" introduced a subjective element that was not always appropriate. The obligation envisaged, if it were customary, was universal: in other words, the same for everyone and was not required of any given State. The expression could be applied only to treaty-contracts or treaty-agreements under the terms of which two States could have specific obligations that differed. He suggested that article 16 should be reworded so as to begin with the words: "There is a breach of an international obligation by a State when an act of that State is not in conformity with that obligation under international law."

39. Mr. PAMBOU-TCHIVOUNDA said that he had expressed the same concern as Mr. Economides with regard to the use of the words "what is required of it" and had already drawn attention to their subjective character. He suggested that the Commission should request the Drafting Committee to try to find a new wording.

40. Mr. CRAWFORD (Special Rapporteur) said he agreed that the wording of article 16 implicitly raised the question to what extent responsibility was conceived as essentially bilateral or "subjective", a problem that would also arise in connection with *jus cogens* in chapter V (Circumstances precluding wrongfulness). The objective was the drafting of a general law of obligations dealing both with universal obligations and with bilateral treaties. As it had been decided not to compartmentalize the issues, the Drafting Committee would have to find wording for article 16 which was general enough to cover both aspects and which must in any case not imply that relationships of responsibility were exclusively bilateral, still less subjective.

41. Mr. BAENA SOARES called upon the Commission not to discount the work done by the previous special rapporteurs, but also to realize that, after so many years of study, the topic had now become urgent. The Special rapporteur's concern to simplify and clarify was entirely commendable, as was the work he had done to prune the text, but there, too, moderation was called for.

42. With regard to article 16, the text proposed by the Special Rapporteur improved on the previous version with no loss of substance. In addition to replacing the word "source" by the word "origin", the brackets and the text they enclosed should be deleted and the Drafting Committee should be left to choose between the English expressions "in conformity with" and "comply with", although the latter seemed the wiser choice. Whichever expression was used, very careful attention would need to be given to its translation into the other languages. The expression "under international law" was useful and should be retained.

43. The new version of article 18 was also an improvement on the previous one. Judging by the comments of

[11] Treaty of Peace (Washington, 26 March 1979), United Nations, *Treaty Series*, vol. 1136, No. 17813, p. 100.

Governments, the basic principle embodied in its paragraph 1 seemed to be undisputed. The deletion of paragraph 2 was justified, as the two questions addressed in that provision would be better located in part two or in chapter V of part one of the draft articles. Paragraphs 3 to 5 were simply transferred to articles 24 (Moment and duration of the breach of an international obligation by an act of the State not extending in time) and 25 (Moment and duration of the breach of an international obligation by an act of the State extending in time), which would be considered subsequently. With regard to the draft articles as a whole, the Commission should coordinate its work with any work by other bodies that might be of relevance to its discussions.

44. Mr. Sreenivasa RAO said that he broadly supported the Special Rapporteur's analysis, but noted that some of his proposals should be reformulated by the Drafting Committee. The draft articles adopted on first reading had had their own scheme and had referred to principles and concepts—primary and secondary rules, obligations of conduct and of result—which, because so much time had elapsed between the first and second readings, had found expression in practice, including that of ICJ, and also in doctrine. Simplification was necessary, but must go hand in hand with the preservation of stability, so as not to create confusion by eliminating, modifying or according different treatment to concepts whose value and importance had already been recognized. Furthermore, a number of questions raised by the draft articles adopted on first reading were unlikely to be resolved at the second reading stage because those problems concerned not the substance of State responsibility, but the primary rules. They could thus not be regulated by referring to secondary rules. Only when an obligation had arisen for the State could all the other considerations, including those under chapter V, be brought into play. The commentary to the draft articles adopted on first reading had already stressed the links between the articles in chapter III and, in particular, those in chapter V. It would be interesting to introduce that link into the articles of chapter III themselves, but those articles should not be made unduly cumbersome. It would be for the Drafting Committee and the Special Rapporteur to find the right balance and an appropriate architecture for the draft articles as a whole.

45. The expression "under international law" must be retained because that was the basis for the draft articles as a whole; because care must be taken to avoid any encroachment by private international law or internal law, even by inference; and because it was right to emphasize the existence of higher rules, represented by the Charter of the United Nations, *jus cogens* or *erga omnes* obligations. The commentary to the draft articles adopted on first reading had drawn no distinction between the expressions "in conformity with" and "comply with", but, if it was absolutely necessary to find one, the first might be seen as presupposing that all the requisite elements were present for the conduct not to constitute a breach, whereas the second would be more flexible and would be concerned solely with achieving a result. There again, it would be for the Drafting Committee to decide. As to the effects of the commission of a crime on *jus cogens* obligations, it was normal and accepted that obligations did not all have the same status and that some obligations vis-à-vis an aggressor State, for example, could be suspended pending resolution of the hierarchically more important question of the aggression. As to whether *jus cogens* and *erga omnes* obligations were merely two facets of one and the same state of affairs, it should be borne in mind that *jus cogens* obligations directly introduced a hierarchy and eliminated any other obligation in the event of disconformity, whereas *erga omnes* obligations were more horizontal in nature, giving more members of the international community the possibility of reacting.

46. With regard to article 17, its paragraph 1 might be reformulated so as to make it more a saving clause than a conditional clause. Paragraph 2 was superfluous. The same went for article 18, whose paragraph 1 could be expressed in the form of a safeguard and whose paragraph 2 could be deleted, for the reasons cited by the Special Rapporteur in paragraphs 50 and 51 of his report. The Special Rapporteur was also right to transfer paragraphs 3 to 5 of article 18 to other parts of the draft articles. As to article 19, paragraph 1 should be retained in that article or, as proposed by the Special Rapporteur, incorporated in article 16, provided, however, that the latter solution did not in any way imply a move towards deleting article 19, for that question had still not been decided. A merging of article 16, the remainder of article 17 and article 19, paragraph 1, was acceptable, as was substitution of the word "origin" for the word "source". The examples given in paragraph 42 of the report were not entirely well chosen, but the Special Rapporteur's underlying argument remained valid.

47. Mr. LUKASHUK said he regretted that the Commission had not responded with its customary openness and attentiveness to the perfectly legitimate feeling expressed by Mr. He. With regard to the draft articles, the fact that States were not overeager to accept the Commission's proposals on the subject should encourage the Commission to prepare texts that were as down-to-earth and clear-cut as possible. He noted that the draft articles adopted by the Commission on first reading had been used by ICJ, for example, in the case concerning the *Gabčíkovo-Nagymaros Project*. We were witnessing a new trend in the progressive development of international law: the Commission stated the rule which it believed existed or should exist and ICJ recognized the rule as a norm of positive international law.

48. Turning to article 16, he said he was inclined to agree that the words "comply with" could be replaced by a more forceful expression, since the idea they conveyed did not necessarily presuppose the engagement of responsibility. Unlike Mr. Addo, he considered that the phrase "under international law" was important, not because of the possible existence of responsibility in internal law, but because of the existence of many diverse norms in international relations, such as political or moral norms, usage and commitments that gave rise to special kinds of responsibility.

49. Lastly, he expressed support for the Special Rapporteur's proposal that article 17 should be deleted.

50. Mr. ROSENSTOCK said that he was not convinced by Mr. Lukashuk's argument in favour of inserting the phrase "under international law" and asked the members of the Commission who supported the proposal to state the reasons for doing so. One might arguably use the

wording "with what is legally required of it by that obligation", but that was not really necessary either.

51. Mr. SIMMA, referring to Mr. Lukashuk's comment on the words "comply with", noted that a number of environmental protection instruments contained detailed provisions and procedures for the settlement of disputes in the event of "non-compliance" with a treaty, but refrained from introducing the notion of a breach precisely in order to keep the matter separate from the law of State responsibility. A case in point was the Montreal Protocol on Substances that Deplete the Ozone Layer. It would therefore be wise to avoid wording of that kind.

52. Mr. Sreenivasa RAO, replying to Mr. Rosenstock, said that the phrase "under international law" was of crucial importance in that it laid the basis for establishing a clear hierarchy between the rules in force and obligations arising from multiple sources.

53. With regard to the terms "non-compliance" and "non-conformity", he thought that the former referred rather to an obligation of conduct that offered a certain amount of latitude in terms of the choice of means to be used in its fulfilment. As he was unwilling to enter into an etymological discussion, he would go along with whatever wording the Commission considered most appropriate in the light of the aim to be achieved.

54. Mr. TOMKA, referring to the different suggestions for replacing the phrase "does not comply with what is required of it" in article 16, which had been adopted on first reading and maintained by the Special Rapporteur, said that the phrase had been discussed at length by the Commission, which had clearly explained its choice in paragraph (4) of the commentary to the article (see paragraph 30 above). As the reasons adduced at the time were still valid, there was no call for any change.

55. He thought it would be more appropriate to include the issue of the "bilateralization" of State responsibility in the case of multilateral instruments under part two of the draft articles, in conjunction with that of an injured State. For example, the obligation under the Vienna Convention on Diplomatic Relations to respect the diplomatic immunity of an embassy was applicable to all embassies, but, if it was breached in the case of one country, only that country could claim damages. No distinction should be made in article 16 between a bilateral instrument and a multilateral instrument.

56. Mr. CRAWFORD (Special Rapporteur), summing up what had been a useful discussion on the first cluster of articles, said that, despite certain differences of opinion, there appeared to be a fairly large measure of agreement—some substantive and some procedural—on points of principle.

57. Starting with the least controversial points, he noted that there had been no real objection to the deletion of article 17, paragraph 2. At all events, the history of article 17 and the underlying principle could be reflected in the commentary, as had been suggested. It was acknowledged that the essential provision of article 17 was that contained in paragraph 1, since the Commission had to elaborate secondary rules applicable to all international obligations, whatever their origin.

58. No member of the Commission had argued for the retention of article 18, paragraph 2, in chapter III. It would perhaps be found, after more detailed consideration, that the provision it contained belonged more appropriately in chapter V.

59. Turning to more controversial questions, he said he was convinced that article 16 had both an introductory and a normative function and should therefore be retained, together with article 18, paragraph 1. He gathered that the Commission was, on the whole, in favour of amalgamating articles 16, 17, paragraph 1, and 19, paragraph 1. It was for the Drafting Committee to come up with appropriate wording and in particular to take a decision on the phrase "is not in conformity with what is required of it", "does not comply with what is required of it" or "is in breach of what is required of it".

60. He noted that there had been disagreement about the phrase "under international law", which he had inserted in response to a proposal by France, in the comments and observations received from Governments on State responsibility, which was apparently concerned to prevent any conflict of obligations, not in order to draw a distinction between international law and internal law, since that already existed, but to forge a link between chapter III and chapter V of the draft articles. It seemed to state, on the one hand, that there was responsibility and, on the other, that there was no wrongfulness. That was a real problem that could be solved in different ways, primarily in chapter V. For the time being, the Drafting Committee could place the phrase in square brackets and revert to it following the debate on chapter V.

61. With regard to the principle of the inter-temporality of international law, he noted that there was broad agreement on retaining article 18, paragraph 1, which stated a principle of general application. The Drafting Committee would have to choose between the initial wording and his proposal, which he would not insist on, although he firmly believed that States were entitled to some form of guarantee against the retrospective application of the law, except in the case of a *lex specialis* arrangement.

62. With regard to the use of the term "non-compliance" to refer to failure to carry out an obligation not involving a breach of international law, he agreed with Mr. Simma that it was vague because it could just as well refer to failure to carry out an obligation that might not involve a breach of international law.

63. With regard to article 19, paragraph 1, he had taken due note of the comments of Messrs Economides, Pambou-Tchivounda and Sreenivasa Rao. He had preferred the word "content" to the words "subject matter" of the obligation breached because it was more precise. He was convinced that the point made in the paragraph properly belonged in article 16 in the form in which he had proposed it, without prejudice to the substantive issue raised by article 19, namely, the distinction between "international crimes" and "international delicts". The existence of obligations to the international community was generally acknowledged, but the Commission would have to determine how it would fit that idea into the framework of State responsibility.

64. In conclusion, he proposed that the Commission should refer the first cluster of articles it had considered to the Drafting Committee.

65. Mr. ECONOMIDES said he supported the proposal on the understanding that the Drafting Committee would also have before it the articles corresponding to the draft articles provisionally adopted by the Commission on first reading so that it could base its discussions on all the material available.

66. The CHAIRMAN said that would be arranged. If he heard no objection, he would take it that the Commission agreed to the Special Rapporteur's proposal.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

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## 2571st MEETING

*Wednesday, 12 May 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

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

[Agenda item 2]

1. The CHAIRMAN invited members to approve a draft programme prepared by the Bureau for the next two weeks of the session. It was proposed that the general discussion on the topic of State responsibility should be continued in plenary whenever possible, depending on the Special Rapporteur's ability to be present. The afternoons would generally be allotted to meetings of the Drafting Committee, which would continue to deal with the topic of nationality in relation to the succession of States during the first week and, depending on the progress made, would probably go on to State responsibility in the second. The programme also provided for a meeting of the Planning Group and of the Working Group on the long-term programme of work.

2. Mr. CRAWFORD (Special Rapporteur on State responsibility) said that, as soon as the Commission completed its consideration of the third cluster of articles in chapter III of part one of the draft, he intended to introduce chapter I, section B, of his second report on State responsibility (A/CN.4/498 and Add.14), dealing with chapter IV.

3. The CHAIRMAN took note of that announcement. He said that, if there were no objections, he would take it that the Commission agreed to the proposed programme of work for the period from 17 to 28 May 1999.

*It was so agreed.*

4. Mr. GOCO (Chairman of the Planning Group) announced that the members of the Planning Group were: Mr. Baena Soares, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Simma and, ex officio, Mr. Rosenstock. Other members of the Commission were, however, welcome to participate in the work of the Planning Group.

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

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 20, 21 AND 23 (*continued*)*

5. Mr. SIMMA, continuing the debate on the second cluster of articles in chapter III (Breach of an international obligation), namely articles 20 (Breach of an international obligation requiring the adoption of a particular course of conduct), 21 (Breach of an international obligation requiring the achievement of a specified result) and 23 (Breach of an international obligation to prevent a given event), said that, before deciding what to do with them, the Commission should recognize that the distinction between obligations of result and obligations of conduct had become almost commonplace in international legal discourse, not only at the academic level but also at that of inter-State relations. The view that the concept was practically a classic in civil law systems was perhaps something of an overstatement, as a result of a tendency on the part of some French lawyers to identify all civil law systems with French law. In German law, for example, the distinction as such had no place, except in connection with labour contracts, as opposed to contracts relating to services.

* Resumed from the 2569th meeting.

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

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

[3] Ibid.

6. As to the reversal of the effect of the distinction, referred to in paragraph 58 of the second report, that had been operated by a former Special Rapporteur, Mr. Roberto Ago, and the Commission at its twenty-eighth session, in 1976,[4] the fact that it had gone unnoticed for so many years suggested that the Commission should perhaps take a more serious interest in comparative law. However, confusing as Mr. Ago's interpretation of the distinction might be, it did not in itself provide an argument for doing away with the concept if it served a real purpose. In his opinion, it did so, but its value was cognitive rather than normative, and it was undoubtedly helpful in the interpretation of primary rules. Viewed from that angle, it did not matter that most obligations, in practice, appeared to be of a hybrid nature, as pointed out in the second report.

7. An instance of a case where the distinction was of value was the issue of reservations to human rights treaties. Thus, the articles of the 1969 Vienna Convention that dealt with the effects of reservations largely depended upon it. In short, the distinction was useful in an explanatory, didactic sense, but whether it should be included in a codification treaty was quite another matter.

8. Another interesting example was provided by article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, an important treaty provision which represented a delicate mix of obligations of conduct and obligations of result. Article 23 of the draft, as adopted on first reading, was yet another good example, since the text spoke of an obligation of conduct while the commentary to the article[5] made it clear that the obligation was not absolute.

9. The conclusion to be drawn was that, while the doctrinal concept was undoubtedly a useful one, the distinction could hardly be made operational at the level of secondary rules. For that reason, it should be deleted from the draft articles but should be dealt with adequately in the commentary, the weight given to it depending on the form the Commission decided the draft should ultimately take.

10. With reference to an article by Dupuy,[6] he would welcome comments by the Special Rapporteur on the suggestion put forward in the article that the existing terminology should be replaced by the terms "obligation to endeavour" and "obligation to achieve"[7] which, it was argued, might prove helpful in determining the precise moment from which a breach began (*momentum a quo)*.

11. Lastly, if the provision on the exhaustion of local remedies was to be moved from the rather odd place it currently occupied, he entirely agreed that article 21, paragraph 2, could be deleted.

12. Mr. ILLUECA, referring to article 23, pointed out that, while the text adopted on first reading contained a specific reference to "conduct", no such reference was to be found in the text of the new article 20, paragraph 2, proposed by the Special Rapporteur. In view of Mr. Simma's comments, it was important for the Drafting Committee to carefully consider whether the notion of conduct should not be restored.

13. Mr. PAMBOU-TCHIVOUNDA said that, as with the first cluster of articles, members should ask themselves whether the Special Rapporteur had provided enough examples in positive law to enable them to arrive at a decision. Had positive law changed sufficiently since 1976 to warrant doing away with the distinction between obligations of conduct and obligations of result? If, as Mr. Simma had just said, the distinction had become commonplace in international law at the doctrinal level, it would surely be worthwhile to take the search for applications of the concept a little further by looking, for example, into the law of the sea and various special regimes. The upshot might well be that the distinction did, after all, have a place in the draft articles on State responsibility.

14. Mr. MELESCANU said that the distinction should not be included in the final draft. It clearly related to the primary rules and, if the Commission intended to be consistent with its own decision to focus on the secondary rules, it had to delete articles 20 and 21, as the Special Rapporteur proposed. To attempt to proclaim a general rule distinguishing between obligations of conduct and obligations of result would be far too ambitious. As Mr. Simma had pointed out, a subtle mix of the two was present in most cases. The decision should be left to the judge in each particular case, depending on the circumstances.

15. Mr. CRAWFORD (Special Rapporteur) said Mr. Melescanu's comments were more or less what he had wanted to say himself. Clearly, the distinction between obligations of conduct and obligations of result failed to cover the whole field of obligations in many cases. The Commission should not be apprehensive about abandoning what was, in effect, a doctrinal distinction if that distinction continued to be upheld in the area of primary rules. As to Mr. Pambou-Tchivounda's remarks, he had searched very hard for judicial distinctions. The results of the search were duly reflected in the report. In the *ELSI* case referred to in paragraphs 62 to 64 of the report, Judge Schwebel had indeed referred to the distinction as embodied in articles 20 and 21 in his dissenting opinion [see pages 117 and 121], but it had had no effect on the majority decision.

16. Mr. GOCO said that the law of State responsibility was a central pillar of the whole structure of international law. It was about accountability for a violation of international law: if a State breached an international obligation, it bore responsibility for that breach. That proposition appeared very simple, yet it was not. The draft articles gave rise to many problems, such as attribution to a State and the entire substantive law of obligations. In civil law systems the topic of obligations and contracts was easily understood, but the treatment of that topic in international law was quite different and much more complicated. He had been impressed by the responses of several States which had criticized the draft articles adopted on first reading as being, among other things, overrefined and

[4] See the commentaries to articles 20 and 21 (2567th meeting, footnote 9), in particular paragraph (2) of the commentary to article 20 and paragraph (1) of the commentary to article 21.

[5] See *Yearbook…1978*, vol. II (Part Two), pp. 81 et seq.

[6] P. M. Dupuy, "Reviewing the difficulties of codification: on Ago's classification of obligations of means and obligations of result in relation to State responsibility", *European Journal of International Law* (see 2566th meeting, footnote 6), pp. 371-385.

[7] Ibid., p. 382.

impracticable. It was to the Special Rapporteur's credit that he had responded to that criticism by simplifying and clarifying the text.

17. Article 16 (Existence of a breach of an international obligation) spelled out the broad rule, and the key words in that rule were "not in conformity with what is required of it", for they meant that the obligation with which the State must comply had to be a definite and precise one. Hence, articles 20 and 21 specified the various categories of obligation requiring a State to adopt a particular course of conduct or ensure a specific result, while article 23 established another type of obligation of result.

18. The Special Rapporteur's conclusion on those three draft articles contained a strong argument for deleting them, because they had been so heavily criticized by Governments. He associated himself with that criticism, but needed to be convinced of the way in which a State could be held accountable under the circumstances stated in the three draft articles. Under article 23, for example, could a State be held liable in the absence of a specific obligation of prevention?

19. Perhaps the problem could be solved by customary law or by treaty obligations, but he would prefer to find the answer in the broad rule set out in article 16. That would require all the categories entailing a particular course of action, a particular result or even the prevention of a specific event to be covered by the rule, so that there would then be no need for a separate classification. Of course, there was always room for interpretation, but interpretation inevitably hinged on the existence of specific rules.

20. Mr. ROSENSTOCK said article 3 (Elements of an internationally wrongful act of a State), subparagraph (*b*), said that, when a State breached an obligation, it committed an internationally wrongful act; article 16 said there was a breach when a State was not acting in conformity with its obligations; and article 19, paragraph 1, said that a breach was a breach no matter what the subject matter of the obligation. The question was whether that approach, or the somewhat less redundant form proposed by the Special Rapporteur, was enriched or further clouded by articles 20, 21 and 23.

21. The claim for retention of the articles was based, inter alia, on the view that the existence of a breach was determined in a completely different way, depending on whether the breach was of an obligation of conduct or of result. But no very convincing evidence was provided to support that view. The Special Rapporteur was correct to say that a classification of an obligation as one of result or of conduct was no substitute for the interpretation and application of the primary norms themselves. Sometimes the conduct/result distinction might be a useful prism through which to view and explicate an obligation, sometimes not. Indeed, taking the distinction seriously would sometimes lead to tragically wrong results, as in the case of torture for example.

22. There might be something to be said for retaining the existing concepts, even if they were not comprehensive in their coverage. If they created confusion, however, it did not seem wise to retain them just because some people found the distinction useful sometimes. Deletion of articles 20, 21 and 23 need not be a denial of the utility of the distinction in all cases. Rather it should be explained as being based on the view that, since the distinctions were not always useful and were not reflected in the categories contained in part two, they should not be articulated in part one as norms.

23. While the Special Rapporteur's reformulation in his bracketed article 20, in paragraph 156 of his report, was clearer than the existing draft articles, it still seemed to purport to make a normative distinction of general validity concerning a process which was often not applicable or the application of which would risk nothing but confusion. For those who hesitated to delete, he commended the excellent article by Dupuy. He stated: "The classification of State obligations in articles 20 and 21 is of no use because it is, at one and the same time, too rigid and too approximate."[8] That position was the one most generally taken in the legal literature. The fact that the distinction made in the draft articles had acquired some currency, although a factor to be taken into account, was not of itself sufficient reason for retaining confusing concepts. The distinction had not been received in the sense mentioned by Mr. Pambou-Tchivounda. To those who feared that the Commission was cutting too much, he would point out that the weightiness of a text was not a function of how heavy it was.

24. Mr. ECONOMIDES said that he agreed with other members that the distinction between obligations of conduct and of result was a very difficult one and the Special Rapporteur was right to say that the content of an obligation depended on the interpretation of the primary rule creating the obligation. The distinction was essentially one of doctrine, but it was increasingly used in practice. There was often no agreement in the doctrine as to which obligations belonged in which category, although obligations of conduct were easier to accept and usually more flexible, while obligations of result were usually more strict. However, many States had the wrong impression that obligations of conduct never entailed responsibility. It would be a good idea to make it clear to them that such obligations were also legal ones and that a failure to exercise due diligence could trigger responsibility.

25. The criteria contained in the three draft articles in question did not cover all cases: there could be obligations of prevention which were obligations of conduct rather than of result, and obligations of result which did not leave States a choice of appropriate means. It all came down to the interpretation of the primary rules.

26. It was necessary to determine in specific cases whether the three articles added anything to the general provision contained in article 16. They sometimes seemed to repeat the same idea, that is to say, that the violation of an obligation entailed responsibility. It might be helpful to add to the list given in the proposed article 16 "(whether customary, conventional or other)" a reference to the type of obligation—of conduct or of result. That would offer a warning to States and might be a good solution to the problem. He agreed with the Special Rapporteur that the distinction drawn was current in international law. It would be impossible to delete it without further ado.

[8] Ibid., p. 377.

Hence, it might be wiser to retain the text in brackets until the Commission had completed its work on the draft, when it would be able to see whether there were other reasons for retaining the text.

27. He doubted whether the proposal for article 20, paragraph 1, was an improvement on the existing form of language, which had the advantage of following the model of article 16 by beginning with the same words. Such uniformity was desirable in a normative text when linking two closely related provisions. Furthermore, he did not understand why in the French version the verb *requérir* had been replaced by *exiger*. "Require" was used in English in both versions and was certainly preferable, and the phrase *un comportement spécifiquement déterminé* was preferable to the proposed *un comportement particulier*. There was no good reason to abandon the existing wording. Of course, the Drafting Committee could work on the basis of both versions.

28. He could accept the merger of article 21, paragraph 1, and article 23 into a single provision but, there again, the text should draw on some of the elements of the language adopted on first reading. He could also agree to the deletion of article 21, paragraph 2. However, the provision might be of some value and should be mentioned in the commentary.

29. Mr. CRAWFORD (Special Rapporteur), responding to the linguistic points made by Mr. Economides, said that the English "a particular course of conduct" was a translation of the original French *un comportement spécifiquement déterminé*. He currently thought that "particular" was a bad translation of *spécifiquement déterminé*. That example showed how, in the draft articles, so much turned on a few words.

30. Mr. PAMBOU-TCHIVOUNDA said that he fully endorsed Mr. Economides' remarks about the need to link the three draft articles under discussion to article 16 and to include in article 16 a reference to the type as well as to the origin of the obligation. In his opinion, the suggestion made by Mr. Economides had the approval of the Commission. The Commission must therefore address the consequences by developing the additional element in the subsequent related articles.

31. He also agreed with Mr. Economides' comments on article 21, paragraph 2, although he was not absolutely sure that the paragraph should be deleted and the point made only in the commentary. Paragraph 2 did contain something quite different, that is to say, the question of the equivalence of results or the recourse by a State having an international obligation to a means other than the one assigned to it by the obligation; in order to achieve equivalence of result it might in fact be necessary to use a different means.

32. Mr. CRAWFORD (Special Rapporteur) said that he agreed with Mr. Pambou-Tchivounda as to the value of the comments made by Mr. Economides, who had accepted the essential critique of articles 20 and 21, questions of language aside, but thought that the Commission should complete its consideration of the draft articles before taking any final decisions. However, Mr. Pambou-Tchivounda's point about article 21, paragraph 2, was quite different. The problem with that paragraph was that it equivocated between two positions, one unacceptable and one unexceptionable. It was unacceptable that there could be a breach which somehow later ceased to be a breach when something else was done, for example when compensation was paid for a violation of a human right. Such a violation was a violation, and payment of compensation did not change its status. But that was what the commentary, unacceptably, said. Everyone could accept the text if it meant merely that there was no breach in the case of an obligation of result where the time for the State to take action had not yet come and the State meanwhile corrected the breach—but there was no need for an article to say so. He thought that article 21, paragraph 2, was positively harmful and that to render it harmless would at the same time render it even more useless than it currently was. He agreed that the Drafting Committee should look at the article 16 hypothesis suggested by Mr. Economides, but he did not agree with Mr. Pambou-Tchivounda that the Commission would be obliged, if that hypothesis was accepted, to spell out the consequences. The new article 16 said that there was a breach irrespective of the content or origin of the obligation or, under the Economides hypothesis, of the type of obligation. Once that provision was accepted, there was no need to talk about the different kinds of breach. However, he would experience no difficulty in retaining a historic relic of the article 16 distinction as a basis for an elaboration in the commentary.

33. Mr. PAMBOU-TCHIVOUNDA, clarifying his previous statement, said it was his view that article 21 was worth retaining, if only because of the very particular situation provided for in paragraph 2.

34. Mr. ECONOMIDES said he did not contest the Special Rapporteur's conclusion that the examples of applicability to human rights cases were not relevant. Article 21, paragraph 2, could, however, be applied in other circumstances. For example, a State that had concluded an agreement to guarantee another State a certain quantity of water drawn from an international river might reduce that quantity but subsequently provide an equivalent supply from a different international river. No international responsibility would then arise. In such cases, article 21, paragraph 2, might be of some value. He had already accepted, however, that that idea could be consigned to the commentaries.

35. Mr. ADDO said that articles 20, 21 and 23 were confusing in the extreme and should be deleted. They were of no practical utility and, judging from the comments of some countries, the Sixth Committee would not take kindly to them. The concepts they set forth were not known to the common law, and even the civil law countries that had given birth to them found it hard to map out their contours. Tomuschat,[9] and to some extent Dupuy,[10] found them difficult to apply, and Judge Schwebel had been in the minority when using those distinctions in the *ELSI* case. While the concepts embodied in articles 20, 21 and 23 might not be alien to international law, they had

[9] Tomuschat, loc. cit. (2567th meeting, footnote 11), p. 335.

[10] P. M. Dupuy, "Le fait générateur de la responsabilité internationale des États", in *Collected Courses of The Hague Academy of International Law, 1984-V* (Dordrecht, Martinus Nijhoff, 1986), vol. 188, pp. 9-134, at p. 47.

not attained the level of universal acceptance that would require their codification.

36. In his view, State responsibility could be reduced to the proposition that, whenever a State was in violation of an international obligation, it incurred responsibility for that violation. That much was basic and obvious. What was surprising was that, after 45 years, that straightforward proposition remained unresolved and confusion continued unabated.

37. Three principles regulated that area of international law. First, there must be an international legal obligation. The obligation might exist between two States only, or it might be of general application. It might arise under a treaty or under customary international law. Secondly, the breach of the obligation by the State must result from a positive act or failure to carry out that obligation: article 1 of the draft articles on State responsibility established the general principle that every internationally wrongful act of a State entailed international responsibility. Thirdly, once there had been a breach of an international obligation, the State in breach was required by international law to make reparation for the liability it had incurred. The Commission should concentrate on those principles and avoid fine distinctions that might not serve a universal purpose.

38. While they were of academic and intellectual value, the concepts embodied in articles 20, 21 and 23 were of no practical utility. It must be remembered that the draft articles were intended, not for cloistered academics, but for practitioners in the larger world. Consequently, he could not support the Special Rapporteur's tentative proposal to embody the substance of the distinctions in a single article, and reiterated his view that all three articles should be deleted.

39. Mr. KATEKA, referring to Mr. Addo's comments, said it was perhaps fortunate that academics were at hand to help the Commission extricate itself from the quandary in which it currently found itself. Mr. Hafner—himself an academic—had said (2569th meeting) that theoretical issues had no place in a set of draft articles that would have to be applied by practitioners. Having carefully studied the distinctions between obligations of conduct, result and prevention as set forth in the second report of the Special Rapporteur, he himself was none the wiser. He was thus grateful to the Special Rapporteur for clarifying the issues involved, and endorsed his conclusion that articles 20, 21 and 23 served no useful purpose and should be deleted.

40. Mr. Sreenivasa RAO said that the distinction drawn between obligations of conduct and of result was a useful one and should be retained. Mr. Simma had provided an accurate analysis of the true purport of the distinction, which was cognitive rather than normative, serving as a tool with which to assess the type of obligation without predetermining its outcome or applying qualitative standards thereto. The distinction drawn in the existing draft articles was just one of a number of possible forms of categorization. Nonetheless, some form of categorization or refinement was essential. That had already been achieved in the articles adopted on first reading and, for better or worse, the concepts were there to stay.

41. While he agreed with the Special Rapporteur that one inference to be drawn from the commentary to article 21, paragraph 2,—that torture or arbitrary detention became permissible if compensation was subsequently paid—was entirely unacceptable, that did not mean that a concept which had stood the test of time should be jettisoned, merely because it was not all-encompassing or because a few examples of oversimplification or overrefinement could be found. When he had first joined the Commission, the precise distinction between primary and secondary rules or between obligations of conduct and of result had been unclear to him. Now, thanks to articles 20 and 21, he had grasped that distinction and he was not prepared lightly to throw away the tool that had clarified the issue for him.

42. Articles 20 and 21 served a purpose: they enabled an obligation to be posited as a primary rule, prescribing certain conduct even if the outcome remained uncertain. States could thus be held accountable even at a stage prior to any deleterious outcome. The value of categorizing certain obligations as obligations of conduct was, as was pointed out by Combacau[11] and cited in the second report, to indicate that, while the ultimate result was unpredictable, it could nonetheless be striven for through the means specified.

43. Article 23 should be deleted. Obligations of prevention, which were usually regarded as an obligation of conduct and a primary rule, had no place in the law of State responsibility. The conduct prescribed was the material factor; obligations of prevention should thus be subsumed under obligations of conduct.

44. As to questions of drafting, obligations of conduct and of result, which were by their very nature different concepts, should not be combined in one article. The only difference of substance in the proposed new article 20 appeared to be the use of the word "means" to replace "conduct"—a choice he was happy to leave to the Drafting Committee, though his preference was for the word "conduct", as obligations of conduct were the point at issue. Article 21, paragraph 2, however, should not be deleted.

45. Lastly, it should be borne in mind that the distinction between means and result was of value to developing countries. *Pace* Mr. Hafner, the reference to means should not be eliminated, even if the main emphasis was to be placed on the result; developing countries did not all have equal means at their disposal to achieve the result required of them.

46. Mr. SIMMA, responding to the comments made by Mr. Sreenivasa Rao, said that neither his own remarks nor the work of the Special Rapporteur should be construed as an attempt to obtain a truncated draft. The only question was precisely what, of all the materials produced by Mr. Ago, and yielded by the discussions in the Commission over the years, should be incorporated in the draft articles, and what in the commentary. The doctrinal distinction between primary rules and secondary rules was entirely apposite. That distinction was the very oxygen that brought life to the draft articles, but it had never been

[11] See 2567th meeting, footnote 10.

suggested that the actual text should spell it out. Indeed, to do so would be counterproductive. The draft articles were informed by a veritable wealth of doctrine, but only a small portion of that wealth was actually on display in the text. Article 20, if read in isolation from the commentary, simply stated something that anyone with common sense could deduce: that an international obligation requiring a certain course of conduct was breached in the event of a departure from that conduct. But in reality, there was no way to express the point in a less bald and abstract manner, short of bringing in the full array of doctrine. That was why he thought the point would be better made in the commentary, where it could be treated in abstract terms but also illustrated with concrete examples.

47. Mr. TOMKA said he was not convinced of the advisability of deleting the three articles. One reason was his respect for the work of Mr. Ago, who had developed for the Commission a methodology for grappling with the very difficult topic of State responsibility. Other reasons were set out in paragraph 91 of the second report. The articles were quite complicated, particularly article 21, paragraph 2, and the commentary to that text was no longer fully appropriate in the view of the approach taken to human rights in contemporary international law.

48. The distinction between obligations of conduct and obligations of result seemed to be the focus of the discussion, but the aim of articles 20, 21 and 23 as adopted by the Commission on first reading had been to determine when the various types of obligations were breached. Each article did not have to contain a legal rule setting forth the rights and obligations of the parties: definitions and qualifications of the legal provisions were sometimes also needed. It was unlikely that the legal consequences of breaches of obligations of conduct and breaches of obligations of result would differ, since nothing in the articles designated the different unlawful acts. That stood in contrast to the dichotomy between international delicts and international crimes, which did entail different consequences. Judges and States might need to qualify a given obligation with a view to determining when it was breached.

49. The combining of articles 21 and 23 did streamline the text but he would prefer, as a matter of legal technique, to have two separate articles dealing with breaches of obligations of conduct and breaches of obligations of result. If such an approach was adopted, the commentary could be drafted along the lines suggested by Mr. Simma.

50. There were certain linguistic inconsistencies that would have to be ironed out, notably in the titles of chapter III, article 20 and article 25 (Moment and duration of the breach of an international obligation by an act of the State extending in time).

51. Mr. ROSENSTOCK said that Mr. Sreenivasa Rao had shown a conservatism that surpassed even his own. He was astonished to hear that the fact that an article had no consequences was a reason for retaining it. Nothing in the debate so far suggested that the distinction between obligations of conduct and obligations of result was useful in terms of secondary rules. Perhaps someone could explain why the Commission was dealing with tools for the analysis of primary rules in an instrument that should and did focus on secondary rules. The distinction, if it had any cognitive utility at all, should be placed, not in an article, but in the commentary, where it was just possible that common ground might be obtainable.

52. Mr. KUSUMA-ATMADJA, referring to the statement by Mr. Addo, said the Commission was trying to finish up work on the topic of State responsibility that had gone on too long. If it could do so before the end of the current quinquennium, it would make a noteworthy contribution. Too much material had been subsumed under the topic of State responsibility and the task currently was to sift and sort that material. Mr. Addo's remarks had been very welcome in terms of the need for streamlining, but he did not agree with the idea of deleting some material altogether. If necessary, it could be placed in the commentary or even in a note to the commentary. The Special Rapporteur had been trying to accommodate a wide range of views, but the time had come for him to be firm. He himself spoke as someone who had been an academic and was a practitioner.

53. Mr. PAMBOU-TCHIVOUNDA, commenting on Mr. Tomka's remarks, said the Commission had decided that the draft articles should envisage rules relating to regimes, in other words, secondary rules. It would be lamentable, however, for the Commission to restrict the treatment of the topic of State responsibility to the development of secondary rules. Was not part one concerned with primary rules? In that connection, he would draw attention to article 3 as an illustration.

54. The Commission's mandate to codify material that had never lent itself to codification obliged it to incorporate primary rules, even if they were kept to a minimum. Those who would be using the draft articles would be encountering certain rules for the first time. By retaining a distinction that was intended to facilitate the work, the Commission must not be obliged to excise some of the material amassed. In that respect, he agreed with Mr. Sreenivasa Rao.

55. Articles 20, 21 and 23 should perhaps be transmitted to the Sixth Committee in square brackets, in view of the divergence of views in the Commission about the advisability of retaining them. Personally, he favoured their retention. International law had evolved since the work of the first Special Rapporteur, Mr. Ago, in 1976. In the instruments on the law of the sea, environmental law and diplomatic law, States could be seen to have tacitly acknowledged the distinction between obligations of conduct and obligations of result, even if those terms themselves were not used.

56. Mr. CRAWFORD (Special Rapporteur) said that it was absolutely impossible to do away with the distinction between primary and secondary rules. Mr. Ago had formulated the distinction, and he himself remained true to it. Article 3 fell squarely within the framework of that conception of the draft articles. Mr. Tomka and Mr. Sreenivasa Rao appeared to approve the merger of articles 21 and 23. Article 20 as it stood, however, was logically void.

57. Mr. Sreenivasa Rao had said that the abolition of the distinction between obligations of conduct and obligations of result would entail certain consequences for the position of many countries in respect of obligations of means. If that was true, then the distinction must not be abolished. But it was not true. For the purposes of working out how primary rules were applied, a distinction was made between obligations of conduct and obligations of result, but that was all. Absolutely nothing was said about any particular obligation being an obligation of conduct or of result or whether the means available to a State were of relevance to the performance of its obligation. That was a matter for the interpretation and application of primary rules.

58. Mr. KATEKA said that some members of the Commission opposed retaining the three articles in any form, others believed they should be placed in square brackets, others wanted the material in the articles placed in the commentary. Where the Commission stood on the issue had to be worked out. The articles should not be sent to the Sixth Committee in square brackets, as that would only complicate the Committee's work.

59. Mr. Sreenivasa RAO, clarifying the position he had taken earlier on Mr. Simma's statement, said he had agreed with him that the articles were cognitive, not normative. Mr. Rosenstock had asked why an article that served no purpose should be retained. Perhaps because its place in the global construct of State responsibility was not visible. Article 16, for example, had links to articles 3, 21, 22, 23 and 45 (Satisfaction). An abstract notion was being unravelled in differing ways throughout the draft. Accordingly, since the distinction was not entirely wrong, it should be retained.

*The meeting rose at 1.10 p.m.*

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## 2572nd MEETING

*Friday, 14 May 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Khasawneh, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Goco, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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**Nationality in relation to the succession of States[1] (*continued*)* (A/CN.4/493 and Corr. 1,[2] A/CN.4/496, sect. E, A/CN.4/497,[3] A/CN.4/L.572, A/CN.4/L.573 and Corr.1)**

[Agenda item 6]

REPORT OF THE WORKING GROUP (*concluded*)*

1. The CHAIRMAN, speaking as Chairman of the Working Group on nationality in relation to the succession of States, introduced the report (A/CN.4/L.572).

2. On the basis of the Memorandum by the Secretariat (A/CN.4/497), giving an overview of the comments and observations of Governments, made either orally or in writing, the Working Group had first dealt with the merits of the draft articles and then with the question of the form, structure and order of the future instrument. It had decided to suggest to the Commission the retention of the current wording of articles 1 to 5, 8 to 18 and 20 to 26, as well as a new wording for article 6, an amendment to article 7, paragraph 1, the deletion of article 19, an amendment to article 20, and an amendment to article 27, which would be renumbered as article 2 bis.

3. Going through the Working Group's conclusions article by article, he said that, with regard to article 1 (Right to a nationality), the Working Group, having examined the question of the right to at least one nationality mentioned in paragraph 26 of the Memorandum by the Secretariat, had concluded that the matter had been sufficiently discussed by the Commission in the past and that its position had been clearly stated in the commentary. Concerning article 2 (Use of terms), having considered the observation summarized in paragraphs 28 to 31 of the Memorandum, the Working Group had decided that it was advisable to maintain the definition of the term "Succession of States", which had been taken from the Vienna Convention on Succession of States in Respect of Treaties (hereinafter referred to as the "1978 Vienna Convention") and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (hereinafter referred to as the "1983 Vienna Convention"). On the other hand, it had thought it inadvisable to attempt to define the term "habitual residence", since that difficult endeavour might result in the adoption of a definition subject to cultural relativity. Since Governments had not made any substantial comments on article 3 (Prevention of statelessness), the Working Group had not suggested any changes. With regard to article 4 (Presumption of nationality), having considered all the arguments set out in paragraphs 36 to 43 of the Memorandum, the Working Group had decided that the Commission had already extensively debated the issues during first reading and had therefore decided to retain the current text. On article 5 (Legislation concerning nationality and other connected issues), the Working Group had decided not to

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* Resumed from the 2569th meeting.

[1] For the draft articles with commentaries thereto provisionally adopted by the Commission on first reading, see *Yearbook ... 1997*, vol. II (Part Two), p. 14, chap. IV, sect. C.

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

[3] Ibid.

suggest any changes since the comments of Governments were of a purely drafting nature.

4. Turning to article 6 (Effective date), he said that the Working Group had considered the argument set out in paragraph 47 of the Memorandum by the Secretariat and had decided to suggest an amendment providing for the retroactive attribution of nationality to be limited to situations in which the persons concerned would be temporarily stateless during the period between the date of State succession and the date of attribution of the nationality of the successor State or the acquisition of such nationality by exercise of the right of option. The text of article 6 as amended appeared in paragraph 4 of the report of the Chairman of the Working Group. With regard to article 7 (Attribution of nationality to persons concerned having their habitual residence in another State), the Working Group had considered the question of clarifying the linkage between article 7 and article 10 (Respect for the will of the persons concerned), mentioned in paragraph 54 of the Memorandum, and had felt that the matter could be resolved by replacing the introductory phrase of article 7, paragraph 1, with the phrase "Without prejudice to the provisions of article 10". The Working Group had noted that no substantial changes had been proposed for article 8 (Renunciation of the nationality of another State as a condition for attribution of nationality), article 9 (Loss of nationality upon the voluntary acquisition of the nationality of another State), and article 10 and it had therefore concluded that their current wording should be retained.

5. Concerning article 11 (Unity of a family), having considered the argument, in paragraph 74 of the Memorandum by the Secretariat, that the article went beyond the scope of the topic, the Working Group had decided to retain it because, in relation to the succession of States, the problem of family unity might occur on a large scale. On article 12 (Child born after the succession of States), the Working Group had examined the articles contained in paragraphs 82 to 86 of the Memorandum and had decided that no amendments were necessary since the current wording contained adequate limitations. It had wished to stress once again that the main purpose of article 12 was to avoid statelessness. An important limitation of its application derived from the phrase "person concerned". In other words, the right in question was limited to children who, prior to the date of the succession of States, had been nationals of the predecessor State. In addition, the rule contained in article 12 was the same as the rule found in several other international instruments applicable to children born in the territory of a State, even outside the context of State succession, and therefore the need for its further limitation in time did not arise.

6. On article 13 (Status of habitual residents), the Working Group had considered the argument contained in paragraph 89 of the Memorandum by the Secretariat concerning the right of habitual residents of a territory over which sovereignty was transferred to a successor State to remain in that State even if they had not acquired its nationality. It had noted that the issue had already been the subject of a controversial debate in the Commission at its forty-ninth session, but had felt it necessary to draw the Commission's attention to the matter once again, taking into account, inter alia, article 20 of the European Convention on Nationality. With regard to article 14 (Non-discrimination), the Working Group had considered the arguments in paragraphs 94 and 95 of the Memorandum supporting the inclusion of an illustrative list of criteria on the basis of which discrimination would be prohibited and of a prohibition of discriminatory treatment of its nationals by a State, depending on whether they had already had its nationality prior to the succession of States or had acquired it subsequently. The Commission had already considered those articles during its first reading of the draft articles and the reasons on which it had based its decision to exclude any elaboration of the provision along the lines suggested were still valid.

7. The Working Group had considered the arguments contained in paragraph 100 of the Memorandum by the Secretariat in favour of the incorporation in article 15 (Prohibition of arbitrary decisions concerning nationality issues) of procedural safeguards for respect of the rule of law and an express prohibition of arbitrary decisions on nationality issues. It had felt that, from a technical point of view, it would be difficult to satisfy such requests. On article 16 (Procedures relating to nationality issues), in the light of the opposing views reflected in paragraphs 101 and 102 of the Memorandum, namely, the requests both for a more detailed and for a less detailed provision, the Working Group had decided that it was preferable to retain the existing wording. Furthermore, on the suggestion to include the requirement of "reasonable fees" among the procedural guarantees, the Working Group had been of the view that, since the attribution of nationality in relation to succession of States occurred on a large scale, the case was not analogous to naturalization and that, in principle, the attribution of nationality should not be subject to any fee.

8. The Working Group had preferred to retain the wording of article 17 (Exchange of information, consultation and negotiation), since it had deemed the suggestion, contained in paragraph 103 of the Memorandum by the Secretariat, to include a sentence concerning compliance with the principles and rules of the draft articles to be superfluous. On article 18 (Other States), having considered the arguments set out in paragraphs 105 to 115 of the Memorandum, the Working Group had decided to retain the article and its current wording because the Commission itself had been in favour of their retention, a position shared by a majority of States. As to the suggestion to replace the phrase "effective link" in paragraph 1, it had noted that the matter had already been discussed in detail in the Drafting Committee during the first reading of the draft articles.

9. In the light of the arguments put forward by States and summarized in paragraphs 126 and 127 of the Memorandum by the Secretariat, the Working Group had decided to suggest the deletion of article 19 (Application of Part II). And in the light of the arguments set out in paragraphs 129 to 133, it had decided to suggest the addition at the end of article 20 (Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State) the following sentence modelled on the last sentence of paragraph 1 of article 25 (Withdrawal of the nationality of the predecessor State): "The predecessor State shall not, however, withdraw its nationality before such persons acquire the nationality of the succes-

sor State." The Working Group had been of the view that article 21 (Attribution of the nationality of the successor State) should be retained in its present form since no Government had proposed a change.

10. The Working Group, having considered the arguments contained in paragraphs 135 to 138 of the Memorandum by the Secretariat concerning article 22 (Attribution of the nationality of the successor States), had concluded that the criterion of habitual residence was adequately combined with other criteria, so that no changes to the article were warranted. In the light of the observations by Governments, summarized in paragraphs 139 to 154 of the Memorandum, on article 23 (Granting of the right of option by the successor States), article 24 (Attribution of the nationality of the successor State), article 25 and article 26 (Granting of the right of option by the predecessor and the successor States), the Working Group had decided not to propose any changes to those articles since they constituted, in its view, a balanced approach to addressing the interests of both States concerned and individuals. With regard to article 27 (Cases of succession of States covered by the present draft articles), the Working Group, having considered the arguments presented in paragraph 156 of the Memorandum, had suggested the deletion of the opening phrase "Without prejudice to the right to a nationality of persons concerned". It had also expressed the view, given the position of similar articles in the 1978 and 1983 Vienna Conventions, that the appropriate place for article 27 was in Part I of the draft articles, after article 2 (Use of terms).

11. With regard to Part II of the draft articles, the Working Group, having considered the general observations summarized in paragraphs 117 to 123 of the Memorandum by the Secretariat, had decided not to suggest any changes in the Commission's typology. It had taken the view that the main purpose of the draft articles was to offer solutions to the types of State succession that were likely to occur in the future.

12. The Working Group had suggested that the current structure of the draft articles should be retained, except for the deletion of article 19 and the repositioning of article 27 as article 2 bis. The Working Group had further concurred with the view of a majority of States that the draft articles should preferably take the form of a declaration by the General Assembly. Lastly, it had decided that a more detailed elaboration of some of the commentaries to the draft articles would be appropriate and that the task should be carried out in parallel with the consideration of the articles by the Drafting Committee.

13. Mr. LUKASHUK congratulated the Working Group and its Chairman on the excellent quality of their work. He noted that the definitions of terms in article 2 of the draft articles were identical to those contained in the 1978 and 1983 Vienna Conventions, although the latter definitions did not match the purpose of the draft articles under consideration. For example, the definition of the term "succession of States" should focus not on the responsibility for the international relations of a territory, but on the exercise of sovereignty over that territory. The definitions in article 2 of the draft articles should therefore be reconsidered.

14. According to article 7, paragraph 2, "[a] successor State shall not attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless". It could thus be inferred that the successor State had the right to impose its nationality against their will on persons concerned who had their habitual residence in its territory, although such action would be both contrary to human rights and entirely unrealistic. He therefore proposed that the paragraph be deleted.

15. According to article 15, "[i]n the application of the provisions of any law or treaty, persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State or any right of option ...". Did that mean that arbitrary measures could be taken in areas other than the application of the provisions of internal law or international law? To avoid ambiguity, arbitrary measures in all areas should be proscribed.

16. Mr. PAMBOU-TCHIVOUNDA commended the Working Group and its Chairman on their work and the results achieved. With regard to the form of the draft articles, he said that he did not share the Working Group's view that a declaration was preferable, even if the idea enjoyed wide support among States. If presented in the form of a declaration, the draft articles would not produce the full normative impact or command the full authority they deserved. They merited the same status as other draft articles.

17. He had no objection to placing article 27 at the beginning of the draft articles, provided that it was entitled "Scope (or field of application) of the present articles".

18. The new wording of article 6 proposed by the Working Group was unsatisfactory, at least as far as the French version was concerned. The word "including" in the phrase "[t]he attribution of nationality in relation to the succession of States, including the acquisition of nationality following the exercise of an option" gave the impression that the acquisition of nationality following the exercise of an option was only part of the attribution of nationality in relation to the succession of States. It would be preferable to make a clear-cut distinction between the two cases, introducing the second by a phrase such as "the same rule is applicable" or "the same applies to". The latter wording had been used in article 6 as adopted on first reading.

19. He supported the Working Group's proposal that the following new sentence should be added to article 20: "The predecessor State shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State". It struck a firm note that would advance the cause of reducing the number of stateless persons.

20. On the other hand, he thought that the wording of article 25 should be more flexible in order to make the individual's right to a nationality more compatible with the exercise of one of the basic prerogatives of a sovereign State, namely, the freedom to attribute or withdraw a person's nationality. To that end, he proposed that the

word "shall" should be replaced by the word "may" in the phrase "the predecessor State shall withdraw its nationality" in paragraph 1 and the phrase "the predecessor State shall not, however, withdraw its nationality" in paragraph 2.

21. Mr. HE said that he supported the Working Group's proposal to delete the opening phrase "Without prejudice to the right to a nationality of persons concerned" in article 27, which could be variously interpreted. He also supported Mr. Pambou-Tchivounda's proposal that article 27 should be placed at the very beginning of the draft articles and given the title "Scope of the present articles". In that connection, he noted that article 1 of the 1978 and 1983 Vienna Conventions was entitled "Scope of the present Convention".

22. With regard to article 1, while it was essential to recognize the right to a nationality and the obligation of States to prevent statelessness, it seemed unnecessary to establish the right to the nationality of "at least" one of the States concerned. The use of the words "at least" could be interpreted as encouraging a policy of dual nationality or plurality of nationalities and might cause problems for many States, particularly in South-East Asia, as indicated by the comment of Brunei Darussalam in the comments and observations received from Governments (A/CN.4/493 and Corr.1). The two words should therefore be deleted so that the draft articles as a whole remained absolutely neutral on the issue and could be approved by a larger number of States.

23. With regard to article 11, he pointed out that the notion of "family" was generally interpreted more broadly in some countries, especially Asian and Muslim countries, than in the West. Habitual residence should be treated as the main criterion for the determination of nationality. Furthermore, the article seemed to have more far-reaching implications for the right of residence. It was thus incompatible with the object of the draft articles as a whole and should be deleted.

24. With regard to the question of decolonization, which had been discussed on first reading, an additional article should be inserted in Part II of the draft articles specifying that the regime thus established was applicable, mutatis mutandis, to the situation of decolonization.

25. With regard to the form of the draft articles, he agreed with the Working Group that a declaration would be preferable.

26. Mr. ECONOMIDES said that the Working Group had certainly made a number of useful changes in the draft articles under consideration, but there were still gaps and deficiencies in the text. Article 18 could be criticized from many points of view. First, it applied not only to the States concerned, but to all States and, as such, was hardly in line with the competence of States in matters of nationality, which was closely bound up with sovereignty. Secondly, it enabled States unilaterally to pass judgement on other States that were unable to defend their own causes, thereby taking the law into their own hands. Thirdly and most importantly, it was questionable whether the concept of the effective link could be applied to the succession of States, given that the successor State had the right to attribute its nationality automatically, extensively and without distinction to all persons affected by the succession.

27. With regard to the right of option, the most obvious gap in the draft articles was that they did not take account of the right of option at the international level, which derived from international practice that dated back several centuries and was rich and abundant. According to the proposed text, persons concerned would no longer have the right to choose between two nationalities, but, in certain circumstances, they could opt for a single nationality, that of the State that was unilaterally organizing the exercise of the option in accordance with its domestic legislation. He nevertheless stressed that that option would exist only in certain circumstances because, according to article 10, at the domestic level, the right of option was compulsory only to avoid statelessness. According to article 10, the States concerned were free to establish the qualifications required for acquiring their nationality through the right of option, and that could mean that a person might acquire several nationalities or remain stateless. It was unfortunate that the right of option, which was unquestionably an individual right in the case of a succession of States, had not found its place in the draft as a rule of international law.

28. Part II of the draft articles envisaged extremely complex solutions for the exercise at the domestic level of the right of option. When part of the territory of the State was transferred (art. 20), the right of option had to be granted to all persons concerned both by the successor State, for the acquisition of its nationality, and by the predecessor State, for the withdrawal of its nationality. In addition to the fact that it unduly broadened the right of option to apply to all persons concerned, something that went far beyond current international practice, it was easy to imagine the confusion that would be created by the parallel exercise of two rights of option concerning the same person. If the persons concerned opted for the acquisition of the nationality of the successor State and for the non-withdrawal of the nationality of the predecessor State, would the successor State be required to recognize the dual nationality of its new citizens? By contrast, in the event of the dissolution of the predecessor State or the secession of a part or parts of its territory, successor States would grant the right of option, not to all persons concerned, but only to persons who were "qualified to acquire the nationality" of two or more successor States (arts. 23 and 26). There was nothing to explain that difference in treatment, and there was obviously a weak point in that the qualifications required were not specified in the draft, but would be determined by the internal law of each successor State. In practice, such conditions could vary from one State to the next and that was prejudicial to legal stability.

29. He believed that the right of option should be granted to nationals of the predecessor State who had their habitual residence in the territory of the successor State and on two conditions: first, that they had acquired the nationality of the successor State automatically, *ex lege*, and secondly, that they had effective links with the predecessor State or with another successor State. The persons concerned covered in articles 22, subparagraph (*b*), and 24, subparagraph (*b*), who did not reside in the territory of the successor State and who were therefore outside

the territorial jurisdiction of the successor State should, except in cases of statelessness, be entitled to acquire the nationality of the successor State only on the basis of individual procedures depending entirely on their will. Such procedures would have an effect equivalent to that of the right of option and it would therefore be unnecessary to provide for a right of option for such persons in article 23, paragraph 1, and article 26. He wondered, then, how article 22, subparagraph (*b*), related to article 23, paragraph 1, on the one hand, and on the other, how article 24, subparagraph (*b*), related to article 26. With regard to article 25, paragraph 2, and article 26, he thought it was unusual, if not to say extraordinary, that they should provide for a right of option for nationals of the predecessor State who had not been affected by the succession of States. He hoped that the Drafting Committee would review all the provisions of the draft articles in detail and improve them still further.

30. Mr. YAMADA pointed out that, despite the comments made by Switzerland and France, the Working Group had decided to retain article 13. Without wishing to reopen the debate, mentioned by the Chairman of the Working Group in his introductory statement, that had taken place at the forty-ninth session on that article, he believed that its purpose was to preserve the status of persons concerned as habitual residents of the successor State, even if such persons did not acquire the nationality of the successor State. In the interests of clarity, it might be useful to spell out in article 13 the connection between that question and the topic of nationality in relation to the succession of States. He hoped that the Drafting Committee would take account of that comment. On the whole, he agreed with the report of the Chairman of the Working Group and hoped that the Commission would transmit all the draft articles to the Drafting Committee for consideration on second reading.

31. Mr. KUSUMA-ATMADJA said that he agreed with the comments made by Mr. He. During the consideration of the draft articles on first reading, he had drawn attention, in connection with the right of option, to a situation when two States, a predecessor State and a successor State, were involved in the process of decolonization. He referred in that connection to the Treaty on Dual Nationality concluded between Indonesia and China.[4] At the current time, since most of the persons concerned by the process of decolonization were dead, the draft articles should rather be viewed in the light of the situation in the Balkans.

32. Mr. ROSENSTOCK, speaking as a member ex officio of the Working Group, said that it had essentially reaffirmed the views on the draft articles that the Commission had already expressed several years earlier and that its recommendations corresponded on the whole to the comments made at the current meeting. The only question that had not been analysed quite so clearly in the past was whether granting an individual a nationality that he or she did not desire to have, but without which he or she would be stateless, was contrary to the right to a nationality. He tended to think that an exception under which nationality was granted over the objections of an individual was not a limitation of the right to a nationality, but rather a recognition of the fact that it was important to avoid the confusion arising from statelessness. He was of the view that the draft articles could now be transmitted to the Drafting Committee.

33. Mr. LUKASHUK, referring to the comment by Mr. Pambou-Tchivounda on the form of the draft articles, said that they could certainly take the form of a convention because they were sufficiently clear and well developed. Account must be taken of certain realities, however, including the fact that it often took a great deal of time before conventions were ratified by States and entered into force. For example, only a few States had so far acceded to the 1983 Vienna Convention and it had not yet entered into force. It was true that declarations did not have legal force, but the provisions in declarations could gradually develop into customary rules of international law. The adoption of the text in the form of a declaration would therefore be a useful procedure at present, especially as the provisions in a declaration had the advantage of being written, and nothing prevented the text of the declaration from subsequently being adopted as a convention. That was why, like the Working Group, he thought it would be preferable to retain the idea of a declaration.

34. The CHAIRMAN, speaking as chairman of the Working Group, thanked those members of the Commission who had commented on the draft articles. After apologizing for the fact that the report of the Chairman of the Working Group did not go as far as some members of the Commission would have wished and had some gaps, he explained that the Working Group had had a relatively restricted mandate: it had been given the task of studying the comments and observations submitted by States and summarized in the Memorandum by the Secretariat and had been unable to take any initiatives not based on those comments or on the views expressed by members of the Commission. In addition, there had been differences of opinion within the Working Group and, when that situation had arisen, it had elected to remain neutral, in other words, to leave the text unchanged. Furthermore, some of the comments submitted by States had concerned purely formal changes, which had not been reflected in its report and would be transmitted directly to the Drafting Committee. All those factors explained why the Working Group had not made more proposals for amendments.

35. With regard to the use of terms (art. 2), the definition of the expression "succession of States" was not disputed and corresponded to the one adopted in many international instruments. On the other hand, to introduce, as some had suggested, the notion of the exercise of sovereign rights—a formulation that was criticized by many States—would have more drawbacks than advantages. Some had feared that article 15 might be interpreted as also referring to administrative measures, but it seemed that, in letter and in spirit, the provision was restricted to the application of laws and treaties. As to the form the draft articles should take, States had differing views on the question, but most favoured the idea of a declaration, at least provisionally. For that reason, and also because of practical considerations connected with the current state of international relations, that seemed to be the wisest solution, on the understanding that it in no way ruled out a subsequent move towards the drafting of a treaty, as had been the case, for example, with the Declaration of Legal

[4] Signed at Beijing, 13 June 1955 (*Indonesian Official Gazette,* 1958, No. 5).

Principles Governing the Activities of States in the Exploration and Use of Outer Space,[5] which four years later had resulted in a fully fledged treaty. With regard to the relocation of article 27, the Working Group had considered that it was more practical to draw on the model of the 1983 Vienna Convention, in which the provision corresponding to article 27 of the draft articles under consideration was article 3. It had also been debated whether article 27 really dealt with the cases of succession of States covered by the draft articles, or with the scope of the draft articles. There again, the Convention could serve as an example, since it contained an article 3 on cases of succession of States and an article 1 on the scope of the instrument. It would thus also be possible to draft a provision on the scope of the draft articles, the substance of which would be: "The present articles apply to the effects of the succession of States in respect of the nationality of individuals". Other shortcomings noted by members of the Commission were attributable to translation problems, caused by the very short time available for processing the Working Group's report. Those problems would be ironed out in the final text to be drawn up by the Drafting Committee.

36. It had been proposed that the wording of article 25 should be toned down by replacing the words "shall withdraw its nationality" by the words "may withdraw its nationality", but that change might upset the overall balance of the draft articles by making article 25 weaker than other provisions. With regard to the very important right to a nationality set forth in article 1, some had feared that the expression "right to the nationality of at least one of the States concerned" might be perceived as encouraging the principle of multiple nationality, but the use of a more limitative wording would pose a real problem with respect to the right of option, which some had proposed strengthening in the draft articles. On the other hand, an unconditional right of option would pose problems for States; hence the need to find wording that reconciled the interests of States and those of the individual. In any case, the right of option needed to be placed in a context of human rights and many States and some members of the Commission had advocated placing the strongest possible emphasis on protection of those rights. The same was true of the right of habitual residence. From the formal standpoint, that right was not actually linked with the right to a nationality, but, from a human rights perspective, there was a very close link between the two. The Drafting Committee would do its best to fill the gaps in the draft articles and would seek to ensure that the substantive comments made during the debate were included.

37. Mr. ECONOMIDES urged the Drafting Committee to make quality its primary concern, even if that meant that it failed to complete its task by the end of the current session.

38. Mr. ROSENSTOCK said he thought that, basing itself on the report of the Working Group and the substantive comments made during the debate, the Drafting Committee would be able to complete its task during the current session without any loss of quality.

[5] General Assembly resolution 1962 (XVIII) of 13 December 1963.

39. The CHAIRMAN said that he was of the same opinion. He thus suggested that the Commission should take note of the report of the Chairman of the Working Group on the topic of nationality in relation to the succession of States and should refer the draft articles adopted on first reading and the amendments proposed by the Working Group to the Drafting Committee.

*It was so decided.*

40. Mr. CANDIOTI (Chairman of the Drafting Committee) said that, for the topic "Nationality in relation to the succession of States", the Drafting Committee consisted of Messrs Galicki (Chairman of the Working Group), Addo, Brownlie, Hafner, Herdocia Sacasa, Melescanu, Pambou-Tchivounda and Rosenstock (ex officio).

41. The CHAIRMAN announced that the Planning Group had established a working group on the question of the holding of split sessions, which would be chaired by Mr. Rosenstock and would also include Messrs Baena Soares, Economides, Kateka, Pambou-Tchivounda and Yamada.

*The meeting rose at 12.45 p.m.*

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## 2573rd MEETING

*Tuesday, 18 May 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

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### State responsibility[1] (*continued*)* (A/CN.4/492,[2] A/CN.4/496, sect. D, A/CN.4/49*8* and Add.1-4,[3] A/CN.4/L.574 and Corr.1 and 3)

[Agenda item 3]

* Resumed from the 2571st meeting.

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

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

[3] Ibid.

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

1. The CHAIRMAN extended a warm welcome to the new member of the Commission, Mr. Kamto, and invited the Commission to continue with its consideration of the topic of State responsibility.

ARTICLES 20, 21 AND 23 (*continued*)*

2. Mr. RODRÍGUEZ CEDEÑO, referring to the discussion on whether or not to retain such fundamental criteria as the distinction between primary and secondary rules, said that in revising the draft articles the Commission should not throw out the achievements of the past. The rules set out in articles 20 (Breach of an international obligation requiring the adoption of a particular course of conduct) and 21 (Breach of an international obligation requiring the achievement of a specified result) were definitely secondary rules, because they would come into play once a new legal situation was created by the breach of a primary rule. They would create a mechanism enabling judges to determine whether there had been a breach of a primary rule or obligation.

3. It was difficult to categorize obligations of conduct and obligations of result, as the work of many authors, including Reuter,[4] had shown. But it had to be done, for international responsibility was closely bound up with the breach of an obligation. That was why articles 20 and 21 had to be retained, in his opinion.

4. Mr. YAMADA said that, by placing the proposed new article 20 in square brackets, in paragraph 156 of his second report on State responsibility (A/CN.4/498 and Add.14), the Special Rapporteur had expressed his scepticism about it. He shared that scepticism and supported the deletion of the article, for which the Special Rapporteur had already presented a convincing case. The excellent article published by Dupuy[5] was also very helpful in advancing the rationale for deletion.

5. The distinction between obligations of conduct and obligations of result was no doubt useful in defining the precise obligations that States had undertaken under primary rules, but it was of no relevance regarding the consequences when such obligations, whether of conduct or of result, were breached. The responsibilities of States for each category of obligations did not differ. Accordingly, the distinction should have no place in the draft articles.

6. The new article 20, paragraph 2, treated obligations of prevention in the same way as obligations of result. As Mr. Sreenivasa Rao had pointed out (2571st meeting), obligations of prevention were more often obligations of conduct, however. The concept of prevention was now widely used in international law and often encompassed a variety of obligations. Obligations of prevention were often due diligence obligations, not obligations of result, particularly in treaties on the environment.

7. The articles under discussion had been with the Commission for more than 20 years. Many scholars had quoted them as elements of State responsibility and they had been referred to in certain judicial decisions. The Commission therefore had to explain why they were being deleted. Commentaries were usually for articles that had been adopted, not those that had been deleted. But in the present case, and as an exception, some succinct explanatory note to justify the deletion of the articles should be included in the commentary to chapter III (Breach of an international obligation).

8. Mr. HERDOCIA SACASA said he noted that, in paragraph 92 of his second report, the Special Rapporteur invited the Commission to express its view on whether to retain the distinction in chapter III between obligations of conduct, obligations of result and obligations of prevention. In order to give focus to the discussion, in paragraph 156 he proposed, in brackets, a new article 20 bringing together the articles covering those obligations, namely, articles 20, 21 and 23 (Breach of an international obligation to prevent a given event).

9. His response to the Special Rapporteur consisted of three questions. Was the distinction sufficiently precise to be used with legal certainty? How was international responsibility served by the distinction? Was the distinction consistent with the point of departure of the draft articles, namely the difference between primary and secondary rules? None of the answers seemed to favour retaining the distinction, at least as originally worded.

10. With regard to the third question, retention of the distinction between obligations of conduct and obligations of result might to some extent lessen the very sharp break made by the former Special Rapporteur, Mr. Ago, with the work of his predecessor, Mr. García Amador, when he had led the Commission to concentrate on secondary rules, not because they were less important than primary rules, but because they determined the legal consequences of failure to fulfil obligations established by primary rules.[6] The categorization of obligations did not fall neatly into the domain of State responsibility, which, as Mr. Ago had stated, was essentially the domain of consequences, effects and results. Overcodification might unduly strain the connecting thread that preserved coherence and continuity in the draft articles.

11. As to his second question, whether the distinction served a useful purpose for international responsibility, he would point out that Tomuschat,[7] among others, had indicated that it provided little help to those having to determine whether a breach of an international obligation had occurred. Even if it was possible clearly to distinguish between the two obligations and the distinction helped to clarify the content of a breach or the moment of its occurrence, there was no doing without the interpretation of a primary rule. The sort of dissection that was feasible in an operating theatre could not be made in an abstract setting. While frames of reference or categorizations were of great benefit, the specific rule must be addressed in order to get a sense of its content, scope and intricacies. In order for responsibility to be assigned, the *corpus delicti* was

* Resumed from the 2571st meeting.

[4] P. Reuter, "Principes de droit international public", *Recueil des cours de l'Académie de droit international de La Haye, 1961-II* (Leiden, Sijthoff, 1962), vol. 103, pp. 425-655.

[5] See 2571st meeting, footnote 6.

[6] See *Yearbook ... 1974*, vol. I, 1251st meeting, para. 2.

[7] See 2567th meeting, footnote 11.

needed. In order for a rule to be interpreted, it had to be seen and evaluated, as did the specific circumstances surrounding the event. No categorization could replace that legal operation *in situ.*

12. As to his first question, about the degree of precision in the distinction, as many authors had pointed out, there was no clear dividing line between the two types of obligations and they sometimes overlapped. In many instances, any conduct yielded certain results and any result entailed a certain conduct. Dupuy had referred in that connection to article 194, paragraph 2, of the United Nations Convention on the Law of the Sea, which he saw as a narrow conjunction of obligations for damage from pollution.[8]

13. Nothing tested the material underlying a categorization like putting it in the crucible of legal practice. In general, international courts had rarely made use of the distinction. ICJ had done so only in a dissenting opinion by Judge Schwebel in the *ELSI* case [9] and in a few comments on the case concerning *the Gabčíkovo-Nagymaros Project.*

14. The findings in other cases handled by international courts would apparently not have been significantly altered by the application of the distinction. On the contrary, legal practice had shown that, without prejudice to its link to the overall scheme, each obligation was a distinct entity with its own distinct personality and could not be categorized or stereotyped.

15. An abstract categorization did not allow for the fact that the moment at which a breach occurred might differ, depending whether the rule was one in the field of human rights, for example, or in another domain. For example, the Inter-American Court of Human Rights, in an advisory opinion, stated that in the case of legislation for immediate application, the violation of human rights, whether individual or collective, occurred by its adoption alone.[10] The European Court of Human Rights had taken a similar position.

16. It must therefore be concluded that the international community attached such value to certain rights like the rights to life, to physical and moral integrity, to non-discrimination and to recognition as a person before the law that the mere enactment of legislation contrary to those rights entailed international responsibility. The findings of the International Tribunal for the Former Yugoslavia concerning torture also bore out that point. It was even possible to determine whether draft legislation was compatible with the provisions of human rights treaties. That had been made clear by the Inter-American Court of Human Rights in another advisory opinion.[11]

17. It had been contended that general international law entitled States to choose the means whereby they would fulfil their international obligations at the domestic level. He would argue, on the contrary, that the growing tendency to incorporate human rights into domestic legislation, the need for joint regulation of certain offences in the field of human rights (forced or involuntary disappearance), the globalization of certain democratic values and the joint efforts to promote the rule of law had greatly restricted the sphere in which States were free to choose the means of fulfilling their international obligations. The Iran-United States Claims Tribunal[12] was one of the few to have referred extensively to the distinction between obligations of conduct and obligations of result and it had acknowledged that the freedom of States to choose such means was not absolute. All of the above pointed to the relative value and limited dimension of means in differentiating between obligations of conduct and obligations of result.

18. Another factor complicating application of the distinction was that, after its transposition from the domain of classical civil law to that of international law, any similarities with the common law system had disappeared. The categorization had become more rigid—now the obligation was to adopt a particular course of conduct—than it had been within the classical system of law, as exemplified by a doctor's obligation "of endeavour" but not necessarily a strict obligation to *cure* his patient. The concepts were thus exceedingly relative.

19. The proposed new article 20, paragraph 1, was simply an example of a circular rule of obvious content. Paragraph 2, however, presented substantive problems. It did not appear to resolve situations in which the decisive aspect of a given obligation of prevention was not the result to be avoided but whether or not the State took all the appropriate steps to prevent adverse consequences. The obligation of prevention was also being addressed under the topic of International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), but from a different standpoint, as could be seen from a comparison of paragraph 18 of the first report on prevention of transboundary damage from hazardous activities, by the Special Rapporteur, Mr. Pemmaraju Sreenivasa Rao[13] and paragraph 85 of the second report on State responsibility. Perhaps the most prudent course would be simplification, so as not to assign the obligation of prevention to one category, thereby excluding another approach. If there was no specific or implicit reference to the obligation of prevention in the draft articles, it could continue to be considered as a subcategory of either the obligation of conduct or of the obligation of result. Similarly, he did not favour retention of the reference to "means" in new article 20, paragraph 2. On the whole, therefore, he was against preserving the distinction between obligations of conduct and obliga-

[8] Dupuy, loc. cit. (2571st meeting, footnote 6), p. 376.

[9] See 2571st meeting, para. 15.

[10] Inter-American Court of Human Rights, *International responsibility for the promulgation and enforcement of laws in violation of the Convention (arts. 1 and 2 American Convention on Human Rights)*, Advisory Opinion OC-14/94 of 9 December 1994, Series A, No. 14.

[11] Ibid., *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83 of 8 September 1983, Series A, No. 3.

[12] Established by the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, of 19 January 1981 (ILM, vol. XX, No. 1 (January 1981), p. 230).

[13] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/487 and Add.1.

tions of result, unless a new wording that alleviated the problems he had mentioned could be found. He had been interested to hear of an intermediate solution or middle way, namely of including a general reference to the distinction in article 16 (Existence of a breach of an international obligation) or of using the proposed new article 20 as the basis for an even more simplified article.

20. Mr. CRAWFORD (Special Rapporteur), responding to those comments, said they recalled the question asked by Mr. Sreenivasa Rao (2571st meeting): what was meant by the distinction between obligations of conduct and obligations of result? Mr. Sreenivasa Rao had discussed obligations of prevention as if they were obligations of result, but they were not. In the French understanding of the phrase, an obligation of prevention was an obligation of conduct—a general obligation of best efforts to prevent something. Under the system set up by the draft articles, however, that was an obligation of result. Confusion was inherent in the fact that most international lawyers used the phrase in the sense embodied in the French meaning, while the draft articles used it in the opposite sense. Which of the two possible distinctions between obligations was to be made in the draft articles had to be very clearly spelled out; otherwise, the case for simplifying the draft articles by removing the distinction became overwhelming.

21. As to Mr. Yamada's comments and those made by Mr. Economides (ibid.), he did not think it was impossible to incorporate the substance of the commentary, especially the commentary to articles 21 and 23, while deleting the articles. The material could appropriately be included in the context of article 16, and the Drafting Committee might wish to supplement that article along the lines suggested by Mr. Economides.

22. Mr. HE said that there was a marked tendency in favour of deleting articles 20, 21 and 23 and the distinction drawn between obligations of conduct and obligations of result, although some members insisted that the articles should be retained. As pointed out by some authors, the distinction between obligations of conduct and of result was both rigid and approximate and would be difficult to apply. Other authors felt, however, that discarding it altogether might be too drastic.

23. Admittedly, the distinction entailed no differentiated consequences in part two, but it did play a significant role in facilitating the answer to at least three important questions: how the breach of an international obligation was committed in any particular instance; whether a breach could be judged to have existed; and when a breach had occurred and was completed.

24. With regard to the time factor, obligations of both conduct and result were closely connected to the temporal dimensions of responsibility. The breach was constituted at the moment it occurred and continued during the time required by the obligations of conduct and obligations of result. Whether a particular obligation was one of conduct or of result depended on the primary rule. Obligations of conduct were more likely to be encountered in direct relations between States, whereas obligations of result largely occurred within the system of the internal law of States. The distinction was thus bound up with the view taken of the State and of sovereignty. In international case law, obligations of conduct and of result were terms to be used in one way or another to refute or support arguments, although in a limited number of cases.

25. The distinction, though regarded as undesirable by some Governments in their comments, did at least make sense for legal analysis. In view of the need for a comprehensive and better-structured framework for international law relating to breaches of international obligations, there were grounds for retaining the existing concepts in a more simplified form than to that initiated by Mr. Ago. He would therefore favour a middle way such as the one embodied in new article 20, from which the square brackets should be removed.

26. In an article, Dupuy had stressed that obligations of prevention were a subcategory of obligations of conduct, not of obligations of result.[14] Consequently new article 20, paragraph 2, should be substantially modified. On that question, the Special Rapporteur had taken the view that it was the occurrence of the damage that triggered responsibility, rather than the failure to take steps to stop it. Article 20, paragraph 2, had been formulated on the understanding that obligations of prevention were a form of result. The view of the Special Rapporteur was therefore not in line with the usual understanding of the term, as advanced by Dupuy.

27. Mr. GOCO recalled that he had associated himself with the consensus in favour of deleting the articles in the second cluster, yet at the same time had expressed concern that the absence of those articles might diminish the precision of the definition of a breach of an international obligation. He had been impressed by the Special Rapporteur's reply to Mr. Yamada to the effect that commentaries on those articles could be accommodated within the context of the commentary to article 16. In view of the comments just made by Mr. He, perhaps the Special Rapporteur could confirm that articles 20, 21 and 23 could indeed be taken into consideration within the framework of the broad rule set forth in article 16.

28. Mr. CRAWFORD (Special Rapporteur), taking up the reference made by Mr. He to an article by Dupuy, said that the author of the article had been thinking of obligations of prevention in the classical French sense, whereby such obligations were normally "obligations of means". Personally, he preferred the term "means" to "conduct" and had incorporated it in paragraph 2 of the proposed new article 20. The problem, however, was that although most obligations of prevention were indeed obligations of means, that was not always the case. Dupuy's point was perfectly valid in terms of the French interpretation but not in the sense of the draft articles as adopted on first reading. The difference was, in his opinion, a matter of emphasis rather than of direct conflict.

29. Mr. AL-KHASAWNEH said that, like Mr. He, he was not absolutely certain that the suppression of the distinction between obligations of conduct and obligations of result would have no impact in terms of the time factor. The point was an important one, and while he appreciated that the distinction, unlike that between continuing and

[14] Dupuy, loc. cit. (2571st meeting, footnote 6), p. 380.

completed breaches, had no normative value for part two of the draft articles, he would appreciate some reassurance with regard to their significance in relation to the time factor.

30. Mr. CRAWFORD (Special Rapporteur), recalling that a similar point had also been referred to by Mr. Tomka, said he agreed that a case could be made out in favour of retaining the distinction because it helped to clarify the time aspect. But while the occurrence of the final result often corresponded to the moment of occurrence of the breach of an international obligation, that was not always true. The "special duty" referred to in article 22, paragraph 2, of the Vienna Convention on Diplomatic Relations provided an important example, notwithstanding Mr. Sreenivasa Rao's earlier strictures. A State that failed to take all appropriate steps to protect the premises of a diplomatic mission against any intrusion or damage was in breach of its obligation to do so even if, in the event, the threat was never realized. In other words, the obligation was triggered at an early stage. In other situations, the point at which the obligation came into effect was less clear; in that connection, he again referred to the case concerning the *Gabčíkovo-Nagymaros Project*, where the moment of occurrence of the Hungarian breach had not been in doubt, but the moment of the subsequent breach by Slovakia had had to be established by analysing the particular circumstances of the case.

31. In short, while agreeing with Mr. Simma that the different categories might be useful for classification purposes, he continued to be convinced that they were of no direct practical use in a given case. Nothing he had heard in the course of the debate had changed his mind on that fundamental point.

32. Mr. ECONOMIDES said that the theoretical value of the distinction between obligations of conduct and obligations of result, or the practically universal use of that distinction in international law, was not in doubt. But was it of practical value? There the answer was less clear. While agreeing with all the criticisms of the distinction as formulated in the articles under consideration, he wondered whether a solution to the problem might not be found by adopting, as it were, a more relativist approach. As he saw it, there was no need to try to define the concepts embodied in articles 20 and 21; it would be sufficient simply to cite them in connection with article 16 and then to discuss them in the commentary to that article. As for the obligation of prevention (art. 23), he agreed with Mr. Herdocia Sacasa that it fell within the scope of primary rules and that no reference to it need be included.

33. Mr. HE, referring to Mr. Goco's comments, said that he agreed that article 16 was well defined and well formulated so far as it went, but felt that its provisions should be developed further. He continued to think that the distinction between obligations of conduct and obligations of result was helpful in that context and should be maintained in the interests of producing a better structured draft.

34. Mr. PAMBOU-TCHIVOUNDA said that the statements by Mr. He and Mr. Herdocia Sacasa had further confirmed his view that the articles in question should be maintained. The distinction between obligations of conduct and obligations of result could have important implications in connection with the forthcoming consideration of chapter V of part one of the draft and also with the consideration of part two. In that connection, he referred to the obligation to negotiate, which formed an essential part of the provisions of the law of the sea and also figured prominently in the judgments of ICJ in the *North Sea Continental Shelf* cases and in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*. The obligation to negotiate an agreement was the epitome of an obligation involving both the element of conduct, or of the means employed, and that of the end result of the negotiations. The distinction between those different categories of obligations, could, moreover, prove of great practical use in connection with the consideration of circumstances precluding wrongfulness (chapter V of part one), where its effect might be to dissuade States from taking a case to arbitration in cases where a breach of an obligation falling into either of those categories could be established. The distinction could also be of practical value in connection with the definition of injured States in part two.

35. Mr. CRAWFORD (Special Rapporteur) said he could not see that maintaining the distinction between obligations of conduct and obligations of result would have any consequences in terms of chapter V, and would also be greatly surprised if the definition of the injured State in any respect hinged on that distinction. However, he would certainly bear Mr. Pambou-Tchivounda's comments in mind, and he was sympathetic to Mr. Economides' suggestion that the distinction should be maintained, as it were, in square brackets in case any consequences cropped up in the course of future work on the topic.

36. Mr. ECONOMIDES said that the example of an obligation to negotiate, referred to by Mr. Pambou-Tchivounda, was of considerable interest at the theoretical level. The result of the negotiations was, of course, decisive in one sense, but if the primary rule required the States concerned to (succeed in) conclude a new agreement, the obligation ceased to be an obligation of means and became an obligation of result. Thus the precise nature of the obligation hinged upon the interpretation given to the primary rule.

37. Mr. CRAWFORD (Special Rapporteur) said that he hoped to see the discussion on the second cluster of articles completed at the next meeting. The consideration of chapter V still lay ahead, and he foresaw that it would prove challenging. The Commission needed to make more rapid progress.

## Cooperation with other bodies

[Agenda item 11]

### Statement by the Observer for the Inter-American Juridical Committee

38. The CHAIRMAN invited Mr. Marchand Stens, Observer for the Inter-American Juridical Committee, to address the Commission.

39. Mr. MARCHAND STENS (Observer for the Inter-American Juridical Committee) said that all the members of the Inter-American Juridical Committee attached great importance to maintaining active cooperation with the Commission.

40. Under the Charter of OAS,[15] the Committee was a technically independent organ of the inter-American system; it was in fact its oldest specialized body, having been founded in 1906. Its purposes were to act as a regional advisory body in legal matters, promote the progressive development and codification of international law, and address the legal problems of the integration of the States members of OAS and the standardization of legislation. The Committee had thus been involved in the drafting of many legal instruments and private international law agreements designed to facilitate integration. The backbone of the inter-American legal system bore the Committee's stamp, for it had made a notable contribution to institution-building. It had also made a contribution to the integration effort by producing studies and draft texts on the progressive development and codification of private international law in trade, procedural and civil matters, thereby facilitating the adoption of multilateral instruments by the Inter-American Conference on Private International Law. The Committee had also made a valuable contribution to the work on the suppression of corruption, resulting in the adoption of the Inter-American Convention against Corruption, which had already entered into force.

41. Four of the Committee's current activities were of particular relevance to the Commission's work. First, the OAS Permanent Council had requested the Committee to study the "Proposed American Declaration on the Rights of Indigenous Peoples" prepared by the Inter-American Commission on Human Rights. The Committee had first examined the relevant provisions of the main international human rights instruments and ILO Conventions No. 107, concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries, and No. 169, concerning indigenous and tribal peoples in independent countries, as well as the draft United Nations declaration on the rights of indigenous peoples produced by the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights.[16] The legal principle, which had shaped the whole of the Committee's work on its own illustrative text, had been the need to promote the full enjoyment of human rights by persons who had preserved their pre-colonization cultures and to facilitate their continued preservation. All the Committee members also shared the view that a high proportion of such persons lived in worse conditions than did the rest of the population and that that situation must be remedied.

42. The preamble to the Committee's draft stated the principle just mentioned and stressed the right of indigenous peoples to development on an equal footing with the rest of the population without having to sacrifice their cultural heritage. The operative part defined as indigenous people a group of persons who had preserved the essential features of their culture, such as language, religious beliefs, adding that the status of indigenous person could never be based on racial considerations. Mention was also made of their right to full and effective exercise of human rights and therefore to effective participation in the decision-making process of the State and of their right to integrate themselves in any other culture existing in the State. There was also a provision on the right of indigenous people living in a separate physical environment to preserve that environment and its traditional uses of the land and its natural resources. The draft text would be considered by the Permanent Council before being submitted to the OAS General Assembly.

43. The second topic was that of improving the administration of justice in the Americas, which had been one of the Committee's most important activities since 1985. The Committee had focused on the following questions: facilitating access to justice and simplifying legal procedures; human rights and the slowness of the law; appointment of judges and other judicial personnel; and protection of judges and lawyers in the exercise of their functions. It had held two seminars, which had resulted in a proposal for the establishment of a private inter-American association to work on the topic in conjunction with governmental and intergovernmental agencies and the OAS secretariat. Two meetings of ministers of justice and public prosecutors had also been held under OAS auspices. The Committee had produced lengthy studies on those questions, including an important one by Jonathan T. Fried on the protection of judges and lawyers, which had been submitted to the Permanent Council with a recommendation that it should keep the topic under constant review.

44. It was generally agreed that, although the modernization and improvement of the judiciary was a very broad subject, ranging, say, from the independence of judges to legal statistics, the central purpose was to make a reliable, fair and effective legal system available to the whole of society, including its poor members and its indigenous groups. The social and economic realities of the Ibero-American countries could not be disregarded in studies on improving the administration of justice. In fact, the Achilles heel of Latin American democracy was the extreme poverty of large sections of the population, for whom access to the legal system was an impossibility.

45. Two distinguished Peruvian diplomats had recently published works on the economic problems of Latin America: in *La capitulación de América Latina: el drama de la deuda latinoamericana*, Ambassador Carlos Alzamora examined the powerful impact of foreign debt on the region's development and in *El mito del desarrollo: los países inviables en el siglo XXI*, Ambassador Oswaldo de Rivero offered a detailed study of the economic situation of the countries of the Third World in general and of Latin America in particular, in which he stressed the crucial need to solve the problem of poverty. In addition, in a study, Nora Lustig, Director of the IDB Poverty and Inequality Advisory Unit, pointed out that in the 1980s poverty had increased in most Latin American

[15] Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3) amended by the "Protocol of Buenos Aires" in 1967, the "Protocol of Cartagena de Indias" in 1985, the "Protocol of Washington" in 1992 and the "Protocol of Managua" in 1993; see Organization of American States, *Charter of the Organization of American States* (Washington, D.C., 1998), OEA/Ser.A STI/1 (25 September 1997).

[16] E/CN.4/1995/2-E/CN.4/Sub.2/1994/56, chap. II, sect. A, resolution 1994/45, annex.

countries and had not declined much in the 1990s. The economic reality was that in several countries of the region 50 per cent or more of people had no access to the legal system because they were too poor.

46. Apart from a few pilot projects of IDB in Central America, the programmes of international agencies concentrated on the overall modernization of legal systems but paid little attention to the central problem of access to justice by the poor. However, the Committee had the question on its agenda and in a study on the access to justice and poverty in Latin America, it recommended drawing the problem to the attention of the organizations operating such programmes, for a solution was vital to the consolidation of democracy and the exercise of human rights.

47. It was his own personal opinion that part of the problem lay in the governance of the Latin American States. In order to implement effective short-term measures a State must have an effective apparatus and a capacity to get things changed. Otherwise it became merely a spectator of the social drama of poverty and unemployment, and the result was the weakening of national cohesion and of the democratic system. Improvement of the efficiency of governance must be an essential part of the reform of a legal system, which was itself a fundamental part of democracy in the sense of giving all people access to the system. The modernization of the State and its institutions must therefore be based on the specific socio-economic and cultural situation of each country.

48. The Committee had reinstated the third topic—Inter-American cooperation to combat terrorism—in its agenda in 1994 and had since been producing studies on what was a very serious problem for Latin America. At the First Summit of the Americas, held at Miami, Florida, from 9 to 11 December 1994, American heads of State and Government had emphasized the urgency of the topic for OAS, which had then held the Inter-American Specialized Conference on Terrorism, at Lima, in April 1996, and adopted a plan of action. Peru's Permanent Representative to OAS, Ambassador Beatriz Ramacciotti, had played a fundamental role in that exercise. The Second Inter-American Specialized Conference on Terrorism, held at Mar del Plata, Argentina, in November 1998, had proposed the creation of an inter-American committee against terrorism and called for the Committee to help with the production of studies on strengthening judicial cooperation to combat terrorism, including extradition. At its meeting in June 1999, the OAS General Assembly would take a decision on that proposal. Meanwhile, it had requested the Committee to study the usefulness of drafting a new inter-American convention against terrorism. The Committee had produced draft texts on extradition and reciprocal assistance in criminal matters, which nonetheless allowed States to refuse extradition if they considered the alleged crime to be political and to grant political asylum. The Latin-American States had in fact already included that option in a number of regional instruments in order to protect persons against political or arbitrary actions by the authorities.

49. As to the last of the four topics—democracy in the inter-American system—the Committee attached special importance to studies on the progressive development of international law in relation to the effective exercise of representative democracy. The Charter of OAS contained four references to democracy, describing it in the preamble as the essential condition for stability, peace and development in the region. The Charter went on to say that American solidarity must mean the consolidation, within democratic institutions, of a system of individual freedom and social justice based on respect for the basic human rights, that it was a fundamental purpose of OAS to consolidate representative democracy in a framework of respect for the principle of non-intervention, and that solidarity among the American States demanded political organization on the basis of the effective exercise of representative democracy.

50. The Committee had adopted an important report on the topic, entitled "The Charter of the Organization of American States: limitations and possibilities" which stated that the Charter of OAS established international legal obligations both for the member States and for OAS itself. On the basis of the doctrine that a matter did not fall within the exclusive jurisdiction of a State if it was regulated by international law, it could be asserted that in the inter-American system democracy was no longer an exclusively internal matter. In the case of a violation of an obligation connected with democracy, OAS and its member States could take only such action as fell within the exercise of a function recognized in international law. For example, a State could break off relations with a non-democratic Government but could not intervene *motu proprio* in the electoral processes of that State or indeed use or threaten to use force. But OAS itself was authorized by various mandates to act in the event of the collapse of democracy. Under one mandate it could take up a case and adopt resolutions on cooperation whose implementation required the consent of each State. There was another legally binding mandate—the Protocol of Amendments to the Charter of the Organization of American States ("Protocol of Washington")[17]—which empowered the OAS General Assembly to suspend a member country whose democratically constituted Government had been overthrown by force.

51. The Committee had held an important seminar on democracy, and OAS had proposed that such meetings should be convened periodically in order to promote the consolidation of democracy. He would be happy to make available to the Commission the publications containing the proceedings and findings of the meetings held so far. Plainly, the great danger facing Latin America as the century drew to a close was that, having attained unprecedented levels of democratic organization, it might revert to the tradition of authoritarianism that had characterized its earlier history unless democracy was reflected in the well-being of the population as a whole.

52. Time did not permit him to speak at length on other important topics dealt with by the Committee, such as corruption. He wished, however, to allude briefly to the educational activities carried out by the Committee, through the holding of annual one-month courses in international law in Rio de Janeiro, which were attended by some 50 lawyers, 30 of whom received scholarships enabling them to attend the courses. Copies of the publication prepared at the conclusion of each course were available for perusal.

[17] See footnote 15 above.

53. In concluding, he again stressed that it was the unanimous wish of the members of the Inter-American Juridical Committee, not only to continue to keep the Commission informed of its activities, but also to intensify existing links between the two bodies to the fullest possible extent.

54. The CHAIRMAN thanked the Observer for the Inter-American Juridical Committee for his valuable presentation, and invited members of the Commission to respond to it.

55. Mr. BAENA SOARES said that links between the Committee and the Commission could be intensified by arranging for members of each body to attend the other's meetings regularly, by improving and institutionalizing exchanges of documents and reports, and by presentation of regular reports of the Committee on its activities, thus enabling members of the Commission to assess its work and possibly to make their own contributions thereto. He asked what use the Committee intended to make of those three procedures in consolidating its dialogue with the Commission.

56. Mr. MARCHAND STENS (Observer for the Inter-American Juridical Committee) said that a unanimous wish existed in the Committee to maintain close and fluid relations with the Commission. Accordingly, it sent a representative to the Commission each year to report on its activities and in 1998 the Committee had had the honour of hearing Mr. Baena Soares' report on the Commission's activities at its headquarters in Rio de Janeiro. Such exchanges should be facilitated and encouraged. Currently, not enough written information was exchanged: exchanges of documentation should perhaps be institutionalized. Consideration might also be given to formalizing exchanges of views between the chairmen of the two bodies.

57. Mr. LUKASHUK commended the distinguished contribution made by the Latin American school of law to the work of the Commission. He fully supported the view expressed about the importance of access to justice by all strata of the population. However, if persons were to enjoy their rights to the full, they needed to be apprised of those rights. Perhaps the Committee and the OAS General Assembly should draw States' attention to the need to provide their young citizens with schooling in the law: respect for human rights, the rule of law and democracy should be instilled from early childhood.

58. As Mr. Baena Soares had said, the situation regarding documentation left a great deal to be desired. Wider circulation of the Committee's basic documents could have an important influence on the Commission and on international practice, thereby ensuring that henceforth the achievements of the Latin American countries were no longer confined to the subcontinent.

59. Mr. PAMBOU-TCHIVOUNDA commended the Committee on the work it was undertaking in fields such as the rights of indigenous peoples, which were currently also a highly topical issue in Europe. He asked what specific inter-American mechanisms existed to regulate democracy—for instance, by monitoring elections—and what techniques the Committee applied, in its integrating role, with a view to harmonizing the administration of justice on a continent-wide level.

60. Mr. GOCO said that countries in his part of the world shared the concerns expressed by the Observer for the Inter-American Juridical Committee in his presentation. Mr. Marchand Stens had touched briefly on the topic of corruption, an issue that was also of interest to the Commission. The Inter-American Convention against Corruption, adopted following the conference held in Caracas in 1996, would provide a valuable input to work undertaken by the Commission on that topic. One member of the Commission, Mr. Opertti Badan, had already circulated some documentation concerning the convention to his colleagues. Further information would, however, be appreciated.

61. Mr. MARCHAND STENS (Observer for the Inter-American Juridical Committee) said that Mr. Lukashuk had raised a very important point. Human rights could not flourish except in a democracy, or be universally valid where access to justice was not guaranteed for all. Justice was the very essence of a civilized society. Yet in some Latin American countries, as many as 60 per cent of the population were denied access to their rights by poverty. It was thus essential to ensure the dissemination of information to those marginalized sectors of the population who were unaware of their rights.

62. Responding to Mr. Pambou-Tchivounda, he said that there were a number of bodies working to regulate democracy. The Inter-American Commission on Human Rights was mandated to hear complaints concerning violations of rights, and, where the Commission failed to resolve a matter, it would then pass to the Inter-American Court of Human Rights, whose decisions were binding on member States. At the political level, the Andean Parliament had no binding powers, but it exerted considerable moral influence. At subregional level, the Andean Court of Justice and the Andean Commission of Jurists worked towards integration of the administration of justice. MERCOSUR also had a highly developed dispute settlement mechanism.

63. As to Mr. Goco's comment, the Inter-American Juridical Committee had been responsible for drafting the Inter-American Convention against Corruption, which imposed on States a moral obligation to legislate. There was currently no harmonization of States' legislation on the question. In view of the widely differing legal systems applied in the various countries of the region, the Committee had prepared, not specific provisions, but a set of guidelines for the legislator, with commentaries, on transnational subornation and unlawful gain.

64. The CHAIRMAN again thanked the Observer for the Inter-American Juridical Committee for his comprehensive report. He had been particularly impressed by the extensive range of topics on the Committee's agenda, and by the manner in which it balanced international and domestic legal concerns in its work. The Commission would take careful note of all the suggestions made concerning ways of improving cooperation between the two bodies. The Committee was one of the longest-established legal bodies and one that steadily improved with age.

*The meeting rose at 1.10 p.m.*

## 2574th MEETING

*Wednesday, 19 May 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

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

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 20, 21 AND 23 (*concluded*)

1. Mr. AL-KHASAWNEH said that the Commission had been perfectly aware that the distinction between obligations of conduct and obligations of result might be difficult to apply, but had nevertheless chosen to adopt it because it was of fundamental importance in determining how the breach of an international obligation was committed, as stated in paragraph (4) of the commentary to article 20.[4] The Special Rapporteur's extensive review of judicial decisions had shown that the distinction did not in fact play a useful, let alone a fundamental, role. Nor did it appear to fulfil, in the overall structure of the draft, any normative function in terms of the substantive consequences of breaches in part two. In addition, the distinction had been taken from civil law, but, in the process of its transformation into a rule of international law, it had in fact been reversed. Thus, obligations of conduct, which were normally understood as nothing more than obligations to endeavour, were treated as obligations requiring the following of specific conduct over and above the result to be achieved, and were accordingly more onerous than obligations of result. Similarly, obligations of prevention, which were obligations of conduct in the great majority of cases, were treated as obligations of result. The confusion that ensued from that inversion was not likely to advance the codification of the topic, all the more so as the two types of obligations constituted a continuum and the decision to place certain obligations in one compartment and not the other rested on a subjective notion of the probability of their achievement in a particular field. Such overcodification was likewise not useful because the question of how the obligation was breached depended on the formulation and content of the primary rule and the importance of the obligation involved.

2. Two lingering doubts argued against abandoning the distinction between obligations of conduct and obligations of result, however, at least for the time being. First, while the distinction had been shown not to be so important as the Commission had first envisaged in determining how a breach of an international obligation took place, it might still be useful in determining when a breach took place. The examples given in paragraph 59 and in the relevant footnote of the second report of the Special Rapporteur on State responsibility (A/CN.4/498 and Add.1-4) clearly showed that the temporal aspect should not be overlooked in determining the moment of the breach, if only because it could have a bearing on reparations. Secondly, while the main features of the draft could now be ascertained, it was impossible to foresee with certainty the impact on the rest of the draft of the removal of such an important stone from Ago's edifice. Under the circumstances, the solution proposed by the Special Rapporteur, namely, to simplify articles 20 (Breach of an international obligation requiring the adoption of a particular course of conduct), 21 (Breach of an international obligation requiring the achievement of a specified result) and 23 (Breach of an international obligation to prevent a given event) in the form of the new article 20 placed in square brackets, appeared to be the best one.

3. Mr. ELARABY said that the fact that courts had found the distinction between obligations of conduct and obligations of result useful, even if only occasionally, was an argument against abandoning the distinction completely. A simplified article should therefore be retained or, alternatively, as Mr. Economides had proposed, the distinction should be mentioned in square brackets pending the review of the entire text of the draft articles.

4. Mr. CRAWFORD (Special Rapporteur), summing up the discussion on the second cluster of draft articles, said the best case for the deletion of articles 20, 21 and 23 had been made, not by Anglophones from the realm of the common law, but by the French Government, which considered that they related to the classification of primary rules and had no place in the text under consideration. He, too, was in favour of deleting those articles, which had never been cited in case law, even if the distinction itself was occasionally mentioned. Nevertheless, he was attentive to the concerns about deleting the distinction expressed by a significant minority of members of the Commission. Turning to specific points, he said that, by and large, it was agreed that article 21, paragraph 2, was an instance of overcodification. Article 21 confused a situation that was quite common, when the State had a choice between various modes of compliance (*aut dedere aut judicare*, for example), with a situation when a prima facie breach was cured by subsequent conduct. The second situation was extremely rare (especially if, as it was to be hoped, the Commission decided that exhaustion of local remedies did not fall into that category) and to deal with it in the draft articles would only create confusion.

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

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

[3] Ibid.

[4] See 2567th meeting, footnote 9.

The Special Rapporteur on prevention of transboundary damage had spoken forcefully for the retention, in a developed way, of the distinction between obligations of means (that term being preferable to "conduct") and obligations of result, since, in the light of the work it had done on the topic of transboundary damage, the Commission could not adopt a position that would make obligations of prevention into obligations of result. The general view was that, whereas most, but not all, obligations of prevention were obligations of means in the original sense of the distinction between the two types of obligations, to try to force them into a single matrix was to transgress the distinction between primary and secondary rules on which the text as a whole was founded.

5. The distinction between obligations of means and obligations of result was more than occasionally useful for the classification of obligations and might be helpful for determining when there had been a breach. There was a significant minority of members of the Commission who thought that the distinction should be mentioned in the draft, not necessarily in separate draft articles, not necessarily in the new article 20, but possibly in article 16 (Existence of a breach of an international obligation). There was, however, a fundamental problem in the fact that, when the distinction was actually used, it was used in the original sense, according to which obligations of means or of result did not necessarily correspond to obligations that were determinate or indeterminate. There might be a tendency for obligations of means to be more determinate, but the distinction was not one based on that criterion. The fact that the Commission had taken one conception of the distinction and turned it into another conception had given rise to enormous confusion. The solution proposed by Mr. Economides (2573rd meeting), namely, to take note of the distinction, but not to define it in the draft articles, was not necessarily a way of evading the problem. He himself had proposed the same approach to the very important distinction between completed and continuing wrongful acts. The Drafting Committee, which had a substantive function and not merely a redactional one vis-à-vis the draft articles, should therefore consider whether it was possible to articulate the distinction in a satisfactory way in the original terms, in which most obligations of prevention were to be understood as obligations of means. If it could not, it should then try the "minimalist" solution of Mr. Economides, namely, to mention the distinction, possibly in the framework of article 16. If neither of those solutions worked, then articles 20, 21 and 23 as adopted on first reading would simply have to be deleted. He was convinced that they were a case of unnecessary overcodification which explained why they were so often criticized, both within the Commission and outside it, and why even the courts that used the distinction between obligations of means and obligations of result did not refer to those articles. The majority of the members of the Commission seemed to share that view.

6. Mr. ROSENSTOCK said that it was essential for the Drafting Committee to consider the three possibilities described by the Special Rapporteur, including the idea of simply deleting the three draft articles, a solution that was favoured by the majority of the members of the Commission.

7. Mr. LUKASHUK said that he was against constantly putting off the solution to problems and wondered whether it might not be more appropriate to set out the distinction in the commentary.

8. Mr. KABATSI said he preferred the approach of combining certain aspects of the distinction in a single article that would be accompanied by an appropriate commentary.

9. Mr. PAMBOU-TCHIVOUNDA recalled that the Drafting Committee had always been seen as a body in which substantive discussions were not to be reopened. At the present stage of the debate, he said he feared that sending the text to the Drafting Committee would only lead to an impasse. He thought it would be more appropriate to adopt the solution proposed by Mr. Elaraby.

10. The CHAIRMAN said he agreed that the Drafting Committee would not have an easy task, but, because of its limited size and the resulting operational efficiency, it could more easily resolve the problems raised by the draft articles in question, even if it subsequently gave the Commission, not one version, but a choice of several. He therefore suggested that article 20 as proposed by the Special Rapporteur in his second report should be transmitted to the Drafting Committee, together with the three draft articles as adopted on first reading, of which certain elements might be retained, and all the views expressed and comments and suggestions made during the discussion, on the understanding that the results of the Drafting Committee's work would then be reviewed by the Commission.

*It was so agreed.*

ARTICLES 18, PARAGRAPHS 3 TO 5, 22 AND 24 TO 26

11. The CHAIRMAN invited the members of the Commission to consider articles 24 (Completed and continuing wrongful acts), 25 (Breaches involving composite acts of a State) and 26 bis (Exhaustion of local remedies), which had been proposed by the Special Rapporteur in his second report and corresponded to articles 24 (Moment and duration of the breach of an international obligation by an act of the State not extending in time), 25 (Moment and duration of the breach of an international obligation by an act of the State extending in time), 26 (Moment and duration of the breach of an international obligation to prevent a given event), 18 (Requirement that the international obligation be in force for the State), paragraphs 3 to 5, and 22 (Exhaustion of local remedies) adopted on first reading.

12. Mr. LUKASHUK said that he endorsed the Special Rapporteur's analysis and his proposals on those provisions. Only article 26 bis posed a problem. The important issue of the application of the rule of the exhaustion of local remedies was dealt with only from the standpoint of diplomatic protection, although it should also be considered in the context of human rights, since so many human rights instruments referred to it. He would like the term "corporations" and its equivalent in the other languages, which usually referred to commercial enterprises, to be replaced by a more general term. Enterprises were, after

all, not the only entities that had to comply with the rule of the exhaustion of local remedies.

13. Mr. CRAWFORD (Special Rapporteur) said he admitted that he had not dealt in any detail with the scope of the rule of the exhaustion of local remedies. He had simply followed the original text, which had been adopted on first reading after a discussion of the need to state explicitly that the rule applied to human rights obligations. As noted by Mr. Lukashuk, human rights instruments explicitly stipulated that the rule in question was applicable to complaints by individuals of a violation of one of their provisions. That was as it should be. Nevertheless, the rule was not always applicable in the same way, for example, in the case of wholesale violations.

14. It was not the purpose of article 26 bis to specify when the rule was applicable or when local remedies were exhausted. There were two reasons for that. First, the issue would be addressed in connection with the subject of diplomatic protection. Secondly, in the event of a breach of a treaty obligation, there was no need to go beyond what the treaty in question stipulated in respect of the exhaustion of local remedies.

15. Personally, he had nothing against the idea of recasting article 26 bis in more general terms in the light of the debate. But as it was a saving clause rather than a substantive provision, the Commission should keep any expansion within bounds.

16. Mr. ROSENSTOCK said that, while he had no objection to the suggested expansion of the provision concerning the application of the rule of the exhaustion of local remedies, he wondered whether it was really necessary in the context of the draft articles, given the sensitive nature of the human rights field.

17. That having been said, he joined Mr. Lukashuk in endorsing the Special Rapporteur's views on articles 18, paragraphs 3 to 5, 24 and 26. He did not believe that either the future instrument or the legal community would be impoverished if the Commission deleted all reference to the question of when a wrongful act began and whether and for how long it continued, on the grounds that it was a matter for interpretation of the primary rules and the application of logic and common sense.

18. He had no great problem with the proposed wording of article 18, but all it said was that an act by a State was not a breach if it was not prohibited. Articles 24 and 25 proposed by the Special Rapporteur added nothing useful. He wondered whether paragraphs 109 and 121 to 124 of the second report demonstrated that the temporal issues they referred to were to be resolved by careful analysis of the primary rules and not by fitting the facts into fancy boxes. Was the Commission producing a complex, multifaceted, sophisticated variation on the theme that "it ain't over till it's over"? Or was it providing the rationale for a result-oriented jurisprudence, such as that contained in paragraph 109? Still, if others found statements of the obvious useful and if the ambiguous provisions adopted on first reading were clarified, as the Special Rapporteur seemed to have done, he would go along with what the majority wanted. He would be happier, however, if the Special Rapporteur explained why the articles were needed. And if his arguments were not convincing, he hoped other members of the Commission would join him in calling for their deletion pure and simple.

19. As far as article 22 was concerned, the Special Rapporteur seemed to be right in stating that the mistreatment constituted the breach and the exhaustion of local remedies a standard procedural condition for establishing the admissibility of a claim and that, where the failure to provide an adequate local remedy was itself the wrongful act, it reflected the primary rule or obligation, not the location of the rule of the exhaustion of local remedies in an overarching taxonomy. He could go along with the wording of new article 26 bis and had no preconception as to whether it belonged more properly in part one or part two of the draft articles. He just wondered whether the text would really be impoverished if the article were simply deleted.

20. He concurred unreservedly with the Special Rapporteur's conclusions on the spatial effect of international obligations and the distinction between breaches by reference to their gravity.

21. Mr. ECONOMIDES, referring to article 24 proposed by the Special Rapporteur in his second report, said he preferred the title "Occurrence and duration of the breach of an international obligation", which closely resembled that of former article 24. The object of the exercise was not to define, on the one hand, a wrongful act not extending in time and, on the other, a continuing wrongful act, but to determine, where a wrongful act had been committed, when the breach had occurred and how long it had continued. With regard to paragraph 1, the phrase "not extending in time" in the former wording was more elegant and precise than the new phrase "not having a continuing character"; the Drafting Committee should perhaps also discuss whether the Special Rapporteur had been right to replace the words "at the moment when" by the word "when". In paragraph 2, the phrase "Subject to article 18" should be deleted. The question of the breach of an international obligation should be settled once and for all and for every case in a single article, which could only be article 18, since it explicitly established the condition for the activation of an international obligation. Otherwise, the phrase would have to be used for every breach of an international obligation having a continuing character, adding to the wordiness of the draft articles. Again, the Drafting Committee could examine whether it was really necessary to replace the words "at the moment when" by the words "from the time". It could also assess the appropriateness of fleshing out, in the interests of preciseness, the verbs *commencer* ("is first accomplished") and *continuer* ("continues"), which seemed to refer to a completed act whose wrongful effects extended in time. Article 24, paragraph 3, was subordinate to the provision in article 20, paragraph 2, concerning the obligation to prevent a particular event. The two clauses should therefore be handled in the same way, and that meant placing paragraph 3 between square brackets for the time being. As to the substance, he considered that the hypothesis aimed at in paragraph 3 was already covered by paragraph 2 and questioned whether paragraph 3 should be deleted.

22. The wording of the two paragraphs of article 25 gave rise to problems, at least in the French version. In paragraph 1, the brackets should be deleted and the repetition of the word "occurs" should be avoided. In

paragraph 2, the phrase "Subject to article 18" should be deleted, as in article 24, paragraph 2. The two paragraphs of article 25 could, in fact, be combined and incorporated in article 24 as a final paragraph. Lastly, he endorsed the Special Rapporteur's proposal that the concept of "complex acts" should be deleted, as it seemed to serve no practical purpose. Needless to say, a corresponding reference should be included in the commentary.

23. With regard to article 26 bis, he concurred with the approach proposed by the Special Rapporteur, while agreeing with Mr. Lukashuk that the article should be couched in far more general terms instead of dealing solely with the case of a breach of the right to diplomatic protection. He proposed the following wording: "These articles are without prejudice to any question relating to the exhaustion of local remedies where such a condition is imposed by international law". That would cover diplomatic protection, human rights or even a bilateral agreement that explicitly provided for the exhaustion of local remedies as a prerequisite for any international petition.

24. Mr. CRAWFORD (Special Rapporteur) thanked Mr. Economides for his constructive comments. He apologized for having been unable to check the French version of the articles.

25. He had no difficulty in accepting the wording proposed by Mr. Economides for article 26 bis, which could likewise meet Mr. Rosenstock's concern. He was not, however, amenable to the suggested amalgamation of paragraphs 2 and 3 of article 24. An obligation of prevention might quite conceivably be breached by the single act of a State and not by an act that was itself of a continuing nature. The breach could consist in the continuation of the result and not in the continuation of the act by the State that had produced the result. That was why the article occupied a separate place in chapter III (Breach of an international obligation). However, should the Commission decide that it was superfluous or that it was enough to mention it in the commentary, he would have no objection. He could go along with the suggestion that paragraph 3 should be placed in square brackets pending a more thorough examination.

26. Mr. HAFNER said that the articles under consideration, relating to three categories of wrongful acts that were sometimes difficult to differentiate in practice, namely, continuing, composite and complex acts, gave rise to extremely complicated problems. He would therefore base his analysis on a somewhat simplistic, but radical conception: that a wrongful act was completed if and as long as one and the same subject of responsibility presented all the elements constituting its definition or if and as long as the elements prescribed in the rule were not present.

27. With regard to continuing acts, European practice provided sufficient proof of how difficult it was to establish them clearly. In particular, it was difficult to distinguish clearly between such acts and instantaneous acts with a lasting effect, as borne out by the reasoning of the European Court of Human Rights in the case of *Papamichalopoulos and Others* v. *Greece* [see page 69]. Contrary to the traditional view that deprivations were instantaneous acts, the Court had ruled that a continuing breach had occurred because it was obviously impossible to identify precisely the act that had led to the deprivation. Recent European history had turned the issue into a highly political one, the question having arisen whether certain acts committed by different States after the Second World War and resulting in the deprivation of property were still contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) by which those States were currently bound. The absence of compensation for the deprivations, which had not been contrary to international law at the time they had occurred, could then nevertheless still count as a wrongful act today.

28. The Special Rapporteur himself justified the distinction by referring to article 41 (Cessation of wrongful conduct) of the draft articles. He found the article somewhat peculiar in that it stated that the consequence of an internationally wrongful act was the obligation to comply with international law. In his view, the opposite was the case. Hence, the article was not really necessary in the context. But, if it was deleted, the distinction between continuing and instantaneous acts could also be deleted, and that would be possible only if it entailed no other legal consequences. The distinction was, of course, widely acknowledged, but its maintenance unduly complicated the Commission's work.

29. The matter seemed still more confused in the case of composite and complex acts. The examples given for composite acts were not very convincing. The issue of composite acts had a different character in relation to the application or non-application of the rule of the exhaustion of local remedies. Supposing, for example, that State A was under an obligation to give free access to its universities to foreign students: if the State denied that right to a foreign student, it could be argued that local remedies had to be exhausted before State B, of which the student in question was a national, could invoke the responsibility of State A. But, if access was denied to all the students of a given State, then that State itself was affected: it could invoke responsibility without a student of its nationality being required to exhaust local remedies. In that case, should the composite nature of the act be the decisive element that changed the primary injured subject? If so, a distinction would have to be drawn in the application of the rule of the exhaustion of local remedies to the effect that it did not apply in the case of a composite wrongful act. But the question remained as to when the wrongful act began to become a composite act. The problem was difficult to solve.

30. The other problem resulted from the difficulty of deriving the distinction between composite and complex acts by reference to the primary rule. The example of genocide given by the Special Rapporteur showed that the primary rule was not very helpful in that regard. The Commission should therefore incorporate a definition in the draft articles if it wished to maintain that distinction and determine the different legal consequences within the framework of the law of State responsibility. For that reason, he acknowledged that some distinctive categories of primary rules should be retained.

31. With regard to the exhaustion of local remedies, the Special Rapporteur proposed a drastic change insofar as

he wanted to drop the idea of the substantial concept in favour of the procedural concept, maintaining, on the basis of the *Phosphates in Morocco* case, that responsibility was triggered at the time of the breach and not at the time when local remedies were exhausted. He acknowledged that reasoning, although it was not easy to reconcile it with the idea that the rule of the exhaustion of local remedies should give the State the opportunity of remedying its wrongful act. That objective was clearly stated in paragraph (29) of the commentary to article 22 adopted on first reading[5] and undoubtedly reflected the doctrine and practice. If the Commission accepted that new concept, it should not lose sight of other problems which it entailed. If an individual harmed by a wrongful act decided not to resort to local remedies, the State of which he was a national would immediately be entitled to take measures within the framework of the law of State responsibility, regardless of the fact that the State at fault offered the possibility of obtaining reparation. The only consequence would be that the latter State had an ex officio obligation to remedy its wrongful act. But in most legal systems it was up to the victim to take the initiative, except in criminal matters. Hence, if the idea of the existence of a material consequence of the rule of the exhaustion of local remedies was dropped, the Commission would have to regard that rule as an obstacle not only to the exercise of jurisdiction, but also to the adoption of other measures under the law of State responsibility or, in other words, to the implementation of State responsibility. In that regard, the wording of article 26 bis was not sufficient, since it did not state either the origin of the requirement of exhaustion or the effect of that requirement. Certainly, the need to meet the requirement depended on the particular character of the infringed primary rule, but primary rules could not contain such a provision. That condition would therefore have to be spelled out in the draft articles. That was all the more necessary since the effect of the condition was a matter of secondary rules and intrinsically linked to State responsibility and to its implementation. If the Commission considered the condition to be an obstacle to the implementation of State responsibility, there would be no problem in dealing with it in the relevant draft articles.

32. The question of the legal basis of the rule and of its effects could easily be resolved in article 26 bis or in part two. The part two solution would have the advantage of giving States the possibility of excluding the application of that condition by treaty, as provided for in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. He would have no difficulty in retaining the 1930 formulation for the draft article, which could be found in paragraph (19) of the commentary to article 22 adopted on first reading.[6] That language was clear and simple and left open the question of the concept underlying the provision. It would have to be adapted to the draft articles in their present form, but its basic structure could be retained.

33. Mr. CRAWFORD (Special Rapporteur) said he agreed with Mr. Hafner that the Commission would have to examine the text adopted in 1930 to see whether it was more simply worded. He himself thought that it would not help very much to settle the question whether the rule of the exhaustion of local remedies was a matter of substance or of procedure. It depended on the context. However, the Commission must indicate clearly that, in some situations, responsibility could not be implemented before the exhaustion of local remedies. It was necessary to make that point even if the Commission did not need to go into the details, as Mr. Economides had wisely pointed out.

34. When the breach of an international obligation harmed only one person and if that person deliberately decided not to take any action, even if the State concerned might have an interest in protesting against the treatment of its national, it did indeed seem that the more specific elements associated with part two of the draft articles could not be applied. At issue was the whole question of preclusion and not a simple procedural rule in the narrow meaning of the term.

35. He also agreed with Mr. Hafner that the problem could be solved in the framework of part two or part three. He tended to think that article 26 bis should be moved, for that would solve some of the problems. It was also comforting that the comments made on the cluster of articles, even if not of a drafting nature, reflected concerns which could be met by making drafting changes.

36. Mr. PAMBOU-TCHIVOUNDA said that he too thought that the provision on the exhaustion of local remedies should be moved. It would be better placed in chapter III.

37. He would prefer to retain the titles of articles 24 and 25 as adopted on first reading. The point was to determine in time when wrongfulness began. The Special Rapporteur proposed, for example, that article 24 should be entitled "Completed and continuing wrongful acts", but he did not define those concepts with the necessary precision and it was difficult to see the linkage between the title of each article and its wording.

38. With regard to paragraph 2 of article 24 proposed by the Special Rapporteur, he was also in favour of deleting the words "Subject to article 18". Furthermore, the words "and remains not in conformity with the international obligation" seemed at least superfluous and could even give rise to problems. How could the act which was deemed to constitute the violation of an international obligation become in conformity with that obligation? The act in question would be a different one. That comment also applied to paragraph 3.

39. The repetition of the word "occurs" should be avoided in paragraph 1 of article 25 proposed by the Special Rapporteur. And he could not see why, in that paragraph, the moment when a given action or omission occurred was established by reference to preceding actions or omissions. Such an approach might be understandable if the composite act ceased exactly at that moment, but there was nothing that said that it did. In the circumstances, it might be possible to reverse the approach and talk about the moment when the first action or omission constituting the composite act occurred and then refer to the actions and omissions which occurred subsequently. That was where the effect of the moment at

[5] *Yearbook ... 1977*, vol. II (Part Two), p. 40.

[6] Ibid., p. 36.

which the unlawful act was deemed to have started took on its full significance. The words "Subject to article 18" should also be deleted from paragraph 2.

40. Mr. CRAWFORD (Special Rapporteur) said that most of the comments made by Mr. Pambou-Tchivounda could be considered in the Drafting Committee. With regard to a problem of the composite act which Mr. Pambou-Tchivounda had raised in connection with article 25, it should not be forgotten that it would take some time for the act to occur since it was composed, by definition, of a series of actions or omissions which occurred over time and were defined collectively as wrongful. Genocide was one example of a composite act. The first murder of a person belonging to a given race was not sufficient to establish that genocide had been committed, but, if it was followed by other similar murders and those murders became systematic, the genocide constituted by that series of murders would be deemed to have begun at the moment of the first murder. Consequently, the perpetrators of the first murders could not claim not to be guilty of genocide on the pretext that, at the moment when they had committed their acts, the reality of the genocide had not yet been established. The idea of taking into account the first past actions or omissions whose whole series constituted the composite act was not a new one. It had already appeared in article 25 adopted on first reading.

41. Mr. PAMBOU-TCHIVOUNDA thanked the Special Rapporteur for his clarification, which the Drafting Committee would no doubt take into consideration.

42. The CHAIRMAN, speaking as a member of the Commission, said that he too thought that the words "Subject to article 18" could be deleted from articles 24 and 25 proposed by the Special Rapporteur because article 18 stated a principle which was always kept in mind. Moreover, the use of those words in some paragraphs and not in others might give the impression that a distinction was being made between the various provisions of articles 24 and 25.

43. However, if the words were kept, it would then be necessary to amend and develop note 2 to article 25, contained in paragraph 156 of the second report, the first sentence of which read: "The proviso 'Subject to article 18' is intended to cover the case where the relevant obligation was not in force at the beginning of the course of conduct involved in the composite act, but came into force thereafter." That was in fact an excessively narrow interpretation of article 18, which also covered the reverse case in which the relevant obligation was in force at the beginning of the course of conduct involved in the composite act, but ceased to be in force thereafter. It would however be preferable to delete those words.

44. Mr. CRAWFORD (Special Rapporteur) said that it would be perfectly possible to delete the words "Subject to article 18", but the necessary explanation would have to be given in the commentary.

45. Mr. ECONOMIDES said that, if the words "Subject to article 18" were deleted, as all members of the Commission seemed to think they should be, it would then be necessary to revise the wording of article 18. New article 18 covered instantaneous acts or acts not extending in time, but dealt with continuing acts only partially and totally ignored composite acts. When it considered that article, the Drafting Committee would therefore have to include those three cases in it in as simple a manner as possible. There would then no longer be any need to use the awkward term "Subject to article 18".

46. Mr. CRAWFORD (Special Rapporteur), summarizing the debate on the third cluster of draft articles, said that the Commission clearly favoured simplifying those provisions, even if there were differences of opinion as to the extent of that simplification. He had carefully noted the very useful suggestions aimed at improving the drafting of the articles.

47. The only issue of principle he had not addressed was whether the notion of a continuing wrongful act should be retained. At the very least, the Commission should leave article 24 in square brackets pending consideration of article 41, which it had certainly not yet decided to delete.

48. Mr. Hafner had asked whether continuing wrongful acts could have other consequences within the framework of responsibility. It was not impossible that the question of extinctive prescription might be affected by whether a wrongful act was or was not continuing. For his own part, he thought that an article dealing with loss of the right to invoke responsibility should be included in part three, by analogy with the similar article 45 in the 1969 Vienna Convention concerning loss of the right to invoke a ground for invalidity or termination of a treaty. That issue had its place in the framework of the draft articles. Whether a fuller formulation of the principle of extinctive prescription or delay was necessary was another matter. His own view was that, although its incidence could be affected by whether the wrongful act was continuing or not, the principle of extinctive prescription remained the same, whether in respect of a continuing wrongful act or other acts. The Commission would have to return to that question.

49. He accepted one part of what Mr. Hafner had said on article 41, in the sense that the obligation of cessation was not a separate secondary obligation existing by reason of a breach of the primary obligation. But that idea, even if expressed differently therein, was implicated in chapter II (The "act of the State" under international law) in the sense that it was deeply concerned with the choice between restitution and compensation, a choice that the injured State would normally make. It was true that there was a presumption in favour of restitution and, in some cases, especially those involving peremptory norms, restitution would be the only possibility. But in many situations there was a de facto choice and the question of the identification of the injured State arose in that context. In other words, it might be that the injured State could call on the wrongdoing State for cessation of the wrongful act, but others could not. It might also be the case that there were more non-injured States with an interest in the cessation of the wrongful act than States actually injured by the breach. That was the case, for example, with breaches of the rules relating to diplomatic immunity. That question would be examined in greater detail when the Commission turned to the consideration of article 40 (Meaning of injured State). In that connection, it was not impossible that it might need to draw a distinction between cessation, on the one hand, and compensation, on the other, in which

case there might be significant consequences for the rest of the draft articles.

50. He remained convinced that a distinction must be drawn between completed and continuing wrongful acts. There was a difference between the effects of a completed internationally wrongful act and the continuation of the wrongful act. He was fully aware of the complexity of the political issues raised by situations that had occurred some time previously and which continued to produce effects. The Commission clearly could not express an opinion on whether expropriation was a continuing or a completed wrongful act. That depended on the situation. What it could do was to emphasize the primacy of article 18, so that acts that had been complete at a time when they had been lawful did not subsequently become the subject of contention because the law had changed. That was a fundamental principle which explained why article 18 was so important. He fully subscribed to the idea that all possible permutations must be considered within article 18; and he thought that, for the moment, the Commission must retain the concept of a continuing wrongful act in chapter III. The precise formulation should be left to the Drafting Committee. The Commission would be able to return to the issue once it had a clearer view of the overall scheme of the draft articles. It thus seemed reasonable to refer the third cluster of draft articles to the Drafting Committee.

51. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer the third cluster of draft articles (arts. 18, paras. 3 to 5, 22 and 24 to 26), together with the remarks and suggestions made during the debate, to the Drafting Committee.

*It was so agreed.*

52. The CHAIRMAN invited the Special Rapporteur to introduce chapter IV (Implication of a State in the internationally wrongful act of another State) of the draft articles.

ARTICLES 27 AND 28

53. Mr. CRAWFORD (Special Rapporteur) said that chapter IV of the draft articles dealt essentially with the question whether a State that had induced another State to commit an internationally wrongful act was itself also responsible for the commission of a wrongful act. Chapter I, section B, of the second report contained an introduction on the scope of chapter IV and an analysis of articles 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act) and 28 (Responsibility of a State for an internationally wrongful act of another State) and the annex to the second report presented a brief comparative analysis of the practice of certain national legal systems with regard to interference in contractual rights, in other words, the question whether inducing others to breach contractual obligations constituted a wrongful act. The comparative analysis showed that legal practice in that field was very diverse, but also that chapter IV of the draft articles seemed to have been strongly influenced by the principle of liability applicable to interference in contractual rights under French law. According to that principle, anyone who assisted others in committing an act that was wrongful for that person was himself responsible. In practice, however, that principle was often nuanced. German law adopted a restrictive position on that question, whereas English law adopted an intermediate position, whereby anyone who knowingly induced another person to breach a contractual obligation could be held liable for a wrongful act, but there might be grounds justifying his conduct. The analogies had their limitations, but it had been interesting to note that chapter IV transposed a general assumption of responsibility from a national legal system and that that had proved a source of difficulties.

54. International law based itself on the general rule that a treaty created neither obligations nor rights for a third State without its consent (article 34 of the 1969 Vienna Convention), a principle also expressed in the Latin tag *pacta tertiis nec nocent nec prosunt*. Yet, article 27 as adopted on first reading seemed to violate that principle, for it raised the problem of the responsibility of a third State not bound by the obligation in question if it had deliberately caused a breach of that obligation. That provision seemed, first, to be a substantive rule and not a secondary rule; and secondly, to be unjustified. Its scope was much too broad, for, while there might well be situations in which a State that induced another State to breach a bilateral treaty ought to be considered as having committed a wrongful act, such cases were rare. By reconceptualizing chapter IV slightly, it was possible to bring it into the framework of secondary rules. Chapter IV was essentially concerned with situations in which a State induced another State to breach a rule of international law by which the inducing State was itself bound. A State could not escape responsibility for committing, through another State, an act for which it would be held responsible if it had itself committed that act. Some legal systems might resolve that problem by applying doctrines of agency. But that approach was not reflected exactly in chapter II. In any event, it seemed appropriate, in the context of chapter IV, to stress the condition that, in order for the responsibility of a State to arise, that State must itself be bound by the relevant obligation. It was that idea, and the desire not to trespass into the field of primary rules, that had inspired the new text of article 27 proposed in the second report.

55. Furthermore, there was an extremely wide range of situations in which States acted jointly in producing an internationally wrongful act. It had been pointed out that article 27 did not address all those cases, particularly the situation in which States acted collectively through an international organization, where the conduct producing the internationally wrongful act was that of the organs of the organization and was not as such attributable to the States. The question was to what extent the States which, collectively, procured or tolerated the conduct in question could be held responsible for doing so. It had been decided at the fiftieth session that that question raised the issue of the responsibility of international organizations and should not be dealt with in the framework of the draft articles, as it went beyond the realm of State responsibility.[7] However, there were other situations in which States acted collectively without acting through separate legal

[7] See *Yearbook ... 1998*, vol. II (Part Two), p. 87, para. 446.

persons and the Commission would have to return to that question in the context of part two, when dealing with the questions of restitution and compensation.

56. The draft articles were based on the proposition that each State was responsible for its own conduct, even if it acted in collaboration with other States. The underlying principle was thus that each State was responsible for its own wrongful conduct, in other words, for conduct attributable to it under the articles of chapter II or for conduct in which it was implicated under the articles of chapter IV. In his view, there was no need to go beyond that proposition. That approach might be spelled out more explicitly in the commentary, in the introduction to chapter IV or even in the introduction to chapter II.

57. He reminded members that he proposed replacing the current title of chapter IV by the title "Responsibility of a State for the acts of another State" because he did not think it possible to assume that the act committed by the other State would be internationally wrongful, as the act might be held not to be wrongful under the provisions of chapter V (Circumstances precluding wrongfulness). Moreover, because, as he had explained, he did not think that, in the framework of secondary rules, at least in the context of article 27, it should be considered that States incurred responsibility in case of breaches of obligations other than those by which they were bound, he proposed that article 27 as adopted on first reading should be amended to establish that State responsibility arose on two conditions: first, that the implicated State had acted with knowledge of the circumstances of the internationally wrongful act and, secondly, that the act in question would be internationally wrongful if it had been committed by that State. The original wording of article 27 was too vague. Furthermore, the words "rendered for the commission of an internationally wrongful act" that appeared therein were ambiguous, particularly if account was taken of aid programmes, for it might be that the aid provided was used for the commission of an internationally wrongful act in circumstances where the State giving the aid ought not to be held responsible. Moreover, in order to respect the *pacta tertiis nec nocent nec prosunt* principle, it was also important to make it clear that a State that had assisted another State incurred responsibility only if the act performed would have been wrongful if it had committed it itself. Thus, the new text proposed in the second report considerably limited the scope of article 27 and set forth what could properly be regarded as a secondary principle of responsibility.

58. He also proposed a new article 28 in his second report. In his view, the wording of article 28 as adopted on first reading had raised several problems. To begin with, as several Governments had pointed out, the term "coercion" as used in paragraph 2 was too imprecise. He took the term in the strong sense, as something more than persuasion, encouragement or inducement, but without the sense of unlawful use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. It could be argued that the same approach should be adopted for article 28 as was now adopted in the case of article 27, namely, that the coercing State should be regarded as responsible only for an act which would have been internationally wrongful if it had committed it itself. However, adopting a strong notion of coercion, that would lead to difficulties because, in certain circumstances provided for in chapter V, the acting State could be excused from responsibility by reason of force majeure. One could acknowledge that coercion itself was not unlawful, but that it was unlawful for a State to coerce another State to commit an unlawful act. The coercing State must also have acted with knowledge of the circumstances. He thus proposed that article 28, paragraph 2, should be amended to make it clearer and also that it should be the subject of a separate article.

59. As paragraph 1 of article 28 was too broad in scope, but had points in common with article 27, it would be deleted and some of its components taken up in article 27 proposed in the second report. The mere fact that a State could have prevented another State from committing an internationally wrongful act by reason of some abstract power of direction or control did not seem to be a sufficient basis for saying that the passive State was internationally responsible. Of course, matters were quite different when a primary obligation imposed on a State, as it did in the case of humanitarian law, a positive obligation of conduct.

60. Article 28, paragraph 3, was a "without prejudice" clause that must be applied to the whole of chapter IV. As the scope of articles 27 and 28 was limited, it nevertheless seemed necessary to retain the structure of chapter IV so as to cover the relatively frequent situations in which States coerced other States to commit certain breaches. It was also significant that no Government had argued for the complete deletion of that chapter. The task at the current time was to make chapter IV coherent with the framework of the text.

*The meeting rose at 1.10 p.m.*

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## 2575th MEETING

*Friday, 21 May 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

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## Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/496, sect. G, A/CN.4/L.577 and Add.1, A/CN.4/L.589)

[Agenda item 10]

INTERIM REPORT OF THE PLANNING GROUP

1. Mr. GOCO (Chairman of the Planning Group) said that the Planning Group had held its first meeting on 12 May 1999. It had had several items on its agenda: re-establishment of the Working Group on the long-term programme of work; establishment of a working group on the proposal to hold split sessions; cooperation with other bodies; and the work plan of the Commission for the remaining years of the current quinquennium.

2. As to the first item, at the fiftieth session, the Planning Group had established the Working Group on the long-term programme of work to consider topics which might be taken up by the Commission beyond the current quinquennium. It had been chaired by Mr. Brownlie. The Planning Group had decided to re-establish the Working Group under the same chairman and had done so in conformity with the Commission's decision at the previous session that the Working Group should be re-established to complete its task.[1] The composition of the Working Group, which was of course an open-ended group, was unaltered from the previous year.

3. Mr. Economides had presented to the Planning Group a paper on a new topic entitled "The law of collective security" (ILC(LI)/INFORMAL/1). The Planning Group had decided that that proposal should be referred to the Working Group on the long-term programme of work, which was to hold its first meeting the following week.

4. The Commission had agreed on the criteria determining the selection of topics for the long-term programme: first, account should be taken of the needs of States in respect of progressive development and codification of international law; second, the topic should be sufficiently advanced in terms of State practice, and also concrete and feasible, to permit progressive development and codification. Furthermore, the Commission had agreed that it should not restrict itself to traditional topics, but could also consider those that reflected new developments in international law and pressing concerns of the international community. That approach had been encouraged by the General Assembly in paragraph 6 of resolution 53/102.

5. At the fiftieth session, the Commission had decided to hold its fifty-second session at Geneva from 24 April to 2 June and from 3 July to 11 August 2000. However, in paragraph 9 of resolution 53/102, the General Assembly had requested the Commission to examine the advantages and disadvantages of split sessions and had decided to return to that matter at its fifty-fourth session. The Planning Group had felt that the request involved two issues: first, the presentation of arguments supporting the Commission's decision to hold a split session in 2000; and secondly, the presentation of the advantages and disadvantages of split sessions in general, in view of the decision taken by the Commission at its previous session that, barring unforeseen circumstances, sessions subsequent to the fifty-first session, in 1999, should be scheduled to take place in two fairly even parts, with a reasonable intervening period, for a total of 12 weeks, in Geneva.[2] Accordingly, the Planning Group had decided to establish a working group on those issues, chaired by Mr. Rosenstock and composed of Mr. Baena Soares, Mr. Economides, Mr. Kateka, Mr. Pambou-Tchivounda and Mr. Yamada. The Working Group had held its first meeting on 14 May 1999 and, once its task was completed, it would submit a report to the Planning Group for transmission to the Commission.

6. Under agenda item 11, "Cooperation with other bodies", the Planning Group had taken note of paragraph 10 of General Assembly resolution 53/102, which stressed the desirability of enhancing dialogue between the Commission and the Sixth Committee and requested the Commission to submit any recommendations to that effect. That request was proof of the attention with which the Assembly followed the Commission's work and of the importance it attached to cooperation between the two bodies. The Planning Group would therefore consider the matter in more detail and would submit suggestions to the Commission.

7. The Planning Group had also taken note of paragraph 12 of General Assembly resolution 53/102, in which the Assembly requested the Commission to continue the implementation of article 16, paragraph (*e*), and article 26, paragraphs 1 and 2, of its statute in order to further strengthen cooperation between the Commission and other bodies concerned with international law, having in mind the usefulness of such cooperation, and invited the Commission to provide the Sixth Committee with updated information in that regard at the Assembly's fifty-fourth session. Article 16, paragraph (*e*), of the Commission's statute referred to consultations by the Commission with scientific institutions and individual experts. Article 26, paragraph 1, related to consultations with any international or national organization, official or non-official, on any subject entrusted to the Commission, while paragraph 2 referred to a list of national and international organizations concerned with questions of international law, for the purpose of distribution of documents. The request by the Assembly thus involved an overview of the Commission's relationship with other bodies concerned with international law. Besides referring to the institutionalized cooperation maintained by the Commission with various regional bodies, the request also touched on possible consultations with other bodies on specific issues, something which would thus pertain to the Commission's methods of work. The Planning Group intended to consider the issue further, and to make recommendations to the Commission thereafter.

8. The Planning Group had noted that the work programme for the quinquennium established at the forty-ninth session required amendment.[3] No decision had been taken on the form such an adjustment should take, but the Planning Group had felt that a review of the work programme for the remaining years of the quinquennium was

[1] See *Yearbook ... 1998*, vol. II (Part Two), p. 111, para. 554.

[2] Ibid., p. 112, para. 562.

[3] See *Yearbook ... 1997*, vol. II (Part Two), pp. 68-70, para. 221.

needed. As a first step, it called on the special rapporteurs clearly to indicate their intentions for the remaining years of the Commission's mandate.

9. Mr. ECONOMIDES, referring to agenda item 11, urged the Planning Group to look carefully into the question of relations between the Commission and ICJ, relations which left a great deal to be desired. The Commission had little or no knowledge of the Court's activities. For instance, it had absolutely no information concerning the applications instituting proceedings filed with the Court recently by Yugoslavia. One 20-minute presentation delivered annually to the Commission by a member of the Court was not sufficient to provide the requisite information. In both bodies' interests, steps should be taken to ensure proper provision of full information, through regular exchanges of documents.

10. Mr. GOCO (Chairman of the Planning Group) said that, at the previous session, the President of ICJ had addressed the Commission on several important aspects of the Court's work and would again be addressing the Commission at the current session. The forthcoming meeting with the President of ICJ would provide an ideal opportunity for Mr. Economides to develop his comments.

11. Mr. DUGARD proposed that the Commission should consider inviting the Chairman of the Sixth Committee of the General Assembly to address it each year, with a view to strengthening links between the two bodies and giving the Commission a clearer picture of the attitude of the Sixth Committee towards many of the projects the Commission was pursuing.

12. The CHAIRMAN said that the question of the technical feasibility of Mr. Dugard's proposal should be looked into.

13. Mr. LUKASHUK said that 1999 afforded an opportunity to take stock of the achievements of the United Nations Decade of International Law[4] as it drew to a close. Unfortunately, the Planning Group's report had made no mention of the Decade. The Commission was particularly well placed to analyse the achievements of the Decade and to make recommendations thereon to the General Assembly for discussion at its fifty-fourth session. Unfortunately, the achievements of the Decade could hardly be described as entirely satisfactory. It was drawing to a close amidst the sounds of uninterrupted bombing. Some 1,300 persons had been killed in the conflict in Yugoslavia, 5,000 had been injured, and the refugees numbered about 1 million. However, it was not for members of the Commission to be emotional: their job as experts was to analyse the facts. During the cold war years, many had seen the main cause of the unsatisfactory state of international law and order as the existence of a so-called "Empire of Evil". The empire had now disappeared, but the evil persisted. The question had to be asked: who was now playing the "Empire of Evil" role?

14. A report published by the United Nations University in 1994,[5] had contained the statement, which had been endorsed by most jurists at the time, that the United Nations has once again become a centre of global diplomacy after having been marginalized in the foreign policies of the most powerful States during the cold war years. Alas, those hopes had not been borne out by subsequent events. Not only had the role of the United Nations not been strengthened; it had actually diminished. The lesson to be drawn from the events in Yugoslavia was that force was still the important factor in international relations. In the past, it had guaranteed the achievement of the goal set. Now, it failed to guarantee the attainment of that goal, but guaranteed only the impunity of those who abused force.

15. Democracy and the rule of law had always been considered to be guarantors of a peaceful foreign policy and of respect for international law. Recent events had shown, however, that with regard to the rule of law, charity began at home but did not always cross State borders. In an article published in 1992,[6] Falk had written that it was difficult to say whether the interventionist policies of the United States of America and other Western powers would continue or not after the cold war. The answer to that question was now quite clear.

16. The status of international law and the attitude taken by States towards the Decade of International Law could be discerned from General Assembly resolution 53/100, which related specifically to the Decade and set out its main purposes but made absolutely no mention of the Commission. Did the Commission really deserve to be passed over in silence, especially when another resolution mentioned the role of the Commission in the fulfilment of the objectives of the Decade (Assembly resolution 53/102, third paragraph of the preamble)? In his opinion, the Commission must contribute to the assessment of the Decade's results, and an item on that subject should be included in the agenda. He endorsed Mr. Economides' proposal for inclusion of the principles of collective security in the long-term programme of work.

17. An issue of decisive importance was promotion of the teaching of international law and dissemination of knowledge of that subject, for international law permeated all aspects of daily life. In a great many countries, international law was not even one of the compulsory disciplines of study for lawyers. The level of understanding of international law among politicians was extremely low, as could be seen from some of their statements.

18. The mass media were crucial to the dissemination of knowledge of international law. Unfortunately, however, journalists often misrepresented the provisions of international instruments or simply ignored them. The General Assembly adopted more than 150 resolutions every year, but what happened to those texts? They were consigned to the archives. The public was totally unaware of their existence, and even the most important of them were not covered in the media. True, it would be impossible to give mass distribution to all the resolutions of the Assembly, and their length and complexity militated against an understanding of them by the general public. But concise, clear resolutions should be adopted on the major issues discussed by the Assembly and the Security Council, and

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

[5] *Global transformation: Challenges to the state system*, Y. Sakamoto, ed. (Tokyo, New York, Paris, United Nations University Press, 1994).

[6] R. Falk, "Recycling interventionism", *Journal of Peace Research* (Oslo), vol. 29, No. 2 (May 1992), pp. 129-134.

the Assembly should encourage States to ensure that they were publicized by the media. In particular, the Commission in the first instance, and then the Assembly, should adopt an informative and carefully worded resolution or declaration on the results of the United Nations Decade of International Law.

19. There was a statue in front of the headquarters of ILO that depicted a man attempting to move a massive boulder. The Commission, like that man, was attempting to move the huge mass of international law. He was convinced that, despite the magnitude of the task, it would be able to overcome the difficulties. Its adoption of the draft statute for an international criminal court[7] was merely one example of the historic breakthroughs of which it was capable.

20. Mr. HE said he fully endorsed Mr. Lukashuk's comments on current developments, which should be of great concern in international law circles in general and to the Commission in particular. He likewise endorsed Mr. Economides' proposal to include the topic of principles of collective security in the long-term programme of work.

21. On cooperation with other bodies, he noted that the Commission had established a good level of cooperation with the Asian-African Legal Consultative Committee, the Inter-American Juridical Committee and the Committee of Legal Advisers on Public International Law (CAHDI). It should, however, strengthen its relations with ICJ, the Institute of International Law and ILA, including by requesting their views on specific issues within the topic of State responsibility, for example. It should also establish relations with other regional and national bodies in the field of international law.

22. Mr. Sreenivasa RAO said that, while the relationship between the Commission, the Sixth Committee and ICJ should be enhanced, that should not entail systematic integration of the work of one body with that of another. The place of each in the overall United Nations system had to be respected. While ICJ was able to produce press releases to inform the public about its current activities, the Commission's work did not lend itself so easily to such an approach, for it was a constantly evolving and collegial process in which the views of members changed in response to points raised by other members. Careful and unhurried consideration should be undertaken, initially in the Planning Group, of ways of informing other international law institutions about the Commission's work. The Planning Group should also look into ways of improving relations with regional organizations in the field of international law. Above all, the Commission's independence and status as an expert body must be kept uppermost in mind, and its capacity to work in a professional manner, out of the public eye, must be preserved.

23. Mr. DUGARD, responding to Mr. Lukashuk's remarks, said he agreed that it was incumbent upon the Commission to be concerned about current events that presented a real threat to international law and to address them within the framework of its own capabilities. In thinking about future topics, that must be kept in mind. Principles of collective security had been proposed as one topic for future consideration, but another that cried out for attention in the present international climate was that of humanitarian intervention. The Commission was arguably better placed to consider the real issues confronting international law than any other body in the United Nations system, but it had a tendency to avoid doing so, and he did not think that was proper.

24. Mr. ROSENSTOCK said it would be entirely appropriate for the Commission to do something to mark the completion of the United Nations Decade of International Law. The views voiced by Mr. Sreenivasa Rao, the most experienced member of the Commission, were intended to serve the Commission's interests, in contrast to other, more transient considerations.

25. Mr. HAFNER, responding to the comments by Mr. He on the Commission's relations with other international law institutions, said an exchange of views with ILA would certainly be helpful in the Commission's work, particularly since ILA closely followed the Commission's discussions and had established committees on the topics it considered.

26. Mr. LUKASHUK noted that in paragraph 3 (*b*) of General Assembly resolution 53/99, the Commission was encouraged to consider participating in the commemoration of the centennial of the first International Peace Conference. Perhaps the Chairman could be sent to represent the Commission at the centennial celebrations at The Hague and at St Petersburg.

### Statement by the Legal Counsel

27. Mr. CORELL (Under-Secretary-General for Legal Affairs, the Legal Counsel) congratulated the three new members of the Commission on their election and welcomed Mr. Mikulka, a former member of the Commission, in his new capacity as Director of the Codification Division and Secretary to the Commission. The Commission and Mr. Sreenivasa Rao, its Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage for hazardous activities), also deserved to be congratulated on the adoption of the draft articles on first reading.[8] Congratulations were also due for progress made with the topic of State responsibility, which had been on the Commission's agenda for many years. He understood that the second reading of part one of the draft might be completed at the current session and that efforts were being made to complete the consideration of the topic by the end of the current quinquennium. Again, the first reading of the draft articles on nationality of natural persons in relation to the succession of States had been completed at the forty-ninth session,[9] and he welcomed the Commission's intention to finish the second reading at the current session. Progress was also being made with the topics of reservations to treaties and unilateral acts of States, both of which were extremely important from the point of view of their practical relevance to all States in the day-by-day conduct of international relations.

[7] *Yearbook ... 1994*, vol. II (Part Two), pp. 26 et seq.

[8] *Yearbook ... 1998*, vol. II (Part Two), pp. 21 et seq., para. 55.

[9] *Yearbook ... 1997*, vol. II (Part Two), pp. 14 et seq.

28. While acknowledging those achievements, he noted that some other topics on the agenda were running behind the work plan adopted at the forty-ninth session. In one case the delay was due to an unforeseen circumstance, namely, the departure of the Special Rapporteur. He was, however, confident that the Commission, with its usual diligence and sense of responsibility, would make every effort to move ahead on those topics as well.

29. Going on to refer to General Assembly resolution 53/98, concerning the Convention on jurisdictional immunities of States and their property, the Assembly decided to establish at its fifty-fourth session an open-ended working group of the Sixth Committee to consider outstanding substantive issues related to the draft articles on jurisdictional immunities of States and their property. He recalled that in paragraph 2 of the same resolution, the Assembly invited the Commission to present by 31 August 1999 any preliminary comments it might have regarding such issues. Such comments would certainly be very helpful to the Sixth Committee in connection with a delicate and complex issue that had been on the agenda for some time.

30. The Commission's achievements included, of course, the draft statute for an international criminal court, ultimately adopted by consensus as the Rome Statute of the International Criminal Court[10] by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held at Rome from 15 June to 17 July 1998. The establishment of the International Criminal Court was one of the greatest projects of the age, and the Commission could be proud of the contribution it had made. The fact that the initial draft had undergone many modifications both in the Preparatory Committee and at the Conference in no way diminished the value of the work the Commission had accomplished in a remarkably short time. As of 14 May 1999, the Rome Statute had been signed by 82 States and ratified by 3 States. He wished to take the opportunity to invite members of the Commission to do everything in their power to promote the ratification of the Rome Statute whenever and wherever possible. It was hoped that the matters still remaining to be decided upon before the International Criminal Court became operative —in particular, the rules of procedure and the so-called "elements of crimes"—would have been resolved and referred by 30 June 2000 to the Preparatory Commission mandated by the General Assembly in resolution 53/105.

31. The Commission had in recent years made remarkable improvements in the organization of its work, the presentation of its report to the General Assembly and its dialogue with the Sixth Committee. The debate on the report of the Commission to the General Assembly on the work of its session was one of the highlights of the Sixth Committee's work every year, and the dialogue between the Sixth Committee and the Commission, further enhanced and revitalized by a number of important innovations such as the presence of Special Rapporteurs and the thematic discussion, was an important element in the process of progressive development and codification of international law. The request for recommendations in that connection addressed to the Commission in Assembly resolution 53/102 showed the importance the Assembly attached to continuing and deepening the dialogue.

32. With regard to organizational issues, the Commission would be able to hold the same number of meetings at its fifty-first session as at its fiftieth, but he was regretfully obliged to inform members that the ongoing financial crisis besetting the Organization would also affect the Commission's work. He would expatiate on that point at the private meeting to be held later that morning. It should be noted, however, that in the annex to resolution 49/221 B, the General Assembly had reaffirmed its previous decisions concerning, inter alia, the provision of summary records for the Commission.

33. With regard to documentation, he referred to paragraphs 543 and 544 of the report of the Commission on the work of its fiftieth session inviting Special Rapporteurs to submit their reports to the Secretariat in good time and requesting the Secretariat to distribute to all members, upon receipt of the report and after its editing, the special rapporteur's report in the language submitted. The Secretariat had complied scrupulously with that request. While recognizing the complexity of the task of special rapporteurs, he wished to emphasize once again that the Office of Conference Services could not guarantee the distribution before the opening of the session of documents not submitted at least 10 weeks prior to the session, especially in view of the financial constraints under which the Organization was operating at the current time.

34. On the subject of the United Nations Decade of International Law, he drew attention to General Assembly resolutions 53/99 and 53/100, as well as to resolution 44/23 setting out the purposes of the Decade. While it was mainly for States to implement the Decade's major purposes of encouraging the progressive development of international law and its codification and promoting the acceptance of and respect for the principles of international law, many tasks had fallen to the United Nations with regard to another major purpose, namely, encouraging the teaching, study, dissemination and wider appreciation of international law. In that context, workshops and seminars had been organized by UNITAR and other United Nations bodies on a number of topics, several web sites had been created and considerable progress had been achieved in establishing the United Nations Treaty Database.[11] A United Nations Audiovisual Library in International Law[12] had been set up and a special section for documents relating to international law had been created in the online United Nations Documentation Research Guide.[13] The United Nations and the United States Library of Congress had signed an agreement to store United Nations legal data in the Global Legal Information Network (GLIN) database.[14] The Assembly, in resolution 53/100, also authorized the Secretary-General to deposit, on behalf of the United Nations, an act of formal confirmation of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, an instrument

[10] A/CONF.183/9.

[11] untreaty.un.org.

[12] www.un.org/law/audio.htm.

[13] www.un.org/Depts/dhl/resguide/specil.htm.

[14] memory.loc.gov/glin/x-un-org.html.

which had originated in the Commission and which, it was hoped, would shortly enter into force.

35. As for publications issued under the responsibility of the Office of Legal Affairs, the *Yearbook of the International Law Commission, 1994*, vol. II (Part One) and the *Yearbook of the International Law Commission, 1996*, vol. II (Part Two) were being printed. The proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law, held in New York on 28 and 29 October 1997, had been published in June 1998.[15] An *Analytical Guide to the Work of the International Law Commission 1949-1997*[16] had been published in July 1998 to commemorate the fiftieth anniversary of the Commission and to complement *The Work of the International Law Commissio*n, currently in its fifth edition.[17] As for the *United Nations Juridical Yearbook*, the 1994 and 1995 editions were in the press and the Codification Division was finishing the 1996 edition. Work was also being completed on the 1989 edition, so that there would be no backlog as from the year 2000. The Codification Division had issued Volume XXI of the *United Nations Reports of International Arbitral Awards*[18] and was at present working on Volume XXII. It was finalizing the proceedings of the Seminar to commemorate the fiftieth anniversary of the Commission, held at Geneva on 21 and 22 April 1998, as well as a collection of essays by legal advisers of States, legal advisers of international organizations and practitioners in the field of international law, to be published at the close of the United Nations Decade of International Law. Referring again to General Assembly resolution 53/99, he said that the first part of the centennial celebrations for the First International Peace Conference had taken place at The Hague earlier that week, the second part being scheduled for June at St Petersburg.

36. In regard to the comment by Mr. Economides about the relationship between the Commission and ICJ, it was, of course, for the Commission to decide upon the form that relationship should take. It should be noted, however, that everything concerning ICJ could now be immediately accessed on the Internet.[19] In that connection, he drew attention to a most important advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, handed down by the Court only a few days earlier on the subject of the privileges and immunities of experts appointed by human rights bodies. Members would be interested to hear that the advisory opinion contained references to articles on that topic which had been elaborated by the Commission.

37. With reference to Mr. Lukashuk's comments, while it could not be denied that much remained to be done with regard to the observance of international law in the fields of international peace and security, human rights and humanitarian law, the situation in many other fields such as communications and public health could be described as excellent. The worldwide availability of information on the Internet, the ever-increasing importance of the activities of non-governmental organizations and the immense contribution being made by civil society in general should not be overlooked. What was needed was not more law but closer observance of the law and a higher quality of statesmanship at the political level.

38. In conclusion, he assured members that the Secretariat was doing its best to provide a level of services commensurate with the importance of the Commission's role.

*The meeting rose at 11.30 a.m.*

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## 2576th MEETING

*Tuesday, 25 May 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Yamada.

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### Cooperation with other bodies (*continued*)*

[Agenda item 11]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN invited Mr. Tang Chengyuan, Secretary-General of the Asian-African Legal Consultative Committee (AALCC), to address the Commission on the Committee's activities.

2. Mr. TANG Chengyuan (Observer for the Asian-African Legal Consultative Committee) said that his organization attached great significance to its longstanding ties with the Commission and profoundly appreciated the latter's role in the progressive development and codification of international law. It was customary for the Commission to be represented at the annual sessions of AALCC and, in recent years, the Commission had also been repre-

[15] *Making Better International Law: The International Law Commission at 50* (United Nations publication, Sales No. E/F.98.V.5).

[16] United Nations publication, Sales No. E.98.V.10.

[17] Ibid., E.95.V.6.

[18] Ibid., E/F.95.V.2.

[19] www.icj.cij.org.

* Resumed from the 2573rd meeting.

sented at the meeting of the Legal Advisers of member States of the Committee held at the United Nations Headquarters in New York during the session of the General Assembly.

3. The thirty-eighth session of AALCC had been held at Accra, from 19 to 23 April 1999. At that session, the Commission had been represented by Mr. Yamada and by Mr. Addo, a national of the host country. Twelve substantive items, including the work of the Commission at its fiftieth session, had been on the session's agenda, but, for lack of time, only some of those items had been the subject of intensive debate.

4. On the topic of State responsibility, AALCC had considered that the draft articles on countermeasures dealt with the most difficult and controversial aspect of the whole regime. One delegate to the Committee had expressed the opinion that the principles of State responsibility should be based on consensus among States and that the draft articles should differentiate between legal injury and material damage.

5. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, AALCC had observed that the Commission had yet to decide on the best direction in which to further its work on the matter. Although the title of the topic was confusing, the substance was clear; moreover, the Commission's work on prevention of transboundary damage should also cover the issues of liability and compensation.

6. With regard to reservations to treaties, the formulation of guidelines seemed a practical way of filling any gaps in the Vienna regime. It had been suggested that the Commission should give due regard to preserving the delicate balance of the customary rules of international law relating to the integrity and universality of a treaty. One delegate to AALCC had expressed the view that the special meeting on reservations to treaties organized by the Committee as part of its thirty-seventh session had dealt exhaustively with the topic. It had been stated in that regard that articles 19 to 23 of the 1969 Vienna Convention were a flexible regime that had stood the test of time and that the final guidelines should reflect the views expressed by the Committee the previous year.

7. AALCC had also taken note of the fact that the work of the Commission on the two topics of diplomatic protection and unilateral acts of States was still in its preliminary stages. In that connection, he recalled that in 1996 the Committee had expressed the wish that the Commission should include the topic of diplomatic protection on its agenda, as it felt that consideration of that topic would complement the Commission's work on State responsibility. At the thirty-eighth session of AALCC, the topic of diplomatic protection had aroused some interest in that it focused on individual rights as opposed to the rights of the State of nationality.

8. With regard to unilateral acts of States, the view had been expressed that the topic was complex and that the Special Rapporteur should not rely on available State practice. While unilateral acts of States could impose international obligations, they could not be cited as sources of international law. Acts of States were regulated either by the law of treaties or by the law relating to State responsibility. One delegation had been of the view that, in the absence of a coherent doctrine encompassing all kinds of unilateral acts, the work of the Commission would lend clarity to aspects of State actions and contribute to ensuring stability in international relations. It had been observed that the Commission's objective should be to identify the constituent elements and effects of unilateral legal acts of States and formulate rules generally applicable to them.

9. With regard to the nationality of natural persons in relation to the succession of States, the Committee had welcomed the work of the Commission and the adoption of the 27 draft articles[1] prepared by the Special Rapporteur, Mr. Mikulka. The draft articles were fairly flexible and provided enough options to enable States to adopt the Commission's draft.

10. The other items considered in the course of the thirty-eighth session of AALCC were: the United Nations Decade of International Law;[2] status and treatment of refugees; deportation of Palestinians and other Israeli practices, including massive immigration and settlement of Jews in the occupied territories in violation of international law, particularly the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949; legal protection of migrant workers; the law of the sea; extraterritorial application of national legislation: sanctions imposed against third parties; report of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court; follow-up to the United Nations Conference on Environment and Development; legislative activities of United Nations agencies and other international organizations concerned with international trade law; and the report of the WTO Seminar relating to Certain Aspects of the Functioning of the WTO Dispute Settlement Mechanism and Allied Matters, held at New Delhi on 17 and 18 November 1998. A document containing an overview of the thirty-eighth session of AALCC had been filed with the secretariat of the Commission.

11. In reply to Mr. Yamada, who, in his statement to AALCC at its thirty-eighth session, had invited comments from member States of the Committee on the item on the Commission's long-term programme of work concerning environmental law, he said that, under the administrative arrangements for its thirty-eighth session, the Committee had organized a Special Meeting on Effective Means of Implementation, Enforcement and Dispute Settlement in International Environmental Law. The report of that Special Meeting had been circulated to the members of the Commission for information. The salient ideas that had emerged from the Special Meeting were: that international environmental law was based largely on treaties that adopted a sectoral approach, whereas an integrated and comprehensive approach was needed to address environmental issues; that, with increasing liberalization and the resultant expansion in world trade, the legal interface between trade and the environment needed to be studied; that States must build up their capacity for the effective implementation of the law and that capacity-building must be accompanied by the transfer of technology and

[1] See 2569th meeting, footnote 8.

[2] See 2575th meeting, footnote 4.

financial resources to the least developed and developing countries; that only States could enforce international obligations relating to the environment; and that alternative dispute resolution (ADR) could be an important means of settling environmental disputes. The Committee had expressed the wish that other meetings should be organized in collaboration with UNEP and other relevant international organizations, for an in-depth consideration of the issues addressed during the Special Meeting.

12. As to future cooperation between AALCC and the Commission, the secretariat of the Committee would continue to prepare notes and comments on the substantive items considered by the Commission so as to assist those representatives of the member States of the Committee who participated in the consideration by the Sixth Committee of the report of the Commission to the General Assembly on the work of its session. An item entitled "Report on the work of the International Law Commission at its fifty-first session" was on the agenda for the thirty-ninth session of AALCC, to be held in 2000. On behalf of the Committee, he invited the Chairman of the Commission to attend that session and expressed the hope that the trend towards closer cooperation between the two bodies would continue.

13. Mr. YAMADA said that he had followed with great interest the thirty-eighth session of AALCC, which had, as always, accorded close attention to the work of the Commission. He had himself presented an oral report on the activities of the Commission and on the relevant work of the Sixth Committee of the General Assembly. He had also informed the Committee of the Commission's future work programme. There had been fewer contributions from the States of Africa and Asia than from other States, particularly in Europe, and he had invited the Committee to participate more actively in the work of the Commission and had stressed the need for the Committee to play a catalytic role in promoting relations between the Commission and the member States of AALCC.

14. Mr. KATEKA said that he welcomed the information provided by the Observer for AALCC, but thought that the views expressed by the members of the Committee on the topics being considered by the Commission should have been described in greater detail. It was certainly useful for the Committee to gather information to assist those of its members who took part in the consideration by the Sixth Committee of the report of the Commission to the General Assembly on the work of its session, but it would be equally appropriate for the Committee to transmit to the Commission reasoned views for its consideration. The Committee's five-day annual session did not appear long enough to handle all the items on its agenda. If it had a shorter agenda, the Committee could concentrate on important items. The Committee's work was nevertheless extremely interesting.

15. The CHAIRMAN said he was convinced that the reports provided to the Commission on the Committee's thirty-eighth session and on the Special Meeting on Effective Means of Implementation, Enforcement and Dispute Settlement in International Environmental Law, which attested to the quality of the exchange of information by the Committee and the Commission, would be of great interest to the members of the Commission.

16. Mr. HE said that he welcomed the tradition by which the Observer for AALCC described the Committee's activities to the Commission each year and a member of the Commission outlined the Commission's work at the annual session of AALCC. He had been pleased to note that the topics considered by the Commission were also being studied by the Committee. The collaboration between the Commission and the Committee could nevertheless be further strengthened and improved, for example, if they were to transmit to each other all relevant documents, thereby facilitating exchanges of view of topics of common interest. The strengthening of cooperation on some of those topics that called for more in-depth study might also be considered.

17. Mr. ADDO said he also thought that, since its annual session was short, AALCC might choose one or two topics of common interest being considered by the Commission on which to hold an in-depth discussion. He wished to know whether the Committee intended to establish a web site and, if so, when, so that all necessary documents could be widely and rapidly disseminated. For example, if such a site had existed, the members of the Commission could have familiarized themselves in advance with the documents submitted by the Committee.

18. Mr. KUSUMA-ATMADJA thanked the Observer for AALCC for the very useful documents which he had submitted and which gave an outline of the Committee's work and of all the topics it was considering. The Committee should focus on a smaller number of topics. The Secretary-General of AALCC had done an excellent job in the area of cooperation with the Commission, which should be represented by more members at the Committee's meetings. Such cooperation was important in general, but even more important on specific topics such as environmental law, an area in which the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal was clearly better suited to the situation of continental States than to those of many Asian countries which were both continental and insular or insular only.

19. Mr. GOCO said that the activities of AALCC were extremely important, first, because of the number of African and Asian countries composing it and, secondly, because of the contribution made by those countries to the progressive development and codification of international law, as demonstrated, inter alia, by the contribution the Committee had made to the preparatory work for the establishment of an international criminal court at its Special Meeting on the Establishment of an International Criminal Court, held at Manila, from 5 to 6 March 1996. Without neglecting other subjects of pressing concern to the international community, the Committee should focus its activities on a selected number of topics of particular importance for the region, including the topics of migrant workers and the status and treatment of refugees.

20. Mr. Sreenivasa RAO pointed out that AALCC had done remarkable work for the region under all its Secretaries-General and particularly under the leadership of Mr. Tang Chengyuan, who had shown the full measure of his talents at the thirty-eighth session of AALCC. Since it now had a permanent headquarters in India, the Committee could devote itself entirely to expanding its coopera-

tion with other bodies, inter alia, in the context of specialized meetings. Two such meetings had been held during the past year, the first was the Seminar relating to Certain Aspects of the Functioning of the WTO Dispute Settlement Mechanism and Allied Matters and the second was the Meeting to Consider the Preliminary Reports on the Themes of the First International Peace Conference, held at New Delhi, on 11 and 12 February 1999. In addition, by setting priorities and working to ensure the best possible use of available funds, the Secretary-General had succeeded in stabilizing the Committee's financial situation. In respect of cooperation with the Commission, the Commission had always been represented at meetings of AALCC, either by its Chairman or by one of its members, but it would be useful for additional African and Asian members of the Commission to be able to represent it. The draft conventions and guidelines of the Commission on extradition, mutual legal assistance, the problems of refugees, the law of the sea and the law of treaties had always been very useful to the Committee, enabling it to make an important contribution to the overall work of codification in those areas. The same was now true of environmental law, on which the Committee had held a Special Meeting on Effective Means of Implementation, Enforcement and Dispute Settlement in International Environmental Law, in Accra, so that the member countries could say what their interests and aspirations were and take part in the codification of the topic.

21. Mr. TANG Chengyuan (Observer for the Asian-African Legal Consultative Committee) thanked members of the Commission for their comments and suggestions. With regard to the need to focus on a small number of topics, he pointed out that the Committee operated according to the principle of consensus and that the member States were not always prepared to withdraw topics they had proposed. The Committee tried to get round that difficulty through the system of special topics or meetings devoted to a specific subject. As to preparations for the General Assembly of the United Nations, the Committee distributed a summary of the work done on the items on the Sixth Committee's agenda to all representatives of its member States in New York. The Committee intended to carry out new studies on the topic of environmental law. It had also established a working group on migrant workers in the context of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. It was currently considering the question of creating a web site. In conclusion, he welcomed the desire for expanded cooperation between the two bodies expressed by the Chairman and all members of the Commission.

22. The CHAIRMAN said that, of all the regional bodies, AALCC was the one which had the largest number of eminent jurists and the one which spent the most time studying the Commission's work. The work done by the Committee should therefore be taken into account, for it was a mirror in which the Commission could see both its successes and its mistakes. The continuity of their interaction was extremely important for both parties and must be ensured even if financial difficulties sometimes prevented it from taking place in an official context. The Commission had recently established a web site and the experience had proved to be particularly positive, as it ensured that its documents were more widely distributed. The Committee should therefore not hesitate to do the same. The system of ordinary and special meetings adopted by the Committee was an interesting experiment in that it improved the capacity of legal bodies to react to the changing needs of societies and countries, something which the Commission should not overlook. In conclusion, he expressed the hope that the Secretary-General of the Committee would maintain contact with the Commission in the context of cooperation between the two bodies that he hoped would be long-lasting.

## State responsibility[3] (*continued*)* (A/CN.4/492,[4] A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,[5] A/CN.4/L.574 and Corr.1 and 3)

[Agenda item 3]

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

ARTICLES 27 AND 28 (*continued*)*

23. Mr. SEPÚLVEDA said he welcomed the fact that the Commission had made remarkable progress on the consideration of the delicate topic of State responsibility, particularly thanks to the Special Rapporteur's legal knowledge and his ability to explain and elaborate on legal concepts with precision and clarity. The Commission's work could only benefit therefrom and should lead to the establishment of a better-organized legal system composed of rules that clearly delineated the rights and duties of States in the area of international responsibility.

24. With regard to chapter IV (Implication of a State in the internationally wrongful act of another State) of part one of the draft articles as adopted on first reading, the salient aspect of the second report of the Special Rapporteur on State responsibility (A/CN.4/498 and Add.1-4) was his recommendation that the key ideas on which the chapter was based should be preserved, subject to some alteration. It would be absurd if a State that was an accomplice in the commission by another State of a wrongful act or that coerced another State into committing a wrongful act were not held responsible. Articles 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act) and 28 (Responsibility of a State for an internationally wrongful act of another State) adopted on first reading had expressed confused concepts that needed to be reformulated. The text of new articles 27 (Assistance or direction to another State to commit an internationally wrongful act), 28 (Responsibility of a State for coercion of another State) and 28 bis (Effect of this chapter) proposed by the Special Rapporteur in paragraph 212 of his second report was an improvement: it was of a higher legal standard and it removed ambiguities. For example, the word "Implication" in the title of chapter IV did not take account of the degree of a State's participation under the various possibilities covered. He

* Resumed from the 2574th meeting.

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

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

[5] Ibid.

assumed that the new proposed title, "Responsibility of a State for the acts of another State", referred to the responsibility of the first State (State A) as a result not of just any act, but of a wrongful act committed by the second State (State B). If so, that idea of wrongfulness should be incorporated in the title.

25. The appropriateness of doing so was underscored by the Special Rapporteur's statement, in the explanatory note following the proposed new title, that moreover, in the case where State B's conduct is coerced by State A, the wrongfulness of that conduct may be precluded so far as State B is concerned. The case could be one of a state of emergency or of force majeure, under which responsibility would be precluded. But the wrongful act committed by State B would nevertheless remain wrongful, even if the State did not necessarily incur responsibility.

26. Turning to article 27, he said that, in the text adopted on first reading, the words "Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act" were confusing. It would have to be determined where responsibility lay for establishing that the aid or assistance in question had been rendered to commit a wrongful act. And that would involve a subjective element. Should the task be entrusted to the victim of the wrongful act or to a judicial body or an arbitral tribunal? He was pleased to note that the proposed new text did not include criteria of that kind, which lent themselves to a variety of interpretations. Secondly, both the commentaries to the relevant articles adopted on first reading[6] and the notes accompanying the proposed new articles 27, 28 and 28 bis, contained a set of guidelines which formed the basis for the principles embodied in article 27 on the complicity of two States in the commission of a wrongful act. First, there was the cause-and-effect relationship between the aid provided and the commission of the wrongful act: the assistance rendered should have the effect of facilitating the commission of the act that breached international obligations. Then there was the principle of intention: a State that rendered assistance for the commission of a wrongful act, knowing full well that a wrongful act would be committed and that the act would be wrongful if it committed it itself, must do so with intent to become an accomplice. Lastly, there was the principle of dual responsibility: article 27 presupposed the commission of two acts that were in themselves internationally wrongful acts and hence implied the existence of two types of responsibility, namely, the responsibility of the State that rendered the assistance and the responsibility of the State that breached its obligations in committing a wrongful act.

27. New article 27, which was well drafted both in terms of form and of substance, thus stipulated that a State A which directed or controlled State B in breaching an international obligation incurred the same responsibility as a State that aided or assisted another State in committing a wrongful act. It nevertheless failed to cover all the ground. For reasons that he found unconvincing, the Special Rapporteur had recommended omitting the hypothesis of conspiracy as a component of international responsibility, in other words, conspiracy between two or more States to commit an internationally wrongful act. It could be argued that each of the States concerned was individually responsible. But, as under the internal legal order, the nature of the wrongful act and the penalties which were applicable differed in the case of organized crime, which entailed aggravated responsibility. For example, following the nationalization of the Suez Canal in 1956, the Governments of three States had formed a conspiracy, characterized as a breach of international law, to oppose the decision.[7] The Commission could thus provide for cases of collective or joint responsibility, without prejudice to the assignment of individual responsibility.

28. The exact meaning of "coercion" in the context of article 28 should be made clear. According to paragraph (29) of the commentary to article 28 adopted on first reading, cited in paragraph 203 of the report, "'coercion' is not necessarily limited to the threat of or use of armed force, and should cover any action seriously limiting the freedom of decision of the State which suffers it—any measures making it extremely difficult for that State to act differently from what is required by the coercing State"; in paragraph 204 of the report, the Special Rapporteur stated that coercion for that purpose was nothing less than conduct which forced the will of the coerced State, giving it no effective choice but to comply with the wishes of the coercing State. It was not enough that compliance with the obligation was made more difficult and onerous. Moreover, the coercing State must coerce the very act which was internationally wrongful. It was not enough that the consequences of the coerced act make it more difficult for the coerced State to comply with some other obligation. As those criteria were essential for determining the grounds for coercion and its consequences, it would be desirable to include in the draft articles a definition of the terms used, duly defining the nature and scope of coercion and making it clear that the term was not confined to the use of armed force, but also included economic pressure.

29. Reverting to the question of the exhaustion of local remedies in chapter III (Breach of an international obligation), he expressed the view that neither article 26 bis (Exhaustion of local remedies) proposed by the Special Rapporteur in his second report nor the Commission's discussion had really done justice to the matter. The commentary to the corresponding article 22 (Exhaustion of local remedies) adopted on first reading[8] ran to some 20 pages and dealt with the legal principles underlying the rule, State practice, judicial decisions and the writings of jurists. A number of conclusions had been drawn, in particular: the Commission considered that the principle establishing the requirement of the exhaustion of local remedies was well founded in general international law; the principle was based on the idea that there could be no breach, or at least no definitive breach, of an international obligation unless the individuals who complained had tried to obtain redress by any means available under the internal law of the State bound by the obligation; a State

[6] For the commentaries to articles 27 and 28 see *Yearbook ... 1978*, vol. II (Part Two), pp. 99 et seq. and *Yearbook ... 1979*, vol. II (Part Two), pp. 94 et seq., respectively.

[7] See M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office), vol. 12, 1971, pp. 320-321.

[8] See 2574th meeting, footnote 5.

incurred international responsibility where a denial of justice was established, that is to say, where local remedies had been exhausted and the State had not fulfilled its international obligations in a satisfactory manner. By limiting his comments to some five pages, however, the Special Rapporteur seemed to assign a minor role to the rule of the exhaustion of local remedies and had even cast doubts on its inclusion, or at least its place, in the draft articles. He strongly advocated the retention of the rule as an essential component of the law of international responsibility. It was not enough to argue that it might be incorporated in the law of diplomatic protection: nobody could really tell what a future instrument dealing with that subject might contain. It was clear, on the other hand, that the rule of the exhaustion of local remedies and its corollary, the denial of justice, were closely and irreversibly bound up with State responsibility. The position of the article dealing with the rule could be discussed once the validity of the principle had been established. It should normally appear in chapter V (Circumstances precluding wrongfulness) of part one, alongside the articles concerning circumstances precluding wrongfulness, but it could also be included in part two, as suggested by the Special Rapporteur.

30. In conclusion, he urged the Commission, whose task at present was to tidy up the draft articles, to refrain from undermining the result of many years' work by seeking to delete articles that were the product of mature reflection and analysis. The Commission's duty was to use that heritage to put in place a carefully planned legal order, with a system of rules defining the rights and duties of States in that area.

31. Mr. CRAWFORD (Special Rapporteur), referring to the part of Mr. Sepúlveda's statement relating to chapter III of the draft articles, said that the discussion of the matter was closed, the Commission having formally referred the corresponding draft articles to the Drafting Committee. However, to dispel any misunderstanding, he wished to reaffirm that he viewed the rule of the exhaustion of local remedies, which was normally included in treaties, as an established rule of general international law applicable both in cases of violations of human rights and in the field of diplomatic protection. There was no question of diminishing its importance. However, it had to be recognized that, contrary to the provision of article 22, an international obligation was not breached solely in cases where the individuals concerned had exhausted local remedies.

32. He summarized very briefly the conclusions of the discussion on that point for the benefit of members of the Commission who had been absent: it had been generally agreed that an article on the exhaustion of local remedies should be retained in the draft articles; it had been broadly agreed that the article should be formulated in broader terms along the lines proposed by Mr. Economides (2574th meeting); it had been generally agreed that the article should not prejudge the nature of the obligation of the exhaustion of local remedies, which could vary from one situation to another; and the Commission should be careful not to bypass the obligation of the exhaustion of local remedies, for example, having regard to the question of countermeasures and, to that end, should specify the consequences of the obligation, in particular the time when the rule applied in the case of an individual breach. Having said that, he found Mr. Sepúlveda's observations on chapter IV useful and had no comment to make on the substance.

33. Mr. Sreenivasa RAO said he was pleased that the Special Rapporteur had reaffirmed the importance of the rule of the exhaustion of local remedies in the draft articles on State responsibility, but it should be stressed that the rule was equally important in the case of investment contracts, which were becoming more and more common throughout the world and involved either States or States and individual investors. Such agreements generally stipulated that local remedies should be exhausted before the international complaints procedure could be set in motion. They could, however, also provide for arbitration.

34. The rule of the exhaustion of local remedies, which was well established not only in treaty law, but also in customary law, was a means of ensuring recognition of and respect for internal legislation and national systems. He noted with satisfaction that the Special Rapporteur had no intention of underplaying its importance.

35. Mr. PAMBOU-TCHIVOUNDA thanked Mr. Sepúlveda for drawing attention to the need to ensure consistency in chapter IV, especially since its title, "Implication of a State in the internationally wrongful act of another State", did not reflect its actual content. The new title proposed by the Special Rapporteur, "Responsibility of a State for the acts of another State", seemed more appropriate, although for the sake of clarity, it would be preferable to say "Responsibility of a State for the internationally wrongful act of another State". That was a matter for the Drafting Committee to decide.

36. He was broadly in favour of proposed new articles 27 and 28, subject to drafting amendments. He had some doubts, however, about new article 28 bis, particularly subparagraph (*b*): the possibility of invoking "any other ground" for establishing the indirect responsibility of a State implicated in the internationally wrongful act of another State seemed to introduce a heterogeneous element into an otherwise homogeneous whole.

37. Mr. DUGARD said that, if the Commission tried to define "coercion" in article 28, for example, by considering the question whether armed or economic coercion was involved, he feared it would be unable to avoid a debate on a definition of primary rules. In his view, it would be well advised to stick to the question of wrongfulness when considering the problem of coercion.

38. Mr. SEPÚLVEDA said his suggestion that the concept of coercion should be included in the definitions had in no way been meant to open a general debate on primary rules. He had simply wished to ensure that, where coercion was concerned, the conditions under which State responsibility arose were clearly delimited.

39. Mr. YAMADA commended the Special Rapporteur on his excellent analysis of "complicity" and "indirect responsibility" and supported his proposal that articles 27 and 28 should be retained with modifications.

40. In his view, articles 27 and 28 as adopted on first reading were much influenced by the concept of crime

dealt with in article 19 (International crimes and international delicts). He was therefore happy to note that the Special Rapporteur had raised the question whether there should be a general rule applicable equally to bilateral treaties and peremptory norms.

41. As the review of the comparative law experience, contained in the annex to the second report, showed, knowingly and intentionally inducing a breach of contract was considered to be a civil wrong in many legal systems. In the Japanese civil law regime, anyone who knowingly assisted another in breaching a contractual obligation by which that person was bound committed a tort. Such an individual was responsible not for the breach of contract, but for compensation for any damage suffered by the victim of the breach. That concept had, however, not been developed in the field of international law.

42. He therefore supported the Special Rapporteur's conclusion that article 27 should be limited to aid or assistance in the breach of obligations by which the assisting State was itself bound. He also agreed with the Special Rapporteur that the same proviso should be applied to article 28, paragraph 1. The directing or controlling State should be responsible only for acts which would have been wrongful if it had carried them out itself.

43. In the case of coercion, the Special Rapporteur contended that there was no reason why article 28, paragraph 2, should be limited to breaches of obligations by which the coercing State was also bound. Although the distinction made between coercion in article 28, paragraph 2, and aid and assistance in article 27 was relevant, he was not convinced by the Special Rapporteur's conclusion in paragraph 207 of the report. He cited the following example: State A became a party to a treaty binding several States not to sell a primary commodity below a certain fixed price. State B coerced State A into selling the product at a price below the floor set in the agreement, not through force, but through economic pressure. Such coercion was not unlawful under international law. He therefore had serious doubts as to whether State B could be held responsible for the breach.

44. The Special Rapporteur was proposing that articles 27 and 28, paragraph 1, as adopted on first reading should be combined in a single article in order to limit responsibility to cases of obligations opposable to the assisting and directing States. However, there was a conceptual difference between "complicity" in article 27 and "indirect responsibility" in article 28, which was made clear in paragraph (16) of the commentary to article 27, which read:

> The need to take into consideration such a form of "participation" by a State in the internationally wrongful act of another State is further attested by the fact that, as a general rule, aid or assistance in the commission of a wrongful act by another remains in international law, like "complicity" in internal law, an act separate from such commission, an act that is classified differently and that does not necessarily produce the same legal consequences. In other words, the wrongful act of participation by complicity is not necessarily an act of the same nature as the principal internationally wrongful act to which it pertains.

45. To draw an analogy with internal law, it might be said that the acts covered in article 27 were similar to acts committed by an accessory, which usually carried lesser charges than the principal offence. The acts in article 28 were entirely different. In article 28, the directing or controlling or coercing State was using another State as a means of violating obligations and, as such, was the principal perpetrator of the breach and not an accessory. The original grouping of article 27 and article 28 had made that difference very clear.

46. Article 27 raised another problem, how to determine the distribution of responsibility between the assisting State, and the assisted State. Paragraph (20) of the commentary to article 27 stated:

> These, however, are questions that relate not to the part of the draft dealing with the origin of international responsibility but rather to the second part, i.e. that which will deal with the content, forms and degrees of international responsibility.

However, he saw no reference to that question in the draft articles of part two adopted on first reading. The Commission should give some thought to that aspect when it considered part two.

47. Mr. CRAWFORD (Special Rapporteur) said he took it that Mr. Yamada's view was that article 28 should cover both direction and coercion, but that it should be limited to conduct which, if carried out by the directing or coercing State, would be wrongful.

48. Mr. YAMADA said that was exactly what he had had in mind.

49. Mr. PAMBOU-TCHIVOUNDA said that Mr. Yamada seemed to believe it would not be an easy matter to determine to what extent State A's coercing of State B into committing an internationally wrongful act was a decisive factor in the commission of that act. It might be wondered whether the coercion was the cause of the commission of the internationally wrongful act or whether the coercion was in itself the manifestation of an internationally wrongful act. In other words, was the coercing State responsible because it was bound by the obligation whose breach would be attributed to the State being coerced or was the coercing State responsible merely because it had coerced another State into committing the internationally wrongful act, thereby violating a general obligation.

50. Mr. ECONOMIDES said that Mr. Pambou-Tchivounda had raised the very pertinent question of dual responsibility. The question was whether responsibility arose for the coercing State both because it was using an unacceptable practice, coercion, giving rise to an independent responsibility, and because it had coerced another State into perpetrating an internationally wrongful act. The reply depended essentially on the primary rule involved and the Commission could not give it. The Commission should consider the responsibility involved in the commission by the coerced State of the internationally wrongful act, rather than a separate responsibility involving the use of coercion. The latter question should be resolved by the primary rules.

51. Mr. CRAWFORD (Special Rapporteur) said that national law analogies had been completely excluded from articles 27 and 28, especially where accessory responsibility was concerned. The basic assumption behind the draft articles was that each State was responsible for its own conduct, except in extreme circumstances which were dealt with in chapter V. Consequently,

the fact that State B had been directed to commit an internationally wrongful act by State A did not excuse State B from responsibility for the commission of that act. The only exception to that rule occurred when the independence of State B was overwhelmed by an act of coercion. He did not see why the term "coercion" should not be defined, if the Commission so wished. There was no point in the Commission formulating a primary rule and presenting it as a secondary rule just because it declined to define it. Article 28 provided for cases in which the independence of State B had been overwhelmed and the only State which could be held responsible for the commission of the internationally wrongful act was State A. He agreed that that distinction did not correspond to the distinction between accessory and principal in national legal systems. Once again, the basic assumption of the draft articles was that every State, while it remained a State, was responsible for its own action, except in the circumstances covered in chapter V. The reason for article 28 bis was to make it clear that other rules, especially primary rules, might impose broader forms of responsibility.

52. Mr. Sreenivasa RAO said that the Commission must not yield to the temptation to return to primary rules when dealing with secondary rules, as difficult as that might be. The Commission must be aware of the difficulties raised by the draft articles. For example, should economic coercion be understood as coercion within the meaning of Article 2, paragraph 4, of the Charter of the United Nations or as any other prohibited conduct? If a concept of differently injured States could be envisaged under the draft articles, why not a concept of differently injuring States? If the goal was to limit the conditions under which a State could avoid responsibility for the breach of an obligation, could other means not be envisaged to ensure that differently injuring States did not avoid responsibility in the name of lack of applicability or uniformity of standards of national law imported into the international realm? Those were important and complex questions which the Commission should consider most thoroughly and carefully.

*The meeting rose at 1 p.m.*

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## 2577th MEETING

*Wednesday, 26 May 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 27 AND 28 (*continued*)

1. Mr. ECONOMIDES said that the draft articles in chapter IV (Implication of a State in the internationally wrongful act of another State) would rarely be applied in practice, but they did have a place in a text codifying the law of international responsibility. Article 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act) was the more important of the two articles adopted on first reading.

2. By addressing in his proposed new article 27 (Assistance or direction to another State to commit an internationally wrongful act), contained in his second report on State responsibility (A/CN.4/498 and Add.14), two distinct cases, covered by articles 27 and 28 (Responsibility of a State for an internationally wrongful act of another State), paragraph 1, the Special Rapporteur had complicated rather than simplified things. The two cases were very different. Article 27, as adopted on first reading, dealt with two separate internationally wrongful acts which were both punishable: the act of a State which by aid or assistance facilitated the commission of an internationally wrongful act by another State, and the unlawful act of that other State, which constituted the principal breach. In contrast, article 28, paragraph 1, dealt with a single internationally wrongful act which was attributable to a State exercising the power of direction or control of another State. The raison d'être of responsibility differed in the two cases. In the first case (art. 27) it was intentional participation in the commission of a wrongful act, i.e. complicity; in the second case (art. 28, para. 1) it was the incapacity of the subordinate State to act freely at the international level. The criterion was therefore absolute: a State exercising direction or control was automatically responsible even if it was unaware of the commission of the wrongful act by the subordinate State. Thus, the Special Rapporteur's first condition (proposed art. 27, subpara. (*a*)) was fine for article 27 adopted on first reading but not for article 28, paragraph 1. The two cases should be addressed differently in separate articles.

3. Turning to other questions prompted by the Special Rapporteur's proposals for article 27, he said that the new

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

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

[3] Ibid.

form of language gave the erroneous impression that the aiding or assisting State itself participated in the commission of the wrongful act as co-author. Insertion of the phrase "by the latter", present in the existing article, would solve that problem. The Commission should also make it clear that the aiding or assisting State itself committed an independent internationally wrongful act and not rely merely on the words "is internationally responsible", which again worked for the second but not for the first case.

4. Article 27 adopted on first reading said that the aid or assistance was wrongful "even if, taken alone, it would not constitute the breach of an international obligation". That very useful clarification did not appear in the proposed new article 27. Furthermore, new article 27, subparagraph (*a*), or more specifically the words "of the circumstances", went too far. The element of intent was essential in the first case (the aiding or assisting State) but not relevant to the second case (the subordinate State). How was it possible to speak in the first case, before the commission of the wrongful act, of the "circumstances of the internationally wrongful act" as if that act had already been committed? The Commission should be less demanding and replace the words "of the circumstances" by something more general or simply delete them.

5. The second condition, namely new article 27, subparagraph (*b*), gave rise to more problems: the act would be internationally unlawful if committed "by that State", i.e. by the aiding or assisting State. That provision considerably reduced, without good reason, the scope of application of article 27. It did not exclude bilateral obligations alone. It also excluded multilateral obligations by which the aiding or assisting State was not bound. The condition was not necessary, since it was most unlikely that a State would knowingly and deliberately help another State to breach its bilateral or multilateral treaty obligations. Neither the commentary to the draft articles adopted on first reading[4] nor the second report of the Special Rapporteur contained any examples drawn from international practice.

6. Accordingly, since the issue was almost devoid of practical interest and since the Commission's solution would not trouble anyone, it would be wiser to opt for a broad rule offering as many guarantees as possible rather than for a narrow rule leaving many lacunae. From the legal standpoint, it would be difficult to defend the notion that a State could with impunity help another State to breach its international obligations, even very minor ones, when it was perfectly aware that the act in question was wrongful.

7. The Commission should consider whether incitement as such should also be treated on an equal footing with aid and assistance for the most serious international crimes, i.e. the ones covered by article 19 (International crimes and international delicts). In the last sentence of paragraph (13) of its commentary to article 27, the Commission offered a timid glimpse of such a possibility, which should be further explored.

8. Article 28, paragraph 1, adopted on first reading did not give rise to any particular problems: the international responsibility of a subordinate State whose international capacity was non-existent or limited should also be non-existent or limited, and the responsibility should rest primarily with the dominant State, regardless of whether it was aware of the commission of the wrongful act by the subordinate State. On a drafting point, he preferred "power of direction or control" to "power of direction and control", although he recognized that "control" was the stronger term.

9. The proposed new article 28 (Responsibility of a State for coercion of another State) did not give rise to any particular problems either. He could accept the existing version, namely article 28, paragraph 2, or indeed the new formulation, except for the phrase "but for the coercion", which was superfluous and confused the issue. He understood the logic of the Special Rapporteur's approach to new article 28 bis (Effect of this chapter), subparagraph (*a*), but it was somewhat difficult to deal on an equal footing with the case of the aided or assisted State and the case of the subordinate State or State acting under coercion. Article 28 bis, subparagraph (*b*), was difficult to grasp and it should be clarified.

10. Mr. CRAWFORD (Special Rapporteur) said that he was grateful for Mr. Economides' drafting suggestions, but there was an issue of principle concerning article 27. He had no difficulty with the idea of treating article 27, as adopted on first reading, separately from article 28, paragraph 1, but it was not right to assimilate coercion to direction. The starting point of the Commission's approach was that it was dealing only with the responsibility of States in the international sense and not with the responsibility of subordinated entities, which were not States, whatever they might be called. The relations within a formal dependency situation gave rise to wholly new problems, which could largely be dealt with under chapter II (The "act of the State" under international law). One State might give directions to another State, but if the latter State would be acting contrary to its international obligations by complying it should not comply and was not excused if it did comply. In the case of coercion, however, it was excused; hence the need for "but for the coercion".

11. Opinions might differ as to whether a State should be held responsible for knowingly assisting another State to breach an international obligation by which the first State was not bound. Perhaps, in fact, the Commission wished to go beyond the rules of privity or *pacta tertiis nec nocent nec prosunt*. If so, it would be creating new primary rules. Article 27 in its broad form, as adopted on first reading, should not be in the draft articles since it was plainly a primary rule.

12. However, a State should not be able, by inducing or assisting another State, to achieve a result which it could not achieve itself. That point fell properly within the framework of the draft articles. It was the reason for the limitation and for the saving clause, because there might well be other primary rules—in the Convention on the Prevention and Punishment of the Crime of Genocide for example—having a broader scope. Accordingly, the point of his proposal was that a State was entitled to help

[4] See 2576th meeting, footnote 6.

another State to do something which it would be lawful for that State to do itself. The position of the latter State was a completely different question. For instance, if two States agreed between themselves not to export supercomputers to a third State, when they were not acting under multilateral sanctions and the third State was not a legitimate target of collective countermeasures, the third State, in the Economides view, would be committing an internationally wrongful act by importing supercomputers from one of those States if it knew of the bilateral agreement. That was an intolerable situation and could not possibly be right. It made the purpose of bilateral action inimical to a third State binding on that third State. As he had said, if it took that route, the Commission would be enacting new primary rules.

13. Mr. DUGARD, responding to the comments made by Mr. Economides on the proposed new article 27, subparagraph (*a*), said that the State must indeed have knowledge not merely of the circumstances of the act but also of its wrongfulness. The Commission's difficulty was that it was dealing in article 27 with both criminal and delictual responsibility without having decided whether to retain article 19. In the case of criminal responsibility there must be full knowledge of the wrongfulness of the act.

14. Mr. CRAWFORD (Special Rapporteur) said the requirement that the assisting State should be bound by the norm coped with the problem of multilateral obligations, including with respect to crimes. In the event of crimes, all States were bound by the rules relating to crimes, by *jus cogens*. But why should a State be required to have knowledge of wrongfulness when it was acting as an accessory but not be so required when acting by itself? That was why he had included "of the circumstances". If a State had to be bound by the primary obligation in question, all that was needed was the same conditions as when it was acting by itself, namely, that it knew what it was doing. Since ignorance of the law was not an excuse when a State acted by itself, why should it be an excuse in the case of assistance to another State? If the Commission included the proposed limitation, which seemed right in principle and for which he would fight, on the ground that if the article was excluded then the chapter had to be deleted, the draft would remain within the framework of the secondary rules, without prejudice to the existence of broader primary rules, and would cope with the vast problem of criminal intent. His proposal dealt with the problems of bilateral and multilateral treaties and obligations *erga omnes*.

15. It was true that some legal systems adopted a broader view of the law on inducing bilaterally unlawful acts, but most such systems also included substantive defences, the defence of justification, for example, thus transparently shifting the matter to the sphere of the primary norms. The Commission could not do that. The whole point was to keep chapter IV within the framework of a set of secondary rules. He therefore disagreed entirely with Mr. Dugard, whose comment had quite unnecessarily introduced the spectre of the intention of States with respect to the acts in question.

16. Mr. ECONOMIDES said that, according to new article 27, subparagraph (*a*), intent was an essential condition for the application of State responsibility, i.e. an aiding or assisting State must be fully aware of the wrongfulness of the act. In the example of the supercomputer, the establishment of the responsibility of the assisting State required the conclusion that it had been fully aware of the act's wrongfulness and had accepted it. That situation was virtually impossible in practice as far as bilateral obligations were concerned. The Commission was thus giving enormous importance to a question which was not worth examining.

17. Mr. CRAWFORD (Special Rapporteur) said that he would give a specific example of what he meant. On the assumption that an agreement among the States members of OPEC was a legally binding treaty prohibiting them from exporting oil below a certain minimum price—and all the States in the world were perfectly aware of that agreement—then in the Economides view it was an unlawful act for a non-member of OPEC to buy oil below that price; OPEC thus became a worldwide-ratified cartel under chapter IV. That was an intolerable situation.

18. Mr. Sreenivasa RAO said that he was grateful for the Special Rapporteur's clarification, but did not think that the OPEC example was entirely apposite. He also wondered whether it was really possible to apply the concept of intent, generally ascribed to individuals in national law, to States in the framework of international law. Again, perhaps the concept of knowledge of the circumstances was being taken too far. The best course might be to follow the approach used in the existing article and leave a given case open to interpretation as to what exactly was involved.

19. Mr. LUKASHUK said that he fully supported the basic points made by Mr. Economides. Article 27 deserved special attention because internationally wrongful acts were increasingly being committed by States acting together. In that light, the proposed new article 27 was less successful than the version adopted on first reading, especially as it combined in a single article two quite different cases. Was it really possible to treat together the case of assistance to a State and the case of the exercise of direction or control by a State? The latter case was an example of coercion rather than of assistance. Consequently, he could not understand why the exercise of direction or control should be subject to the requirements of subparagraphs (*a*) and (*b*).

20. A State was responsible only if it exercised real and not merely nominal direction or control. If it really exercised such direction or control it could not fail to be aware of the circumstances. Thus, the new article 27, subparagraph (*a*), was illogical. Furthermore, the State exercising direction or control would be an accomplice in the wrongful act even if its influence was not itself wrongful. Therefore the responsibility of the directing or controlling State should be addressed in a separate article. Providing assistance and exercising direction or control were quite different matters. Article 28 as adopted on first reading should be retained.

21. Article 27 had another substantive shortcoming. It dealt with assistance by one State to another, but experience showed that States often committed a wrongful act jointly, with each bearing equal responsibility. In such cases the requirements of article 27 on awareness were

irrelevant. Of course, the question of joint conduct had not escaped the Special Rapporteur's attention. He attributed accessory responsibility to such conduct in paragraph 159, subparagraph (*a*), of his second report. In paragraph 211 he also touched on the problem of conspiracy, but concluded that the notion was not needed in chapter IV. He nevertheless acknowledged in the same paragraph that issues might arise "in terms of reparation for conduct caused jointly by two or more States".

22. In an attempt to justify his position, the Special Rapporteur stated that joint conduct of States usually took place within the framework of an international organization and that the issue should be resolved in the articles on the responsibility of such organizations. That was true, and questions of the responsibility of members of an organization for its wrongful acts would also be resolved there, as would questions of the responsibility of an organization for the acts of its members. However, the draft articles should address as a separate issue the responsibility of States for the joint commission of wrongful acts. It was not of particular significance to the Commission whether such acts were committed under the auspices of an organization. The situation was such a topical one that the Commission could not defer a decision until it had dealt with the articles on the responsibility of international organizations. There should be a separate article on the joint conduct of States.

23. Mr. ADDO said Mr. Economides had stated that intention was a condition sine qua non: in other words, that there must be knowledge on the part of the State in order for responsibility for an internationally wrongful act to be established. The problem was how, and by whom, that intention or knowledge was to be established. Would it be established by an independent adjudicatory or investigatory body, or would it be a presumption rebuttable by the affected State? Intention seemed to him to be a notion that properly belonged to criminal law and municipal systems. He would welcome some clarification of that issue by Mr. Economides or by the Special Rapporteur.

24. Mr. ECONOMIDES said that article 27 did indeed contain the condition that there must be intention, or more accurately knowledge, on the part of the State. However, the question of how, and by whom, the existence of that condition was to be established belonged to the realm of practice. It would be resolved by the organs—perhaps States in their negotiations or, failing that, the judge or arbitrator—competent in a given case.

25. Mr. SIMMA, referring to the OPEC example cited by the Special Rapporteur, said his own reading of new article 27 was that subparagraph (*b*) excluded from its scope strictly bilateral treaty obligations in which State C was not bound by any rule contained in a treaty concluded between States A and B. On the other hand, as it currently stood, article 27 covered not only the case of obligations *erga omnes* but also rules of general international law to which both States were subject, such as rules on diplomatic relations, whether conventional or customary. The wording suggested by the Special Rapporteur thus took care of that problem.

26. The other problem, the subjective element of intention, was incorporated into what was clearly a secondary rule—in a departure from the Commission's usual practice that he heartily welcomed. The concomitant neglect of the objective element of the materiality or essentiality of the aid or assistance was an issue to which he intended to revert later in the debate.

27. Mr. BROWNLIE said he supported the general purpose of new article 27, but felt that subparagraph (*a*) was pleonastic, as the elements of knowledge were already built into the conditions of aiding, assisting, directing and controlling. It was also likely to cause misunderstanding, as it might actually set conditions of liability, and set them at rather a high level. In his view, the article would be much improved by deleting subparagraph (*a*), with subparagraph (*b*) retained as the sole condition.

28. Mr. KABATSI said his understanding of new article 27 as proposed by the Special Rapporteur was that treaty arrangements among a set of States limited to the interests of those States did not bind States not parties to the treaty in question. Those arrangements might be of little interest to the aiding or assisting State, and might even run counter to its interests. When a State gave aid or assistance to another State resulting in the commission of a wrongful act, that wrongful act must be held wrongful in respect of the aiding or assisting State if its responsibility was to be triggered.

29. Mr. CRAWFORD (Special Rapporteur) said he conceded that there were three situations: aid and assistance, direction and control, and coercion, and that the conditions for each needed to be considered separately. He agreed with the views expressed by Mr. Brownlie and Mr. Simma, to the extent that the level at which one set aid and assistance depended on whether subparagraph (*a*) was retained. If subparagraph (*a*) were deleted, aid and assistance would have to be further particularized along the lines hinted at by Mr. Simma. The reason why he had proposed that the wording should merely be "aids or assists" was that the requirements contained in subparagraph (*a*) alleviated any difficulties regarding the threshold.

30. On the point raised by Mr. Lukashuk, he agreed that there might be a need for an article making it clear in chapter II that where more than one State engaged in the conduct, it was attributable to each of them. Chapter IV was not concerned with joint conduct in the proper sense of the word—which would include a situation in which two States acted through a joint organ (other than an international organization). Where a joint organ acted on behalf of several States—for example, in launching a satellite—that constituted conduct of each of those States, attributable to them under chapter II. Chapter IV was concerned with a different situation in which a State did not itself carry out the conduct but assisted, directed or coerced the conduct, which nevertheless remained the conduct of another State. There was absolutely no intention to exclude the case of joint action. The fact that any joint action might in some sense be coordinated by an international organization did not mean that the State was not itself carrying out the conduct. If it was the State's agent that engaged in the act, the State was responsible for the acts of its agent or organ, even though there was some umbrella coordinating role of an international organization. That situation was not excluded by the proposed subparagraph (*a*). The problems of joint conduct should thus

be seen within the framework of chapter II. The Drafting Committee should consider whether some clarification of that point was required in chapter II itself, or whether it could be adequately dealt with in a commentary forming part of the *chapeau* to chapter II.

31. Mr. ROSENSTOCK said that the contributions by previous speakers had raised the fundamental question whether articles 27 and 28 were really needed in an edifice constructed on secondary rules and designed to serve as secondary rules. Undeniably, the Special Rapporteur's proposals for new articles 27, 28, 28 bis and the title of chapter IV were a vast improvement on the text adopted on first reading, with its overbroad scope and its heedless and shameless crossing of the line between primary and secondary rules. The restriction of article 27 to obligations binding upon the assisting State was particularly helpful in ensuring that the Commission did not stray too far and too boldly into the forest of primary rules. However, he still inclined to the view that few if any situations were remotely likely to occur where those articles, as corrected by the Special Rapporteur, would be necessary to establish the result the Special Rapporteur produced. He would be pleased to hear the Special Rapporteur furnish examples of what the Commission had achieved by including that material.

32. A possible exception was a hypothetical situation in which there was a strong case for some coercion having taken place but the coerced State was not legally able to absolve itself by claiming force majeure: where, in short, the coerced State could have resisted, albeit at some considerable cost. One was too close to "incitement" for so loose a rule. If the phrase "but for" was intended to limit the article to circumstances covered by chapter V (Circumstances precluding wrongfulness), that fact had not been made sufficiently clear to him. Perhaps it could be stressed in the commentary.

33. The issue was not whether coercion was legal or otherwise, but whether the Commission was dealing with secondary rules or venting its outrage at coercion—a matter for primary rules. The best way to conceive of the rules contained in the chapter was by way of a process of subtle or indirect attribution. To underscore that point, it might be worth adding the words "acting alone" at the end of proposed new article 27, subparagraph (*b*). Perhaps that was merely a question of drafting.

34. It followed that he was in complete agreement with Mr. Yamada (2576th meeting) and the Special Rapporteur concerning interference with contractual rights, for the reasons given by the latter.

35. Mr. Sreenivasa RAO sought clarification from Mr. Rosenstock concerning a hypothetical situation in which a State might have resisted coercion.

36. Mr. ROSENSTOCK said he had had in mind a situation in which a State was under perhaps considerable pressure to do something, but not to the point at which it could claim force majeure. In such a situation, he was not sure the Commission would remain in the realm of secondary rules if it tried to pin responsibility on the coercing State—unless it wished to adopt a primary rule condemning coercion, a course of action which would not be within its mandate. His conclusion could be built on the words "but for", if stated sufficiently clearly on the record and in the commentary.

37. Mr. SIMMA asked whether the Special Rapporteur could confirm that, in the example cited by Mr. Yamada (ibid.) of a treaty providing for the delivery of a commodity, the threshold he had established for coercion to be operative would not be reached.

38. Mr. CRAWFORD (Special Rapporteur) confirmed that Mr. Simma was correct in his assumption. The Commission must understand that it would get into deep waters if it followed the path proposed by Mr. Economides. It would then become embroiled in the question of what constituted unlawful coercion, whereupon the draft articles would become completely unmanageable. He entirely accepted the point made by Mr. Economides and Mr. Yamada (ibid.): the Commission might want to consider direction and control separately from assistance. But the virtue of adopting the approach he was proposing was that, by so doing, the Commission could maintain a general notion of coercion that did not require it to make extremely controversial judgements about the nature and legality of coercion. To tackle those issues would spell the end of any hopes of concluding consideration of the topic during the current quinquennium. The Commission was not seeking to enact the whole of the law, but merely secondary rules, and it was concerned only with coercion that overrode the will of the acting State. In his view, the Commission was in effect dealing only with situations of force majeure. The situation with regard to direction was quite different: there, the State gave direction and it was obeyed, but the acting State might be perfectly happy to have received the direction and to cooperate therewith, and was therefore not coerced.

39. Mr. YAMADA, clarifying his statement (ibid.), said he had been asking, not whether a certain type of coercion was lawful or unlawful, but whether, if the coercing State was not under an obligation into which the coerced State had entered with other States, it should be held responsible for the breach of the obligation. He had cited the very revealing example of an Asian country with natural gas deposits which were developed and exploited by a European company. The product passed through Japan, however, as the liquefaction and transport of the natural gas were done by a Japanese company. Japan thus had the means to coerce, or influence, the other Asian country to break the export contract. If that country did so, would Japan be held responsible under the proposed new article 28?

40. Mr. DUGARD requested clarification from Mr. Rosenstock on what he himself found a radical but very attractive proposal. Was he suggesting that the Commission should dispense with chapter IV altogether and leave matters to attribution and wrongfulness? Much of the debate so far had centred on primary and secondary rules, but in taking on coercion, the Commission was entering dangerous waters. It was moving towards a definition of coercion which would be very similar to the General Assembly's Definition of Aggression.[5] The proposal by Mr. Rosenstock would allow the "purity" of the draft articles as an exercise in secondary rules to be retained.

[5] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

41. Mr. ROSENSTOCK said that Mr. Dugard had correctly understood his proposal.

42. Mr. Sreenivasa RAO said the point that needed to be stressed after hearing the Special Rapporteur explain certain nuances about handling the issue of coercion in chapter IV was that doing away with coercion altogether would mean doing away with the responsibility of the coercing State, and only the responsibility of the State which had breached the obligation would come into play. There were limits within which that could be done, and the Special Rapporteur was right to point them out.

43. Mr. LUKASHUK said that the Special Rapporteur's response to the problem of coercion was quite correct. It was not for the Commission to give a definition of coercion. A precedent already existed in the 1969 Vienna Convention, which mentioned coercion without elaborating on the concept. The Commission should go along with the position advocated by the Special Rapporteur.

44. Mr. PAMBOU-TCHIVOUNDA said he was grateful to the Special Rapporteur for fighting, not to jettison chapter IV, but to clarify its contents. The current discussion, particularly the statements by Mr. Lukashuk and Mr. Economides, had revealed a concern to avoid contributing to confusion. The only reproach that could be levelled at the Special Rapporteur at the present stage was that new article 27 covered two situations of very differing scope: aid/assistance and direction/control. Those two situations should be clarified, perhaps by reverting to a treatment similar to that used on first reading. What was meant by aid or assistance, precisely? New article 27, subparagraph (*a*), involved a problem, namely "knowledge of the circumstances". Did the phrase "if it is established", in article 27, as adopted on first reading, mean the same thing? If the Commission was in agreement, the work could usefully be done by the Drafting Committee. New article 28 raised similar problems, but even more acutely. What exactly was involved when a State, again "with knowledge of the circumstances", coerced another State? On that problem, however, he thought the Drafting Committee could be of lesser assistance without some guidance from the Special Rapporteur.

45. Mr. SIMMA, referring to Mr. Rosenstock's comments, said there were two choices before the Commission. The first was not to refer in the draft articles to the role or implication of third States in the commission of internationally wrongful acts. If cases arose in which a third State was actually involved, the role of that State would have to be viewed through the overall prism of State responsibility. That approach would be fine with him. Another choice, which Mr. Rosenstock appeared to favour, was to subsume the cases under discussion within attribution. He could go along with that approach as well.

46. The cases in point could be placed on a sliding scale, from aid/assistance to direction/control to coercion. A former Special Rapporteur, Mr. Roberto Ago, had decided to have aid/assistance on the one hand and direction/control and coercion on the other. He himself preferred the previous direction/control solution, because aid/assistance involved an actual wrongdoer who, though assisted, performed the act with full intent. In fact, as the Special Rapporteur had pointed out, direction could be entirely welcome to such a wrongdoer. But that brought up the issue of control, and there was only a difference of degree between control and coercion. Accordingly, the last word had not yet been said about where the various cases were to be placed in the scale.

47. Mr. KUSUMA-ATMADJA said that great care must be exercised when introducing concepts that were valid and useful in internal law into the context of international law, where they could sometimes be dangerous. Intent was one such concept. If wrongful acts were linked to crime, a thicket of problems would rise up involving a distinction between crime and delict. The Commission must not head in that direction.

48. As to Mr. Yamada's remarks, it was true that a joint authority had been set up by one country and its closest neighbour to explore and exploit oil and natural gas. All decisions on those activities were subject to the approval of an executive board consisting of the ministers of the two countries concerned. OPEC was generally considered to be a cartel, in that its members were obliged to abide by certain production limits. To go beyond the production limits was wrong in the eyes of OPEC. But did the obligation extend to prices as well? And at what point were exports affected?

49. The CHAIRMAN extended a warm welcome to the new member of the Commission, Mr. Gaja.

50. Mr. GAJA expressed his thanks to the Chairman and said he would first like to make a general remark. While he recognized the need to revise part one of the draft in the light of developments in practice, of the comments by Governments and further consideration of the subject, several provisions adopted on first reading had been found by ICJ to correspond to rules of general international law. The most recent instance was the advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. The Court was now discussing continuing and composite wrongful acts with reference to the Commission's work in the 1970s under the Special Rapporteur, Mr. Ago, so it was disconcerting to see that the Commission was at the same time engaged in redrafting the relevant articles. Those remarks should be taken, not as criticism, but as a note of caution about altering some provisions that had become an authoritative restatement of the law.

51. He shared some of the Special Rapporteur's misgivings about article 22 (Exhaustion of local remedies). As adopted on first reading, the article represented an attempt to combine two approaches. According to the first approach, the use of local remedies provided the wrongdoing State with the opportunity to remedy what appeared to be a breach of an international obligation. According to the second, shared by the majority of members of the Commission, exhaustion of local remedies was required in all cases and was a burden imposed on the private party before a claim could be preferred on its behalf. If the exhaustion of local remedies was viewed as affecting the admissibility of a claim, the requirement would naturally be viewed as procedural. However, before remedies were

exhausted, the legal consequences that attached to wrongful acts did not necessarily ensue. A State might use its good offices with a view to ensuring that a natural or legal person enjoyed certain treatment even before remedies were exhausted. In the case of a claim arising from the breach of an obligation, however, the exhaustion requirement would have to be complied with. Moreover, the fact that the requirement could be waived was not necessarily decisive. A waiver might follow from an agreement between the States concerned or constitute a unilateral act, altering the circumstances of a case but leaving general international law unaffected.

52. While sympathizing with the view that exhaustion of local remedies affected the admissibility of a claim, he felt that further thought should be given to the issue of whether admissibility of claims had a place in part one.

53. The possibility of a State adopting equivalent conduct—Ago's idea—depended entirely on the content of the primary rule. The details to be inferred from such rules should perhaps be addressed in the commentary rather than in the article itself.

54. As to new article 27, the wording proposed by the Special Rapporteur rightly assumed that the aiding or assisting State should also be under an obligation not to commit the internationally wrongful act. This does not necessarily occur in the case of breach of a multilateral treaty. For example, a State party to a multilateral treaty on extradition was under an obligation to extradite an offender when requested to do so by another State party. Another State party would not be in breach of the treaty unless also requested to extradite. If the offender was expelled by the requested State to another State party to the same treaty, there was arguably no obligation for the latter State to return the offender. In the case of a human rights treaty, however, all States parties were under an obligation to prevent a violation of human rights in any specific circumstances covered by the treaty. There was an *erga omnes* obligation. Aiding or assisting would thus be relevant in the second case but not in the first. Article 27 could perhaps be worded in such a way as to clarify the matter.

55. The existence of an obligation not to assist or aid a wrongdoing State appeared to depend on a wide interpretation of primary rules, as illustrated by the hypothetical case cited in paragraph 181 of the Special Rapporteur's second report of a party to a nuclear non-proliferation treaty assisting another party in acquiring weapons from a third State in breach of the treaty. While he had nothing against the ostensible focus on primary rules in part one, he wondered whether it was wise to state a principle of such wide scope as that contained in article 27, which seemed to add a rule prohibiting aid or assistance to all primary rules.

56. According to note 2 to the proposed new article 27, the assisted State should actually have committed the wrongful act in order for responsibility to ensue. The primary rule would arguably prove a more effective deterrent if it prohibited the rendering of aid or assistance, irrespective of the consequences.

57. Mr. CRAWFORD (Special Rapporteur) said that Mr. Gaja had established a case for the retention of article 22, proposed as new article 26 bis, in chapter III (Breach of an international obligation). Other members felt strongly that it belonged elsewhere and the question was still open. His own position was that it was wrong to treat the issue of local remedies as though it involved a choice between two irreconcilable views—one "substantivist" and the other "proceduralist".

58. With regard to new article 27, subparagraph (*b*), it had been asked whether the aiding or assisting State would be committing a wrongful act in extending the aid or assistance or whether it would have committed a wrongful act if it had committed the same act as the assisted State. The case of an extradition treaty was not perhaps a good example, for if State A instead of performing its obligation under the treaty deported the accused to State B, State B was not assisted in the unlawful act. It merely complied with an obligation to readmit a national. But if State B, knowing that the accused was being sought by State C, successfully urged State A to return him instead of complying with the extradition treaty, State B, if bound by the extradition obligation, was guilty of an unlawful act. A separate extradition request to State B would not be required under the circumstances.

59. Mr. Simma had mentioned three options: deletion, extended attribution and full-scale implication. A fourth option was a code of primary rules. His present wording of the proposed article implied extended attribution in the sense that the assisting or directing State was required to assume responsibility for the conduct that it had knowingly assisted or directed.

60. Mr. HE said that, although there was a case for deleting chapter IV, he supported its retention. The new title "Responsibility of a State for the acts of another State" reflected the content of the chapter more accurately.

61. With regard to new article 27, a number of factors had to be taken into account in determining whether aid or assistance was rendered for the commission of a wrongful act. Interference with contractual rights had been cited to illustrate that the inclusion of article 27 was justified where one State was implicated in the commission of a wrongful act by another. Two conditions were mentioned in the article: that the State rendering the aid or assistance must do so with knowledge of the circumstances of the internationally wrongful act and that the act must be internationally wrongful for both the assisting and the assisted State. Only the second condition was new. The first had been contained in the article adopted on first reading.

62. He doubted whether proposed new article 27 covered the situation previously dealt with under article 28, paragraph 1, as adopted on first reading, i.e. where one State directed and controlled another to breach its international obligations. He would prefer to retain article 28, paragraph 1, with a clarification in the commentary. The terms "direction and control" were more closely related to "coercion". One possible approach would be to draft three separate articles, the first dealing with aid and assistance, the second with direction and control, and the third with

coercion. An alternative approach would be to revert to the article as adopted on first reading: aid and assistance would be covered by article 27, with the addition of the two provisos, direction and control by article 28, paragraph 1, with clarifications in the commentary, and coercion by article 28, paragraph 2. He was in favour of retaining a separate article 28 bis dealing with the effects of chapter IV as a whole.

63. Some important concepts and possibilities should also be envisaged in chapter IV, as enumerated in paragraphs 159, 161 and 211 of the second report. For example, in the case of incitement, a State would be implicated in the act concerned if it materially assisted a State in committing a wrongful act or directed or coerced it to do so. In the case of conspiracy, where a conspiring State aided or assisted another, the planning might itself constitute such assistance. The concept of joint or collective action or conduct raised questions about the extent to which States were responsible for the acts of the organization concerned or of individual member States, and about reparations for damages caused by the conduct of an individual State or two or more States. Responsibility for such acts should not be overlooked in the draft articles.

64. Mr. CRAWFORD (Special Rapporteur) said he agreed entirely that direction and control were more closely related to coercion than to aid and assistance. He had placed them in article 27 because they would be subject to the same regime as aid and assistance. He had no objection to the idea of three separate articles. There was an important distinction between a case in which a State acted voluntarily, even under direction and control, and a case in which it was actually coerced. The assumption was that nobody should be allowed knowingly to coerce another State, to commit a wrongful act, even if the coercion, considered alone, would not be unlawful.

65. He had an open mind on the question of whether the condition applicable in article 27 should also apply to coercion. If, for example, State A took lawful and proportionate countermeasures against State B, the aim of which was to procure cessation of a wrongful act, it in fact engaged in coercive action. If State A also knew that, in doing so, it was inevitable that State B would as a consequence of the countermeasures breach a bilateral obligation to State C, was State A responsible to State C for that situation? Obviously, if State A was bound by the same rule, it would incur responsibility. If not, the situation was unclear. Mr. Yamada argued that it would be difficult to sustain the breadth of article 28 with respect to coercion. One possible solution was to treat the act of coercion as unlawful and another to apply the terms of new article 27, subparagraph (*b*), to coercion: although the coercion as such need not be unlawful, the conduct would be unlawful if committed by the coercing State.

*The meeting rose at 1 p.m.*

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# 2578th MEETING

*Friday, 28 May 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Yamada.

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

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 27 AND 28 (*concluded*)

1. Mr. HAFNER said that the Special Rapporteur had been correct to take account of the relativity of international law in drafting new articles 27 (Assistance or direction to another State to commit an internationally wrongful act) and 28 (Responsibility of a State for coercion of another State), proposed in his second report on State responsibility (A/CN.4/498 and Add.1-4). State responsibility was rightfully dealt with from a private law rather than a criminal law point of view. The public law aspects of international law covered only very exceptional situations, whereas the Commission was dealing with the normal application of international law in daily relations.

2. With regard to article 27, he fully subscribed to the two conditions required in order to entail a State's responsibility. To some extent, the condition established in proposed new article 27, subparagraph (*a*), included knowledge of the wrongfulness of the act, but such knowledge must be separated from the intention itself. Emphasizing the need for knowledge of wrongfulness did not mean that the notion of intention was automatically being reintroduced. He also shared the Special Rapporteur's opinion that incitement to commit a wrongful act should be excluded. Mr. Rosenstock had pointed out that all those problems could be dealt with through the question of attributability. It would be interesting, in that connection, to compare article 27 with article 8 (Attribution to the State of the conduct of persons acting in fact on

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

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

[3] Ibid.

behalf of the State) as adopted on first reading. It might be difficult in practice to determine whether a situation fell within the purview of article 8 or article 27. Nevertheless, that should not prevent the Commission from drafting article 27, as the consequences were quite different, depending in particular on whether the conditions spelled out in subparagraphs (*a*) and (*b*) were met. Generally speaking, he was fully in agreement with the new wording of article 27 as proposed by the Special Rapporteur in his second report.

3. As to article 28, the question was whether the term coercion included only unlawful coercion and whether the conditions provided for in article 27, subparagraph (*b*), should also apply to article 28. He was not certain that all reprisals and countermeasures could be included in the meaning of the term coercion. The principle that countermeasures or reprisals must not interfere with the rights of third States must also be taken into account. The Special Rapporteur appeared to have drafted new article 28 with that in mind. According to the text, a third State would incur no risk at all, as the coercing State was responsible even if the coercion was not wrongful. The coercing State had to compensate the third State for the injury sustained. The coerced State might also become responsible if it could not claim force majeure.

4. On the other hand, if article 28 were to include only unlawful coercion, the third State would risk not being compensated if the coercion was lawful and the coerced State could claim force majeure to escape responsibility. The third State would have to pay a price, in the interest, perhaps, of international law. It therefore seemed desirable to qualify the coercion as unlawful. The condition contained in new article 27, subparagraph (*b*), that "the act would be internationally wrongful if committed by that State", might also be included. Consequently, if that condition was met, the coercing State would certainly be aware of the possibility of a breach occurring and it should assume responsibility towards the third State even if the coercion was not wrongful.

5. For those reasons, he proposed that article 28 should specify that the responsibility of the coercing State was entailed only if the coercion was unlawful or if the act would be internationally wrongful if committed by that State. That wording would, on the one hand, respect the rule that reprisals must not interfere with the rights of third States and, on the other, avoid the situation of responsibility without wrongfulness.

6. Mr. Sreenivasa RAO requested clarification as to what Mr. Hafner had meant by the "relativity of international law" and by "third State". Did "third State" refer to the coercing State or to the State affected by the act committed under coercion?

7. Mr. HAFNER said that article 28 involved three States: the coercing State (State A), the coerced State (State B) and the third State, or the State affected by the act in question.

8. The third State should certainly be protected, but not to the extent that the coercing State would have to pay compensation even if there had been no wrongfulness on its part, for instance if the coercion was lawful. However, the coercing State should assume responsibility if the act would be internationally wrongful if committed by it. Instances might arise where the third State was not protected, but that was justified by the fact that the coercing State could not be held responsible when the coercion was not unlawful and when it was not bound by the obligation breached.

9. International law was still based to a large extent on the relativity of rules, in the sense that those rules were applicable only to the States which were bound by them. He referred in that connection to the principle *pacta tertiis nec nocent nec prosunt*, embodied in article 34 of the 1969 Vienna Convention, which stated that a treaty did not create either obligations or rights for a third State without its consent. The public law principle according to which all States were bound by one and the same obligation did not yet fully apply in international law. Mr. Yamada (2576th meeting) had drawn a distinction between the criminal law and the civil law approach. The civil law or, more exactly, private law approach prevailed in the present case. That was what he understood by the relativity of international law.

10. Mr. Sreenivasa RAO said that, apart from the obligations arising out of bilateral or multilateral treaties, which bound only the parties to those treaties, there were obligations *erga omnes* and rules of *jus cogens* which applied to all, and that the question could not be approached only from the civil law point of view.

11. The Commission must not try to define coercion or to reconsider the primary rules relating to it. By qualifying coercion, as Mr. Hafner was proposing, the Commission might be entering a realm it did not wish to enter. He invited Mr. Hafner to approach the matter more flexibly.

12. Mr. PAMBOU-TCHIVOUNDA said he wondered why Mr. Hafner had said nothing about the rules of international law giving rise to obligations *erga omnes*.

13. Mr. CRAWFORD (Special Rapporteur) said that Mr. Hafner's reference to the international system being in line with a civil law paradigm had obviously related to issues of general theory. Although the draft articles at times gave the impression of relating to general theory, they aimed to establish a framework for the institution of State responsibility and they were, fortunately, consistent with a variety of theories, thereby facilitating the Commission's work.

14. Mr. Hafner's reflections on articles 27 and 28 were directly in line with the debate in the Commission where Mr. Yamada had said (ibid.) that the condition attached to article 27 would make it operate differently depending on whether the underlying obligation was bilateral or multilateral and equip it to meet different types of obligations. Thus, there was no need to establish dichotomies between delict and crime or between bilateral and multilateral obligations. It was possible to formulate the articles so as to cover different situations. Moreover, it would be very undesirable to retain chapter IV (Implication of a State in the internationally wrongful act of another State) and at the same time take an a priori decision to the effect that it applied only to a certain type of wrongdoing.

15. Mr. HAFNER said he had wished to point out that articles 27 and 28 adopted on first reading had not taken account of possibilities other than the criminal law or public law approach. Consequently, other aspects had to be covered and the reformulation of article 27 proposed by the Special Rapporteur, as well as his own proposal on

article 28, should take account of different kinds of rules, including *jus cogens* rules and obligations *erga omnes*.

16. Mr. ROSENSTOCK asked whether, to the extent that the Commission was going beyond the question of attribution, it was remaining within the realm of secondary rules.

17. Mr. KABATSI said that chapter IV was intended to establish a general rule prohibiting complicity or participation by one State in the internationally wrongful act of another State. That complicity or participation, though material, must not be of such gravity as to amount to the commission of the principal act or acts covered by the primary rules. The distinction was a very delicate one, since the occurrences sought to be covered by those provisions must be very unusual, if not rare. The assistance provided for in article 27 must be material, given with the intent of facilitating commission of the wrongful act by the other State, and the assisted State must actually commit the wrongful act. The situation was worse still when the wrongful act was committed under coercion, as envisaged in article 28. It was probable that in such a case the assisting or coercing State could be considered as the perpetrator, in which case its conduct would fall within the general primary rules. It was difficult, however, to eliminate the grey areas and perhaps more difficult still to convince anyone that such situations would always be covered by the primary rules. The Commission had chosen not to take that risk and appeared to have convinced the majority of States of the need to keep chapter IV, subject to a clearer drafting being provided. The Special Rapporteur had indeed proposed clearer new articles and had introduced certain limitations, particularly in article 27. He thus favoured the retention of chapter IV.

18. He also supported the shifting of article 28, paragraph 1, to article 27 and the new formulation for that article proposed by the Special Rapporteur. He was persuaded of the value of placing the provisions of former article 28, paragraph 3, in a separate new article 28 bis (Effect of this chapter), as they also covered situations referred to in article 27.

19. With regard to article 28, he endorsed Mr. Hafner's proposal to indicate explicitly that the coercion must be unlawful or that the act would be unlawful if committed by the coercing State. Why should State A, which lawfully coerced State B, for economic reasons, for example, be held responsible for a breach by State B of obligations under a treaty concluded with State C to which State A was not a party?

20. Lastly, with regard to the change in the title of chapter IV, he noted that the new title, "Responsibility of a State for the acts of another State", proposed by the Special Rapporteur was shorter and therefore more attractive, but that it was not as accurate as the title adopted on first reading. In his opinion, chapter IV was concerned more with complicity than with total responsibility, and it would therefore be preferable to retain the former title.

21. Mr. ADDO drew attention to paragraph (22) of the commentary to article 27,[4] which stated: "the Commission considers it useful to emphasize that aid or assistance rendered by a State to another State for the commission by the latter of an internationally wrongful act is itself an internationally wrongful act". In his opinion, that meant that the aid or assistance rendered to a State itself constituted an independent internationally wrongful act and did not create a sort of co-responsibility nor a sharing of responsibility with the assisted State. That presupposed the existence of a general rule of international law that prohibited the rendering of aid or assistance in the commission of an internationally wrongful act. It was doubtful that any such rule existed, at least in customary international law. If no such rule existed, then there was no point in elaborating other rules relating to it. And if it did exist, then it belonged in the realm of primary rules, which did not fall within the Commission's remit. It thus seemed appropriate to consider whether the concept set forth in article 27 was a primary rule or a secondary rule. He personally had come to the conclusion that article 27, whether in the version adopted on first reading or in the new version proposed by the Special Rapporteur, stated a primary rule and that consequently it was outside the scope of the draft articles. He was aware that that view was not shared by the majority of members of the Commission.

22. With regard to new article 27 proposed by the Special Rapporteur, he noted that, according to that article, first, there must be aid or assistance in the commission of an internationally wrongful act committed by another State, and, secondly, that aid or assistance must have been provided "with knowledge of the circumstances of the internationally wrongful act". What did that expression mean? Did it mean that the assisting State must have the intention of facilitating the commission of the internationally wrongful act? Or did it mean that it must have knowledge of the fact that the assisted State would use the aid or assistance to commit an internationally wrongful act? Thirdly, article 27 presupposed that the internationally wrongful act for which the assistance had been provided must have been actually accomplished and that attempt or failure did not incur responsibility.

23. He regretted the fact that new article 27 gave no clue as to what kind of aid or assistance would trigger responsibility of the aiding or assisting State. The aid or assistance could be military, financial or consist purely of advice on what strategy to adopt. For instance, a State might aid another State by sending it technicians to train its personnel in how to operate sophisticated fighter jets that the assisted State had purchased from State A with funds provided by State B. In such a case, which of the types of assistance provided by those States would trigger State responsibility if the assisted State committed an internationally wrongful act using the aircraft in question?

24. Paragraph (17) of the commentary to article 27 mentioned that the aid or assistance must have the effect of making it materially easier for the aided or assisted State to commit an internationally wrongful act. In his opinion, that material element was very difficult to determine. If article 27 was to serve any practical purpose, it was essential to spell out in its wording what kind of aid would trigger the responsibility of the assisting State. As the Special Rapporteur himself said in paragraph 180 of his second report, the term "materially" was problematic. The Special Rapporteur advocated not qualifying the words "aids

[4] See 2576th meeting, footnote 6.

or assists" and considered that it would be sufficient to explain the meaning in the commentary. But, in his view, that did not resolve the problems and it would therefore be preferable to delete article 27. Besides, as Mr. Yamada had recalled (2576th meeting), article 27 had been drafted with article 19 (International crimes and international delicts) in mind, and as it had more or less been decided that article 19 should be deleted, article 27 should also be deleted. In addition, that article was more related to international crimes than to international delicts and the basis of States' international responsibility was essentially delictual.

25. The Commission had a duty not only to tidy up the draft articles submitted to it, but also to subject them to a rigorous reappraisal to determine their practical utility for the purpose of carrying out its mission of progressive development and codification of international law. If, in the process of appraisal, it concluded that some draft articles did not stand up to close scrutiny, it must delete them.

26. Mr. DUGARD said he tended to agree with Mr. Addo's comments and endorsed his suggestion that article 27 should be deleted. He would be interested to know whether Mr. Addo took the same position in respect of article 28, which also seemed to be a primary rule. Indeed, at a previous meeting, one member of the Commission had said that article 28 was even more of a primary rule than article 27 and that those rules had no place in the draft articles.

27. Mr. ADDO said that article 28 should also be deleted as it, too, set forth a primary rule.

28. Mr. YAMADA, replying to Mr. Addo's question concerning the meaning of the expression "with knowledge of the circumstances", said that, 20 years previously, the Government of Japan had authorized the export of several hundred Yamaha plastic boats to a country in the Middle East, in the belief that those boats would be used for leisure purposes. In fact, several years later, they had been used in a war between that State and a neighbouring State and had indeed played a significant role in the course the war had taken. In that case, the State that had acquired the boats had claimed that its role in the conflict was one of self-defence, but it was not difficult to envisage a scenario in which it might have been the aggressor. If the Government of Japan had known that those boats were going to be used in a war of aggression, it would have been responsible under article 27, even if it had not intended to assist the aggression.

29. Mr. ADDO said that, if a Government had knowledge of the fact that its aid was going to be used to commit an act of aggression, one had entered the realm of a criminal act. Furthermore, the fact that boats or aircraft could be used in a conflict for purposes of self-defence as well as in an act of aggression clearly showed the difficulty of pinpointing the nature of the aid or assistance provided and the impossibility of foreseeing every eventuality. Consequently, the best solution seemed to be to delete article 27.

30. Mr. ECONOMIDES, noting that Mr. Addo considered that articles 27 and 28 came within the realm of primary rules and must therefore be deleted, said that article 1 (Responsibility of a State for its internationally wrongful acts), which provided that every internationally wrongful act of a State entailed its international responsibility, could also be added to the category of primary rules and asked whether Mr. Addo would also advocate deleting that article. Article 3 (Elements of an internationally wrongful act of a State) and other articles could also be taken as belonging to the category of primary rules. But to adopt such an approach would mean jettisoning the work the Commission had carried out over several decades. The question of primary and secondary rules should therefore not be taken too far. Admittedly, those categories created a line of demarcation and offered some criteria, but it must be acknowledged that borderline cases sometimes arose in which a rule could be construed both as a primary rule and as a secondary rule. In such cases, the criteria of the secondary rule should prevail, in the interests of the draft articles and of the activity of the Commission.

31. Mr. CRAWFORD (Special Rapporteur) said that questions of borders and boundaries raised difficult problems in any sphere. In his opinion, the Commission must remain faithful to the fundamental principles of the draft articles while being conscious that, in some situations, the draft articles touched on the area of primary rules. He agreed with Mr. Economides that some elements of the text must be appreciated having regard to the economy of the draft articles and to the legal tradition. What must certainly be excluded was the adoption of secondary rules which depended for their content on a judgement as to the content of individual primary rules. By definition, the rules in the draft articles were of a general nature, in other words, applicable to all primary rules or at least to certain general categories of primary rules. One of the main difficulties posed by article 19 was that it went deeply into the content of the primary rules. In answer to the question asked by Mr. Rosenstock, he said that, in his opinion, one could not pretend that chapter IV contained only secondary rules in the strict sense of the term.

32. Nonetheless, articles 27 and 28 had a place in the draft articles, first, because they dealt with questions analogous to problems of attribution and, secondly, at least in respect to coercion, because of the relationship with the excuse provided for in chapter V (Circumstances precluding wrongfulness). Thus, it was important as a matter of principle not to adopt too rigid a position and not to push the analysis of the scope of chapter IV too far.

33. Mr. DUGARD said that, in view of the difficulties to which articles 27 and 28 gave rise, he wondered whether it would be possible to distinguish between the two by arguing that article 27 was applicable to all primary rules, which was not the case with article 28. Article 27 should therefore perhaps be retained and article 28 deleted.

34. The CHAIRMAN said that the consideration of that question had been made even more complicated by the fact that the new article 27 contained several elements of article 28.

35. Mr. GOCO said that, in the commentary to article 27 adopted on first reading, there could be no question of the participation of a State in the internationally wrongful act of another State in cases where identical offences were committed in concert, or sometimes even simultaneously, by two or more States. According to the same commentary, the wording of article 27 brought out clearly that the material element characterizing the internationally

wrongful act of participation must consist in real aid or assistance in the commission by another State of an internationally wrongful act, but must also remain within the limits of such aid or assistance. Moreover, the aid or assistance must be rendered with a view to its use in committing the principal internationally wrongful act. It was not sufficient that that intention should be "presumed"; it must be "established". The Commission had also stressed that the principal internationally wrongful act must actually have been committed by the State which received the aid or assistance, as the words "carried out by the latter" in the article suggested.

36. Article 27 had given rise to many comments by Governments. One Government had doubted whether it was possible to give it a sound foundation in international law and practice. According to that Government, it would seem that many of the situations contemplated by the Commission and cited as examples of aid and assistance actually referred to independent breaches of obligations under international law. For example, the fact that a State which had made its territory available to another State allowed it to be used by the latter to commit an act of aggression constituted aggression and not aid or assistance for that aggression. For another State it did not emerge clearly from article 27 whether the State which rendered the assistance was responsible only if it was aware of the wrongfulness of the behaviour for which the assistance was meant or whether its responsibility was incurred even when, aware of the nature of the behaviour for which it rendered its assistance, it regarded such behaviour as lawful. According to that same State, it was difficult to see what the effects would be if the State rendering the assistance misinterpreted the law. The example had been given of a State which, rendering assistance to another State in order to intervene by force in a third State, considered that the intervention was justified for humanitarian or other reasons. Yet another State had referred to the difficulty of drawing a distinction between aid and assistance, on the one hand, and joint commission and responsibility, on the other. All the comments and observations received from Governments on State responsibility (A/CN.4/492),[5] which were summarized by the Special Rapporteur in paragraphs 171 and 172 of his second report, must be taken duly into account.

37. The Special Rapporteur's own comments showed all the difficulties, both substantive and procedural, inherent in article 27 as it was formulated and constructed, in establishing the responsibility of the State rendering the aid. The comments made in paragraph 177 of his report were very pertinent and demonstrated well that the questions of formulation and definition overlapped with others which were really questions of substance. For many years, the Philippines had had military bases of the United States of America on its territory which had played an important role in the military operations of the Korean war and, later, the Viet Nam war. Did article 27 allow a third State which considered those wars to be acts of aggression to accuse the Philippines of complicity?

38. The new wording of article 27 discarded a number of objectionable aspects of the article adopted on first reading by limiting State responsibility for aid or assistance rendered and introducing the notion of knowledge of the intrinsic wrongfulness of the act the commission of which was facilitated by the assistance. The new wording also incorporated the notions of direction and control which had appeared earlier in article 28. The whole constituted a provision which was simpler and easier to understand, but the principle remained the same. The description of such interaction between two States, one rendering aid or assistance, directing or controlling and the other allowing itself to be assisted, directed or controlled, in particular in the commission of a wrongful act, had no relevance to the modern world, in which sovereign States asserted their national integrity and independence. Regardless of how praiseworthy the principles were which had presided over their preparation, articles 27 and 28 were out of step with the principles of the Charter of the United Nations, which called for friendly relations based on equality of rights and self-determination. In the area of State responsibility, that would be recognition of practices which had prevailed in the past. As a number of States had pointed out, article 27 had no foundation whatsoever in positive law and would only express a purely causal relationship; thus, it should be deleted. As to article 28, there was reason to ask whether the notion of coercion could be transposed from domestic law to international law. There again, the situations of dependence or protectorate referred to in the report no longer prevailed. One State had considered that the content of the provision fell more under circumstances precluding wrongfulness. In any event, either the State really resisted the coercion and could not be held responsible, or it did not, in which case there was joint responsibility.

39. Mr. CRAWFORD (Special Rapporteur) said that there was a primary rule of international law pursuant to which no State could allow its territory to be used for the purpose of committing an attack against another State in violation of the Charter of the United Nations. Consequently, it would suffice to ensure that the rule embodied in article 27 did not establish a more extensive form of responsibility.

40. Mr. SIMMA said that the discussion on article 27 and, in particular, Mr. Addo's comments illustrated the importance of reviewing the Commission's theoretical premises and the positioning of the various articles of the draft. Some of them were based entirely on the traditional, bilateral conception of State responsibility and the traditional notion of delict, while others paid tribute to a new, more "objective" paradigm, according to which the commission of a wrongful act entailed responsibility even when there was no damage. In such a system, it was natural and necessary to provide, in the current case in article 27, for rules on responsibility in cases of cooperation between wrongdoing States and the involvement of third States, but the draft article was clearly torn between the traditional bilateralist position and new considerations of community interest and public order. On the one hand, article 27 was undeniably a case of the progressive development of international law because it was virtually impossible to cite any State practice in that connection, but, on the other hand, the provision reflected a certain hesitation about "going too far". Thus, complicity was taken into account, but not incitement, although the latter weighed heavier in criminal law. There was reason to note that opponents of article 27 invoked above all examples taken from private law. The conclusions of the compara-

[5] See 2567th meeting, footnote 5.

tive analysis of practice were not necessarily relevant because most systems of private law were very cautious about the implication of third States. As for the supporters of article 27, they drew their examples from criminal law. Hence, the distinction between private law and public law persisted, the difficulties posed by article 27 being due to the fact that it straddled the two. Whenever the Commission attempted, in a draft article, to give concrete expression to its concern for objectivity in the sense defined above, it encountered the same problems. The *East Timor* case referred to by the Special Rapporteur was another example which clearly showed how, at the level of primary rules, international law was broadening and opening up to the notion of obligations *erga omnes*, whereas, at the level of the legal dispute settlement in respect of those obligations, the Commission found itself in the usual bilateralist straitjacket. It was very telling that virtually all the examples cited in the commentary of Ago on the drafts adopted on first reading concerned complicity in the breach of obligations *erga omnes*. Mr. Yamada had asked whether it was desirable to draw up rules which simultaneously covered violations of commercial or other bilateral obligations and violations of obligations *erga omnes* and even certain crimes. The answer to that question was that the new article 27 seemed, in principle, geared to what was called international delicts and even in that respect appeared to be moderately progressive, but that, regarding obligations *erga omnes*, the rules on the implication of third States should be more ambitious. In particular, the notion of incitement could be incorporated for breaches of obligations *erga omnes*, for example, incitement to commit genocide, or a mental savings clause should at least be agreed for violations of such obligations, *jus cogens*, etc.

41. Article 27 was also the occasion for the Commission to engage in a number of extravagancies compared to its usual practice. For example, most of the time the Commission used the distinction between primary and secondary rules to deal with difficult questions, whereas, in the text under consideration, it tackled primary rules head on, and that was a positive development. In another extravagance, the Commission showed itself to be open to the subjective elements of knowledge or intention, thereby taking a firm stand against legal opinion. In one of the footnotes of his report, the Special Rapporteur referred to an article by Graefrath,[6] but the latter had been very guarded about the subjective element, contemplating instead a presumption of intention which the wrongdoing State would in a sense have to falsify. In contrast, the substantial or essential element was virtually absent. Always timorous in the use of terms, the Commission was reluctant to speak of materiality, although the context was clear and there could be no confusion with "material breach" in article 60 of the 1969 Vienna Convention. But above and beyond terms, there was a real problem, namely, how to be more precise and specific about the interrelationship between the aid provided to the State and the wrongful act which it committed. To do so, it was important either to restrict the notion of complicity to the most serious breaches of international law and, in particular, the violation of obligations *erga omnes*, and then to be less restrictive on the link between the aid and the wrongful act, or to confine oneself to forms of aid which were essential and then require a causal link between the aid and the wrongful act or, lastly, to emphasize the positive and active nature of the aid, i.e. the existence of a specific link between the aid and the wrongful act.

42. Concerning article 28, the Special Rapporteur was right to stress that that provision concerned actual direction and control and not merely the power to exercise direction or control, possibly by virtue of a treaty, and that coercion must attain a certain threshold. However, coercion could be introduced as a form of implication of a third State without entering into a discussion on when coercion became illegal. In that connection, the title of article 28 was not fully in keeping with the content of the provision. It had probably been chosen so as not to repeat the general title of chapter IV; article 28 could perhaps be given a more specific heading by reverting to the title of that chapter as adopted on first reading.

43. Mr. BROWNLIE said that he was somewhat sceptical about the need expressed by Mr. Simma to make articles 27 and 28 more detailed. The articles were "skeletal" versions of primary rules and should be retained in the draft articles on pragmatic grounds, but it would be dangerous to flesh them out because of the risk of getting bogged down in the manifold particularities, standards and duties pertaining to different fields of international law. To take just one example, the assistance provided for in article 27 could be associated with the use of force, the creation of environmental hazards, human rights violations, and so forth.

44. Mr. CRAWFORD (Special Rapporteur) said that he had tried, particularly in article 27, to draft an article that would deal appropriately with a range of different situations. Without disregarding the concerns expressed by Mr. Simma, he had sought in article 27 to state a rule of general application which might prove useful, subject to certain limitations. The articles in question should therefore not be used, to reintroduce the "delicts/crimes" dichotomy through the back door.

45. Mr. Simma had been right, on the other hand, to stress the need to include a greater element of materiality, preferably in the commentary, but possibly also in the articles themselves, without going too far in elaborating general rules. With regard to terminology, it should be noted that the definition of a "material" breach given in the 1969 Vienna Convention was more reminiscent of a fundamental or repudiatory breach striking at the core of the obligation that had been breached and thus differed from the criterion applicable in article 27. Some clarification was therefore necessary, though without incorporating whole segments of criminal law in the articles.

46. Mr. SIMMA thanked the Special Rapporteur for helping to clear up a misunderstanding between himself and Mr. Brownlie. Recapitulating briefly, he said that his first proposal had been that a reference should be included to "material" or "essential" aid or assistance, which was important enough to appear in the text of the article itself and not just in the commentary. Secondly, when addressing the question of "crimes", the Commission should consider whether the extent of a third State's implication in the case of a "crime" could be greater than in the case of a "delict".

[6] B. Graefrath, "Complicity in the law of international responsibility", *Belgian Review of International Law* (Brussels), vol. XXIX (1996-2), pp. 370-380.

47. Mr. Sreenivasa RAO said that he supported the Special Rapporteur's proposals, whereby he had skilfully achieved a delicate balance.

48. With regard to the notion of "incitement", he said that it existed in international law and was applicable not only to crimes, but also to diverse other situations, covering real circumstances in which crimes were committed in cold blood, without compunction, for personal interest.

49. He agreed with the Special Rapporteur that it was advisable, in the case in point, to avoid relying unduly on notions of internal criminal law.

50. Mr. SIMMA said that, at least in its German equivalent, the term "incitement" did not necessarily convey the idea of "immediacy". It rarely arose in relations between States.

51. Viewed from the standpoint of the degree of implication of a State, "aid or assistance" presupposed that the wrongdoing State took the initiative and was subsequently joined by another State, which encouraged it to persevere and eventually played a coercive role. In his view, the notion of incitement should not be included in the draft articles. However, the Commission could consider whether it had a place in the case of crimes such as genocide.

52. Mr. Sreenivasa RAO said he continued to believe that the Commission should fall in with the Special Rapporteur's proposals. He noted, however, that there was a clear tendency in the discussion to separate, possibly within one and the same article, the notion of "aid or assistance" from that of "direction and control", even though the same conditions were applicable to the two, and that the Special Rapporteur had no objection to the idea.

53. Mr. PAMBOU-TCHIVOUNDA said he thought that chapter IV of the draft articles was useful, not so much because the articles it contained, as explained in the commentary adopted on first reading, were based on past events, but because it was forward-looking. As the means deployed by the "cold-blooded monsters" were becoming more and more complex in technical terms, the Commission must propose safeguards that would check the natural urge of States to take whatever steps were required to further their dark designs.

54. New fields had emerged in which a State would be tempted to provide insidious aid or assistance to another State for the commission of a wrongful act, for example, in business as a consequence of the liberalization of trade or the globalization of the economy. In that new area of operations, which was opening up against the background of ostensibly private interests, nobody could predict the future conduct of States at a time when bilateral agreements were being replaced by multilateral agreements. Economic warfare was a palpable threat. At a fundamental level, the notion of respect for the territorial integrity of States, which entailed obligations and hence rules to be observed, was laden with such normative connotations that no draft articles on the subject were called for. Not everything in international law was written down; a great deal could be implicit. But take, for example, the situation in the Great Lakes region of Africa, in which a number of States were involved. If those States decided to restore some kind of order, it would be necessary to determine where responsibility lay: primary responsibility, immediate responsibility, indirect responsibility. It was for just such a situation that the Commission must develop a minimum set of rules that could be invoked to reach a determination. To that end, it would be appropriate to separate aid or assistance by a State to another State for the commission of an internationally wrongful act from direction and control.

55. Referring to Mr. Simma's comment on the need to specify that aid or assistance should be essential, he drew attention to the correlation with article 19, which the Commission had adopted on first reading, but had set aside for the time being.

56. The CHAIRMAN said that the discussion had brought to light problems pertaining to the three notions of aid or assistance, direction and control, and coercion. The members of the Commission appeared dissatisfied with the Special Rapporteur's proposal that the text adopted on first reading should be amended by divorcing coercion from direction and control and marrying aid or assistance to direction and control. The best solution might be to keep the three notions separate.

57. Mr. CRAWFORD (Special Rapporteur), summarizing the discussion on chapter IV, said that he had joined the notion of aid or assistance to that of direction and control not because he thought they were similar, but on the grounds that they were subject to the same regime. He proposed that the draft articles should be referred to the Drafting Committee with a recommendation that it should consider article 28 first, because a decision on that article could help it solve the problems to which the new version of article 27 gave rise. In that connection, he noted that, with few exceptions, article 27 adopted on first reading had been deemed unacceptable: none of the examples cited in the commentary by way of illustration remotely approximated to the case of aid or assistance in the breach of a bilateral treaty.

58. No Government had suggested deleting chapter IV, but that did not prevent the Commission from trying to improve the wording of the constituent articles so long as it did not go too far. It should set aside for the time being the question whether the most serious breaches should be explored in greater depth. At all events, a general formulation of the articles of chapter IV had its place in the draft articles.

59. Referring to Mr. Dugard's comment on article 28, he said he thought the article should be retained because of the link with the force majeure case referred to in chapter V.

60. Mr. ROSENSTOCK said that Mr. Addo was not alone in considering that it would be preferable to delete chapter IV. The fact that the Commission had adopted it over 20 years earlier was no justification for its retention.

61. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer chapter IV, with all pertinent observations, to the Drafting Committee.

*It was so agreed.*

*The meeting rose at noon.*

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# 2579th MEETING

*Tuesday, 1 June 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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## Nationality in relation to the succession of States[1] (*continued*)* (A/CN.4/493 and Corr.1,[2] A/CN.4/496, sect. E, A/CN.4/497,[3] A/CN.4/L.572, A/CN.4/L.573 and Corr.1)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the report of the Drafting Committee (A/CN.4/L.573 and Corr.1) containing the titles and texts of the draft articles on nationality of natural persons in relation to the succession of States adopted by the Drafting Committee on second reading.

2. Mr. CANDIOTI (Chairman of the Drafting Committee), introducing the report of the Drafting Committee, said that the Committee had held five meetings, from 17 to 20 May 1999. He wished to thank the Chairman of the Commission, the members of the Drafting Committee, the former Special Rapporteur on the topic, Mr. Václav Mikulka, and the Secretariat for their valuable assistance.

3. Under its programme of work for the current quinquennium, the Commission had decided to complete the second reading of the topic at the current session. The Drafting Committee had facilitated the achievement of that goal by rapidly completing the second reading of the draft articles, allowing sufficient time for the revision and updating of the commentaries. In considering the articles, the Drafting Committee had had before it the report of the Chairman of the Working Group on nationality in relation to the succession of States (A/CN.4/L.572) and the Memorandum by the Secretariat (A/CN.4/497) giving an overview of the comments and observations of Governments, made either orally or in writing. Government comments had by and large been favourable to the draft and that had alleviated the task of the Drafting Committee.

4. The titles and texts of the draft articles on nationality of natural persons in relation to the succession of States,** as adopted by the Drafting Committee on second reading, read:

PREAMBLE

***The General Assembly*,**

***Considering* that problems of nationality arising from succession of States concern the international community,**

***Emphasizing* that nationality is essentially governed by internal law within the limits set by international law,**

***Recognizing* that in matters concerning nationality, due account should be taken both of the legitimate interests of States and those of individuals,**

***Recalling* that the Universal Declaration of Human Rights of 1948 proclaimed the right of every person to a nationality,**

***Recalling* also that the International Covenant on Civil and Political Rights of 1966 and the Convention on the Rights of the Child of 1989 recognize the right of every child to acquire a nationality,**

***Emphasizing* that the human rights and fundamental freedoms of persons whose nationality may be affected by a succession of States must be fully respected,**

***Bearing in mind* the provisions of the Convention on the Reduction of Statelessness of 1961, the Vienna Convention on Succession of States in Respect of Treaties of 1978 and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983,**

***Convinced* of the need for the codification and progressive development of the rules of international law concerning nationality in relation to the succession of States as a means for ensuring greater juridical security for States and for individuals,**

***Declares* the following:**

PART I. GENERAL PROVISIONS

***Article 1. Right to a nationality***

**Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles.**

***Article 2. Use of terms***

**For the purposes of the present draft articles:**

**(*a*) "Succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;**

**(*b*) "Predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;**

**(*c*) "Successor State" means the State which has replaced another State on the occurrence of a succession of States;**

**(*d*) "State concerned" means the predecessor State or the successor State, as the case may be;**

**(*e*) "Third State" means any State other than the predecessor State or the successor State;**

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* Resumed from the 2572nd meeting.

[1] For the draft articles with commentaries thereto provisionally adopted by the Commission on first reading, see *Yearbook ... 1997*, vol. II (Part Two), p. 14, chap. IV, sect. C.

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

[3] Ibid.

** The number within square brackets indicates the number of the corresponding article adopted on first reading.

**(*f*) "Person concerned" means every individual who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may be affected by such succession;**

**(*g*) "Date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.**

*Article 3 [27]. Cases of succession of States covered by the present draft articles*

**The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.**

*Article 4 [3]. Prevention of statelessness*

**States concerned shall take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor State from becoming stateless as a result of such succession.**

*Article 5 [4]. Presumption of nationality*

**Subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession.**

*Article 6 [5]. Legislation on nationality and other connected issues*

**Each State concerned should, without undue delay, enact legislation on nationality and other connected issues arising in relation to the succession of States consistent with the provisions of the present draft articles. It should take all appropriate measures to ensure that persons concerned will be apprised, within a reasonable time period, of the effect of its legislation on their nationality, of any choices they may have thereunder, as well as of the consequences that the exercise of such choices will have on their status.**

*Article 7 [6]. Effective date*

**The attribution of nationality in relation to the succession of States, including the acquisition of nationality following the exercise of an option, shall take effect on the date of such succession, if persons concerned would otherwise be stateless during the period between the date of the succession of States and such attribution or acquisition of nationality.**

*Article 8 [7]. Persons concerned having their habitual residence in another State*

**1. A successor State does not have the obligation to attribute its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that or any other State.**

**2. A successor State shall not attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless.**

*Article 9 [8]. Renunciation of the nationality of another State as a condition for attribution of nationality*

**When a person concerned who is qualified to acquire the nationality of a successor State has the nationality of another State concerned, the former State may make the attribution of its nationality dependent on the renunciation by such person of the nationality of the latter State. However, such requirement shall not be applied in a manner which would result in rendering the person concerned stateless, even if only temporarily.**

*Article 10 [9]. Loss of nationality upon the voluntary acquisition of the nationality of another State*

**1. A predecessor State may provide that persons concerned who, in relation to the succession of States, voluntarily acquire the nationality of a successor State shall lose its nationality.**

**2. A successor State may provide that persons concerned who, in relation to the succession of States, voluntarily acquire the nationality of another successor State or, as the case may be, retain the nationality of the predecessor State shall lose its nationality acquired in relation to such succession.**

*Article 11 [10]. Respect for the will of persons concerned*

**1. States concerned shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned.**

**2. Each State concerned shall grant a right to opt for its nationality to persons concerned who have appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States.**

**3. When persons entitled to the right of option have exercised such right, the State whose nationality they have opted for shall attribute its nationality to such persons.**

**4. When persons entitled to the right of option have exercised such right, the State whose nationality they have renounced shall withdraw its nationality from such persons, unless they would thereby become stateless.**

**5. States concerned should provide a reasonable time limit for the exercise of the right of option.**

*Article 12 [11]. Unity of a family*

**Where the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family, States concerned shall take all appropriate measures to allow that family to remain together or to be reunited.**

*Article 13 [12]. Child born after the succession of States*

**A child of a person concerned, born after the date of the succession of States, who has not acquired any nationality, has the right to the nationality of the State concerned on whose territory that child was born.**

*Article 14 [13]. Status of habitual residents*

**1. The status of persons concerned as habitual residents shall not be affected by the succession of States.**

**2. A State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto.**

*Article 15 [14]. Non-discrimination*

**States concerned shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of States by discriminating on any ground.**

*Article 16 [15]. Prohibition of arbitrary decisions concerning nationality issues*

**Persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State or any right of option, to which they are entitled in relation to the succession of States.**

*Article 17 [16]. Procedures relating to nationality issues*

**Applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option, in relation to the succession of States, shall be processed without undue delay. Relevant decisions shall be issued in writing and shall be open to effective administrative or judicial review.**

*Article 18 [17]. Exchange of information, consultation and negotiation*

**1. States concerned shall exchange information and consult in order to identify any detrimental effects on persons concerned with respect to their nationality and other connected issues regarding their status as a result of the succession of States.**

**2. States concerned shall, when necessary, seek a solution to eliminate or mitigate such detrimental effects by negotiation and, as appropriate, through agreement.**

*Article 19 [18]. Other States*

**1. Nothing in the present draft articles requires States to treat persons concerned having no effective link with a State concerned as nationals of that State, unless this would result in treating those persons as if they were stateless.**

**2. Nothing in the present draft articles precludes States from treating persons concerned, who have become stateless as a result of the succession of States, as nationals of the State concerned whose nationality they would be entitled to acquire or retain, if such treatment is beneficial to those persons.**

PART II. PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES

*Article [19]*

**[deleted]**

SECTION 1

TRANSFER OF PART OF THE TERRITORY

*Article 20. Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State*

**When part of the territory of a State is transferred by that State to another State, the successor State shall attribute its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor State shall withdraw its nationality from such persons, unless otherwise indicated by the exercise of the right of option which such persons shall be granted. The predecessor State shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State.**

SECTION 2

UNIFICATION OF STATES

*Article 21. Attribution of the nationality of the successor State*

**Subject to the provisions of article 8 [7], when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have united, the successor State shall attribute its nationality to all persons who, on the date of the succession of States, had the nationality of a predecessor State.**

SECTION 3

DISSOLUTION OF A STATE

*Article 22. Attribution of the nationality of the successor States*

**When a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States, each successor State shall, unless otherwise indicated by the exercise of a right of option, attribute its nationality to:**

**(*a*) Persons concerned having their habitual residence in its territory; and**

**(*b*) Subject to the provisions of article 8 [7]:**

**(i) Persons concerned not covered by subparagraph (*a*) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;**

**(ii) Persons concerned not entitled to a nationality of any State concerned under subparagraphs (*a*) and (*b*) (i) having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.**

*Article 23. Granting of the right of option by the successor States*

**1. Successor States shall grant a right of option to persons concerned covered by the provisions of article 22 who are qualified to acquire the nationality of two or more successor States.**

**2. Each successor State shall grant a right to opt for its nationality to persons concerned who are not covered by the provisions of article 22.**

SECTION 4

SEPARATION OF PART OR PARTS OF THE TERRITORY

*Article 24. Attribution of the nationality of the successor State*

**When part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist, a successor State shall, unless otherwise indicated by the exercise of a right of option, attribute its nationality to:**

**(*a*) Persons concerned having their habitual residence in its territory; and**

**(*b*) Subject to the provisions of article 8 [7]:**

**(i) Persons concerned not covered by subparagraph (*a*) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;**

**(ii) Persons concerned not entitled to a nationality of any State concerned under subparagraphs (*a*) and (*b*) (i) having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.**

*Article 25. Withdrawal of the nationality of the predecessor State*

**1. The predecessor State shall withdraw its nationality from persons concerned qualified to acquire the nationality of the successor State in accordance with article 24. It shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State.**

**2. Unless otherwise indicated by the exercise of a right of option, the predecessor State shall not, however, withdraw its nationality from persons referred to in paragraph 1 who:**

**(*a*) Have their habitual residence in its territory;**

**(*b*) Are not covered by subparagraph (*a*) and have an appropriate legal connection with a constituent unit of the predecessor State that has remained part of the predecessor State;**

**(*c*) Have their habitual residence in a third State, and were born in or, before leaving the predecessor State, had their last habitual residence in what has remained part of the territory of the predecessor State or have any other appropriate connection with that State.**

*Article 26. Granting of the right of option by the predecessor and the successor States*

**Predecessor and successor States shall grant a right of option to all persons concerned covered by the provisions of articles 24 and 25, paragraph 2, who are qualified to have the nationality of both the predecessor and successor States or of two or more successor States.**

5. No changes had been made in the structure of the text, which consisted of a preamble and 26 draft articles. The articles were divided into two parts, as they had been on first reading, and Part II consisted of four sections. The draft's structure on first reading had been designed to present the articles in the form of a declaration. Since the form was a matter for the Commission to decide, the Drafting Committee was making no recommendation in that regard. One article had been moved from Part II to Part I, altering the numbering of the articles. The numbers in square brackets corresponded to the article numbers as adopted on first reading.

6. As to Part I (General provisions), the Drafting Committee had made no changes to articles 1 (Right to a nationality) and 2 (Use of terms).

7. With regard to article 3 [27] (Cases of succession of States covered by the present draft articles), the Commission, when completing the first reading, had indicated that its placement was provisional and had decided to revert to the matter on second reading.[4] The Working Group had reconsidered the matter and had recommended that it be placed after article 2, as was the case with an analogous article in the 1983 Vienna Convention. The Commission had agreed with that suggestion, and the Drafting Committee had accordingly positioned article 27 as new article 3.

8. Governments, in their comments, had favoured deleting the opening phrase, "Without prejudice to the right to a nationality of persons concerned". They considered that it made the article ambiguous and that the matter illustrated by that phrase, despite its merits under general international law, did not call for an explicit reference in that article. The Working Group and the Commission had agreed, and the Drafting Committee had therefore deleted the phrase. The Drafting Committee had made a further modification, inserting the word "only" after "apply" in order to bring the article into line with article 3 of the 1983 Vienna Convention, something which would be made clear in the commentary to the article.

[4] See paragraph (4) of the commentary to article 27, *Yearbook ... 1997*, vol. II (Part Two), p. 43.

9. No changes had been made to articles 4 [3] (Prevention of statelessness) and 5 [4] (Presumption of nationality). A minor editing change—replacing the word "concerning" in the title and in the text of the article by the word "on"—obviously had no effect on the meaning of article 6 [5] (Legislation concerning nationality and other connected issues).

10. Article 7 [6] (Effective date), consisted of a new text proposed by the Working Group to take account of the suggestion by Governments that the article's retroactive effect should be limited to the extent strictly necessary. Under the new formulation, retroactive attribution of nationality was limited to situations in which persons would be temporarily stateless during the period between the date of State succession and the attribution of nationality of the successor State or the acquisition of such nationality upon exercise of the right of option.

11. Governments had requested further clarification of the relationship between article 7 (Attribution of nationality to persons concerned having their habitual residence in another State), and article 10 (Respect for the will of the persons concerned), as adopted on first reading, to which it had referred. In response, the Working Group had suggested replacing the opening phrase "Subject to the provisions of article 10," by "Without prejudice to" in article 8 [7] (Persons concerned having their habitual residence in another State). The Drafting Committee, however, had been of the view that article 8 [7] stated a principle and that it applied independently of article 11 [10] (Respect for the will of the persons concerned). Under article 8 [7], a successor State had no obligation to attribute its nationality to persons concerned if those persons had their habitual residence in another State and also had the nationality of that or any other State. Similarly, a successor State would not attribute its nationality to persons concerned who had their habitual residence in another State against the will of such persons, unless such persons would otherwise become stateless. The only part of article 11 [10] that could have any relationship with article 8 [7] was paragraph 3, under which, when a State concerned granted the right of option to persons concerned, it could not then refuse to grant its nationality if such persons opted for it. The operation of article 8 [7], stating a principle, was accordingly independent of that of article 11 [10], paragraph 3, which dealt with a specific situation, and there was no need to make any direct link between the two, something that only created confusion. The Drafting Committee had therefore deleted the opening phrase in article 8 [7], a change that had no effect on the meaning of the article. The title of article 8 [7] had been simplified.

12. Governments had commented favourably on articles 9 [8] (Renunciation of the nationality of another State as a condition for attribution of nationality), 10 [9] (Loss of nationality upon the voluntary acquisition of the nationality of another State) and 11 [10], and no changes had been suggested by the Working Group. The Drafting Committee had made no changes to article 9 [8] and, with respect to article 10 [9], had only added the word "concerned" after the word "persons" in paragraphs 1 and 2, a reference that had inadvertently been omitted on first reading. As for article 11 [10], the Drafting Committee had simplified paragraph 5 by replacing the words "rights set forth in paragraphs 1 and 2" by "right of option". No

changes had been made to articles 12 [11] (Unity of a family), 13 [12] (Child born after the succession of States), 14 [13] (Status of habitual residents) and 15 [14] (Non-discrimination).

13. In regard to article 16 [15] (Prohibition of arbitrary decisions concerning nationality issues), the Drafting Committee had deleted the opening phrase, "In the application of the provisions of any law or treaty", which it regarded as being unnecessary, since it placed too much emphasis on the application aspect of the article when the article was enunciating a principle. The deletion did not affect the meaning. It simply shifted the emphasis and allowed proper place for the statement of principle. The fact that the principle would in practice mostly arise in connection with the application of provisions of laws or treaties would be explained in the commentary.

14. The only changes to article 17 [16] (Procedures relating to nationality issues) were stylistic. The Drafting Committee had divided one single sentence into two and had placed the phrase "in relation to the succession of States" between commas. In the decisions denying the granting of nationality should be reasoned, indicating the justification for such denial, but rather than burden the text of the article, the commentary should indicate that requirement. Articles 18 [17] (Exchange of information, consultation and negotiation) and 19 [18] (Other States) remained unchanged.

15. One of the issues of concern for Governments had been the relationship between Part I (General Provisions) and Part II (Provisions relating to specific categories of succession of States). The Commission itself had had lengthy discussions on the subject. On first reading, it had viewed the articles of Part I and Part II as a continuum, even if they presented different legal obligations and options for States. Part I dealt with general principles with respect to problems arising from State succession, while Part II indicated the manner in which provisions of Part I could be applied to specific categories of State succession. That understanding had been reflected in an article that had been numbered 19 (Application of Part II). As apparent from Government comments, however, that article not only did not clarify the relationship between the two parts but simply made it more confusing. Governments had suggested the deletion of article 19, the Working Group had agreed, and the Drafting Committee had followed the Working Group's recommendation, taking the view that deletion of the article eliminated the status of Part I as governing the provisions of Part II and elevated the provisions of Part II to the same status as those in Part I.

16. Some members of the Drafting Committee had accepted the deletion of article 19 reluctantly. In their opinion, it changed the presumption on the basis of which the two parts had been drafted. They had been concerned about possible inconsistencies between the provisions in the two parts and lack of guidance on how such possible inconsistencies could be resolved. The majority of the Drafting Committee, however, had thought that the provisions of Parts I and II were in harmony. There were no inconsistencies between the two parts and there was no reason to create any special status for the articles in one part in relation to the other. To make that point clear, there would be a general commentary dealing with the structure of the draft and the relationship between the two parts.

17. Turning to Part II, he said that in the light of comments made by Governments, the Working Group had suggested the inclusion of a new sentence in article 20 (Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State), one that was identical to the last sentence of article 25 (Withdrawal of the nationality of the predecessor State), paragraph 1. The addition was intended to avoid the possible occurrence of statelessness. It was stipulated that the obligation of the predecessor State to withdraw its nationality from the persons concerned having their habitual residence in the transferred territory should be fulfilled only after such persons had acquired the nationality of the successor State. Even though that obligation stemmed from article 4 [3], it had been considered preferable to include a reference to it in article 20, since one already existed in article 25, paragraph 1. The addition made for consistency between articles 20 and 25.

18. The Drafting Committee had merely replaced the opening words of article 21 (Attribution of the nationality of the successor State), as adopted on first reading, "Without prejudice to article 7", by the words "Subject to the provisions of article 8 [7]", which more appropriately stated the fact that the provisions of article 8 [7] limited the operation of article 21.

19. Taking articles 22 (Attribution of the nationality of the successor States) and 24 (Attribution of the nationality of the successor State) together, since their wording and structure were the same and the Drafting Committee had introduced the same changes in both of them, he said that Governments had found them unclear, and the Drafting Committee had thought they could be improved by reducing cross-references and overlap. The *chapeau* of the two articles had contained the phrase "subject to the provisions of" article 23 (Granting of the right of option by the successor States) and article 26 (Granting of the right of option by the predecessor and the successor States), respectively, both of which referred to the right of option. The Drafting Committee had replaced the phrase by "unless otherwise indicated by the exercise of a right of option".

20. As drafted on first reading, articles 22 and 24 had created the possibility of multiple nationality. To avoid that possibility, the Drafting Committee had added a new phrase to subparagraphs (*b*) (ii) of both articles to specify the persons covered therein: "persons concerned not entitled to a nationality of any State concerned under subparagraphs (*a*) and (*b*) (i)". The Drafting Committee had also replaced the phrase "without prejudice to" by "subject to" in subparagraph (*b*) of both articles.

21. While the Drafting Committee had made no changes to article 23, it considered that the commentary to the article should clarify the relationship between article 23, paragraph 2, and article 11 [10], paragraph 2, since both addressed the question of granting the right of option to certain categories of persons concerned.

22. In article 25, the reference to article 26 at the beginning of paragraph 1 had been deleted, because it was unnecessary. In paragraph 2 of the article, the reference to

article 26 had been replaced by the words "Unless otherwise indicated by the exercise of a right of option". The Committee had also inserted the word "legal" before "connection", a correction that had been made only to bring the paragraph into line with subparagraph (*b*) (i) of articles 22 and 24.

23. The Drafting Committee had simply supplemented the reference in article 26 to articles 24 and 25 by the more specific reference to articles 24 and 25, paragraph 2.

24. In the first paragraph of the preamble, the Drafting Committee had simply replaced the words "are of concern to the international community" by "concern the international community". The reason had been to avoid using the words "of concern", which had been given a special status in the context of crimes under the Rome Statute of the International Criminal Court.[5] The Drafting Committee believed that the commentary following the preamble should stress the fact that in cases of State succession, the human rights and fundamental freedom of persons whose nationality might be affected could be at high risk. That remark was particularly relevant with respect to the sixth paragraph of the preamble.

25. Mr. LUKASHUK said he wished to extend sincere thanks to the former Special Rapporteur on the topic, Mr. Václav Mikulka, and all those who had facilitated the work on the draft articles. The text was of excellent quality and had been prepared in a very short period of time. Judging from the experience of his own country, which was dealing with hundreds of cases arising from State succession, the text was likely to be put to use very soon after its adoption.

26. The mechanical transposition to the draft articles of the definition of succession of States in the 1978 and 1983 Vienna Conventions had not been the best solution, but that was simply a technical point and would probably have no substantive effect. On the other hand, article 8 [7], paragraph 2, would enable a State to attribute its nationality to persons concerned against their will, something that was difficult to reconcile with the status of the individual and human rights. In the past, it had been impossible for an individual to decline nationality or citizenship—only the State had had the power to withdraw nationality. The right of individuals to change their nationality had gradually been recognized, and the next stage would be to accept that the right to nationality included the right to statelessness as well. Nationality had always been understood as the person's belonging to a State, a purely feudal concept that had somewhat evolved with time, now having come to mean membership. The parties were accordingly equal in their rights and duties. The right to diplomatic protection must be construed as a right of the individual, and not as a right merely accorded at the discretion of the State.

27. On the whole, however, the draft was very well done and met a tangible need. In the interests of consensus, he would willingly support it.

28. Mr. GOCO praised the work done by the Drafting Committee and pointed out that it had made no recommendations concerning the form of the draft articles. According to the Memorandum by the Secretariat, most States had favoured a declaration by the General Assembly, which they viewed as sufficient for achieving the purpose of providing States involved in a succession with a set of legal principles and recommendations to be followed by their legislators when drafting nationality laws. However, other States had expressed a preference for a convention on the grounds that it would be problematic to reject the form of a treaty for a set of draft articles modifying rules of customary origin already applied by States. As the Commission would have to take a final decision on form, he asked whether the Drafting Committee could offer it any guidance on the matter.

29. Mr. CANDIOTI (Chairman of the Drafting Committee) said that the Drafting Committee had not considered the issue of form precisely because it was a matter for the Commission to decide.

30. Mr. ECONOMIDES commended the Drafting Committee on its efforts to improve the text of the draft articles. He conceded, however, that it was difficult to make substantial changes to a very complex text at such a late stage. The improvements to be welcomed included, in particular, article 27, as adopted on first reading, which had become article 3. It followed, word for word, the corresponding articles in the 1978 and 1983 Vienna Conventions, strongly reaffirming the established rule that no succession of States occurring unlawfully as a result of force would be covered by international law or entail legal consequences. Another welcome improvement was the insertion of a new last sentence in article 20, which remedied an inconsistency with article 25, paragraph 1. The principle stated in the new sentence, which formed part of the new law of State succession, should also be included in Part I of the draft as a general principle establishing the obligation of a predecessor State not to withdraw its nationality from persons who had not acquired or had been unable to acquire the nationality of the successor State.

31. Other inconsistencies had not, however, been rectified. The right of option under new article 20 should be recognized for all persons concerned, without discrimination. But article 23 recognized its existence only for those who, in the event of the dissolution of a State, were qualified to acquire the nationality of two or more successor States, and article 26 for those who, in the event of separation of part or parts of the territory, were qualified to have the nationality of both the predecessor and successor States or of two or more successor States. He saw no justification for such unequal treatment in respect of the right of option, whose raison d'être was the same for all. He was also puzzled as to how the provisions of articles 23 and 26 could be applied in practice. The right of option, being left to the discretion of each State concerned and its internal legislation, was far from being guaranteed by the draft articles. In his view, it was a retrograde step vis-à-vis past international practice and was all the more regrettable in that it concerned a fundamental human right. The Commission had, unfortunately, been unwilling to deal with the right of option in the context of international law, ignoring an institution that had existed for several centuries. Kunz, in a lecture on the option of nationality,[6] had

[5] See 2575th meeting, para. 30.

[6] J.L. Kunz, "L'option de nationalité", *Recueil des cours de l'Académie de droit international de La Haye, 1930-I* (Paris, Sirey), vol. 31 (1930), pp. 111-175.

traced the right of option as far back as 1640 and concluded that it was an embryonic norm of the law of nations. Admittedly it had not yet become customary law, as ruled, inter alia, by the Trial Chamber I of the International Criminal Tribunal for the Former Yugoslavia in the *Celebici* case. However, there was no doubt in his mind that the right of option, as a treaty rule and a rule of *lex ferenda*, should have a central place in the draft articles. It should be stated, as in the Declaration on the consequences of State succession for the nationality of natural persons (the Venice Declaration) of the European Commission for Democracy through Law (Venice Commission) of the Council of Europe,[7] that in all cases of succession of States except that of unification, persons concerned who acquired the nationality of the successor State ex officio and who had effective links with the predecessor State or another successor State should enjoy a right of option within a reasonable period of time. If the Commission did not wish to accord the right of option the status of an international obligation, it should at least explain why it was ignoring an aspect of international practice that had worked satisfactorily for several centuries.

32. The draft dealt somewhat perfunctorily, from the point of view of international law, with the question of the rights and obligations of States concerned in the case of State succession. The matter had been approached largely from the standpoint of internal law. His impression was borne out by the fact that the major principles of international law relating to the subject had not been enunciated, for example the customary principle according to which the successor State had the right in all cases of succession to attribute its nationality ex officio to all nationals of the predecessor State who were habitual residents of the territory affected by the succession, a right that became a legal obligation if those persons would otherwise become stateless. That obligation also applied, in the case of unification or dissolution, to nationals of a predecessor State who were not resident in the transferred territory but who would become stateless if they failed to acquire the nationality of the successor State. Some of the draft articles were quite obviously based on the internal law of States, for example articles 9, 10 and 13, and, in particular, articles 22, subparagraph (*b*), and 24, subparagraph (*b*), which listed categories of persons who could acquire the nationality of the successor State not by virtue of international law but by virtue of internal law. Obviously, each State concerned could freely, under internal law, attribute its nationality to persons concerned, other than those who were resident in the transferred territory or resident abroad and were in danger of becoming stateless, the only cases regulated essentially, not to say exclusively, by international law. Indeed, the successor State could attribute its nationality to such persons provided they had effective links with the State and acquired its nationality on the basis of individual procedures that were entirely subject to their will.

33. The draft articles thus resembled an instrument of internal law rather than one of international law designed to codify the question of the nationality of natural persons in cases of succession of States. It followed that, in his view, they could only be given the form of a declaration.

34. Mr. GOCO suggested that the Commission should discuss the matter of the form of the proposed draft articles.

35. Mr. Sreenivasa RAO said that the Commission customarily discussed the articles of a draft instrument before deciding on the question of form. He proposed that the decision on the form of the draft articles should be deferred.

*It was so agreed.*

36. The CHAIRMAN invited the members of the Commission to consider the text of the draft articles on nationality of natural persons in relation to the succession of States adopted by the Drafting Committee on second reading, article by article.

PREAMBLE

37. Mr. PAMBOU-TCHIVOUNDA suggested that the words *question de* should be inserted in the French version of the second paragraph of the preamble before *la nationalité*.

*The preamble was adopted.*

PART I (General provisions)

ARTICLE 1 (Right to a nationality)

38. Mr. HE commended the Drafting Committee as well as the Special Rapporteur on their excellent work. The draft articles constituted a valuable contribution to international law and a helpful supplement to the 1978 and 1983 Vienna Conventions.

39. The views of the members of the Drafting Committee had been duly reflected in the new version of the draft. However, he was still not convinced of the need to state in article 1 that every individual had the right to the nationality of "at least" one of the States concerned. It had been understood that the Commission was to adopt a neutral stance on the issue of multiple nationality, but the words "at least" could be interpreted as encouraging a policy of dual or multiple nationality. If the article was adopted as it stood, the commentary should make it clear that the draft was neutral on the issue.

40. The CHAIRMAN said that, if the words "at least" were deleted, the Commission would undermine other rights recognized by the draft articles, such as the right of option. The choice between two possible nationalities must be available. Moreover, if a person had a right to more than one nationality on the basis of existing legislation, that right should not be diminished or abolished. Those views had been expressed during the discussion in the Working Group and the Drafting Committee. The draft articles should be and were in fact neutral on the question of multiple nationality. It was for States and persons concerned to act as they saw fit in given situations. The wording of article 1 had been explained in the com-

[7] Council of Europe, 10 February 1997, document CDL-INF(97)1, pp. 3-6.

mentary but if Mr. He wished to include a more detailed explanation, he could make that point when the commentaries were discussed at a later stage in the proceedings.

41. Mr. KABATSI said he wondered what the loss would be if the words "at least" were deleted. Would it not be sufficient if every individual had a right to the nationality of one of the States concerned?

42. Mr. CANDIOTI (Chairman of the Drafting Committee) said that the Drafting Committee had discussed the possibility of deleting the words "at least" and had decided to retain them as the best way of ensuring that the Commission's neutral stance concerning the question of multiple nationality was maintained, without prejudging the question of the possible right of a natural person to more than one nationality. It must be clearly spelled out in the commentaries that the draft articles were neutral with regard to the question of multiple nationality, a question which was a matter entirely for States' discretion.

43. The CHAIRMAN said it was no secret that a proposal had been made to include an additional sentence in the commentary to article 1, to the effect that articles 7, 8 and 9 provided sufficient guarantees to States that favoured a policy of single nationality to enable them to apply such a policy. Nonetheless, deletion of the words "at least" would create the false impression that the Commission was totally opposed to multiple nationality. The Working Group and the Drafting Committee had felt that retention of the words "at least" was a compromise formula which avoided prejudging the question.

44. Mr. Sreenivasa RAO endorsed the view of the Chairman of the Drafting Committee and of the Chairman of the Commission that the words "at least", which had been introduced on first reading as a means of maintaining the Commission's neutrality on the issue of single versus multiple nationality, should be retained.

45. Mr. ECONOMIDES said he shared Mr. Kabatsi's opinion that the words "at least" served no useful purpose. Indeed, they actually detracted from the Commission's neutral stance. In the first place, all international provisions previously adopted on the question spoke of "the right to a nationality". Secondly, the Commission's aim was to avoid situations of statelessness by guaranteeing every person a nationality; multiple nationality was, however, purely a matter for States' internal law. Thirdly, many States rejected the phenomenon of dual nationality and there was no reason to antagonize such States. Last but not least, the words gave the impression that the Commission was in favour of dual or multiple nationality, an issue which in any case fell outside the scope of the topic under consideration. In short, while the right to a nationality was a hallowed right, the right to at least one nationality was a highly debatable proposition, especially in international law.

46. Mr. ROSENSTOCK endorsed the view that to delete the words "at least" would prejudice the issue of dual nationality, whereas to retain them, together with an explanation in the commentary, would not prejudice the issue one way or the other.

47. Mr. LUKASHUK said it was necessary to dispel a misconception. The Commission was discussing, not the right to dual nationality, but a right to choose between two nationalities—a right of option. The words "at least", far from prejudging the issue, provided persons with an opportunity to acquire one or another nationality, and should therefore be retained.

48. The CHAIRMAN noted that many States, too, had favoured retention of the words "at least", and had supported the neutral approach adopted by the Commission on the question of multiple nationality. It was not true to say that the formulation ran counter to existing practice: the European Convention on Nationality clearly recognized the possibility of dual nationality. Deletion of the words "at least" might thus create more problems than it solved. The point at issue was, not application of the formula by States—whose right to apply a policy of single nationality was safeguarded elsewhere—but protection of natural persons' right of option.

49. Mr. Sreenivasa RAO said that the words "at least" had been added on first reading in order to emphasize from the outset that, in situations of State succession, statelessness was the outcome to be avoided.

50. The CHAIRMAN said that, if need be, further clarification could be added when the Commission came to adopt the commentaries to the draft articles.

51. Mr. ECONOMIDES reiterated, for the record, his view that an article 1 worded "... has the right to the nationality of one of the States concerned ..." would fully cover all eventualities. He could not accept the contention that deletion of the words "at least" would prejudge the issue of dual nationality one way or the other.

52. The CHAIRMAN said that, with all due respect to Mr. Economides, it seemed to him that by deleting the words "at least" the Commission would, *a contrario*, be rejecting the possibility of dual nationality. The words "nationality of one of the States concerned" implied "one and only one". The point at issue was the right to a nationality, which must be distinguished from nationality itself, the final effect of realization of that right.

53. As the overwhelming majority of members appeared to favour retaining the words "at least", he would take it that the Commission wished to adopt article 1 in the form proposed by the Drafting Committee, bearing in mind the suggestions that the commentary to the article might be redrafted so as to place even greater emphasis on the Commission's neutral stance on the question of multiple nationality.

*Article 1 was adopted.*

ARTICLE 2 (Use of terms)

54. The CHAIRMAN said that the Drafting Committee had proposed no changes to article 2 as adopted on first reading.

55. Mr. PAMBOU-TCHIVOUNDA proposed amending subparagraph (*e*) of article 2 by replacing the words "other than the predecessor State or the successor State" by the words "other than the State(s) concerned", a term already defined in subparagraph (*d*).

56. Mr. ROSENSTOCK said he saw some merit in having each definition in article 2 stand as a self-contained entity, without cross-reference to other subparagraphs of the article.

57. Mr. CANDIOTI (Chairman of the Drafting Committee) supported the view expressed by Mr. Rosenstock. An article dealing with use of terms should strive for definitions of the utmost clarity. So as to leave absolutely no room for doubt, it would be better to adopt the subparagraph unchanged.

*Article 2 was adopted.*

ARTICLE 3 [27] (Cases of succession of States covered by the present draft articles)

58. The CHAIRMAN reminded members that, after extensive discussions in the Working Group and Drafting Committee taking account of the comments of States, it had been decided to place the former article 27 near the beginning of the text, as article 3.

*Article 3 was adopted.*

ARTICLES 4 [3] (Prevention of statelessness) and 5 [4] (Presumption of nationality)

59. The CHAIRMAN said that the Drafting Committee had proposed no changes to articles 4 and 5.

*Articles 4 and 5 were adopted.*

ARTICLE 6 [5] (Legislation on nationality and other connected issues)

60. The CHAIRMAN said that as a minor stylistic change, in the title and the text, the expression "legislation concerning nationality" had been altered to "legislation on nationality".

61. Mr. PAMBOU-TCHIVOUNDA proposed amending the words *de l'effet de sa législation sur leur nationalité, des options que cette législation peut leur offrir*, in the second sentence of the French text, to *de l'effet de cette législation sur leur nationalité, des options qu'elle peut leur offrir*.

62. Mr. CANDIOTI (Chairman of the Drafting Committee) said that the proposed amendment better reflected the original English text, of which the French text was a translation. He could thus support Mr. Pambou-Tchivounda's proposal.

63. The CHAIRMAN requested members to submit any proposals for linguistic amendments to versions other than the English text directly to the secretariat, for consolidation.

64. Mr. GOCO asked whether the Drafting Committee had heeded the suggestions made by States, first, to change the word "should" to "shall"; and secondly, to replace the word "consequences" by some stronger formulation.

65. The CHAIRMAN said that the Working Group and the Drafting Committee had opted for the more general and neutral "should", as there was no objective requirement to adopt legislation and some States might already have done so.

66. He said that, if he heard no objection, he would take it that the Commission wished to adopt article 6 as it stood.

*Article 6 was adopted.*

ARTICLE 7 [6] (Effective date)

67. Mr. PAMBOU-TCHIVOUNDA proposed two changes in the French version: *y compris* should be replaced by *tout comme* and, accordingly, *prend* by *prennent*. The current wording gave the impression that the acquisition of nationality following the exercise of an option was a subcategory of the attribution of nationality in relation to the succession of States, when in fact they were two different matters.

68. The CHAIRMAN said the matter had been thoroughly discussed in the Working Group, which had decided to merge the two situations.

69. Mr. SIMMA supported Mr. Pambou-Tchivounda's view. Attribution and acquisition were different matters and one could not be a subcategory of the other. In the English version, "including" might be replaced by "as well as".

70. The CHAIRMAN, citing article 11 [10], paragraph 3, said that attribution and acquisition were in fact two sides of the same situation. The rendering of nationality was an attribution for the State and an acquisition for the person concerned. In the light of article 11 [10], paragraph 3, the acquisition of nationality following the exercise of a right of option was included in the general concept of attribution of nationality in relation to the succession of States.

71. Mr. SIMMA suggested that replacing "including the acquisition" by "including the attribution" might be a possible solution.

72. Mr. CANDIOTI (Chairman of the Drafting Committee) said that the remarks of both Mr. Pambou-Tchivounda and Mr. Simma had merit. He himself did not have strong feelings either way.

73. Mr. MELESCANU said that both Mr. Pambou-Tchivounda's and Mr. Simma's proposals were preferable to the current formulation. Of the two he preferred Mr. Pambou-Tchivounda's proposal, as article 7 [6] was an attempt to link two articles which had originally concerned two different ways of obtaining nationality. However, he could also accept Mr. Simma's proposal.

74. Mr. SIMMA said that, in the light of Mr. Melescanu's comments, the best solution would be to replace "including" by "as well as".

75. The CHAIRMAN said there appeared to be a consensus in favour of Mr. Pambou-Tchivounda's proposal. In the French version, *y compris* would be replaced by

*tout comme* and *prend* by *prennent*, and in the English version "including" would be replaced by "as well as". He said that, if he heard no objection, he would take it that the Commission wished to adopt article 7 with that amendment.

*Article 7, as amended, was adopted.*

ARTICLE 8 [7] (Persons concerned having their habitual residence in another State)

76. Mr. PAMBOU-TCHIVOUNDA proposed that "another State" in the title should be replaced by "third State".

77. Mr. ECONOMIDES said that the expression "another State" was preferable because it could cover a State concerned, such as the predecessor State. Article 8 [7] also raised a sensitive question of international law: could a successor State automatically attribute its nationality to persons outside both its territorial jurisdiction because they lived abroad and its personal jurisdiction because they already had a nationality? He did not think so, and the article should say as much. Otherwise the Commission would be committing an error of international law.

78. Mr. MELESCANU said that paragraph 2 met Mr. Economides' concern. The draft article had achieved a balance between respect for the fundamental principle of public international law to which Mr. Economides was referring, and the concern to reduce the number of stateless persons throughout the world, especially in connection with State succession.

79. Mr. ELARABY, supported by Mr. PAMBOU-TCHIVOUNDA, said that there was a contradiction between "unless they would otherwise become stateless" and "against the will of the persons concerned" which could not be resolved in the commentary alone. Perhaps a phrase such as "Notwithstanding the need to ensure that no person remains stateless", or something similar, might be added at the beginning of paragraph 2; that would leave intact the most important element in the paragraph, namely the fact that no State could attribute its nationality against a person's will.

80. Mr. SIMMA said that Mr. Elaraby's proposal did not make the Commission's preference clear.

81. The CHAIRMAN said that the formula "unless they would otherwise become stateless" in article 8 [7] was a direct reflection of the principle of prevention of statelessness in article 4. In the opinion of the Working Group and Drafting Committee, it created a proper balance between the principles of individual will and prevention of statelessness. Statelessness should be an exception; it was not the Commission's role to create stateless persons.

82. Mr. PAMBOU-TCHIVOUNDA said that the difficulty arose from the failure to determine the basis for the successor State's power to attribute nationality. It seemed to him that the Commission was creating, *a contrario*, an obligation for the successor State to confer nationality on persons who had not chosen its nationality and whom it did not recognize.

83. Mr. ELARABY said that Mr. Simma's point was well taken. Since the question of statelessness was covered in article 4, perhaps the phrase "unless they would otherwise become stateless" could simply be deleted.

84. Mr. ROSENSTOCK said the difference between article 4 and article 8 [7] was that article 4 did not allow States to impose a nationality under certain circumstances. Article 8 [7] provided clear guidance in the event of a clash between an individual's will and the avoidance of statelessness, in which case the avoidance of statelessness was considered to take precedence. That clear value choice was not provided in article 4.

85. The CHAIRMAN suggested that, if the "unless ..." formula was not acceptable, a phrase such as "Subject to the provisions in article 4" might be placed at the beginning of the article.

*The meeting rose at 1.10 p.m.*

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## 2580th MEETING

*Wednesday, 2 June 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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**Nationality in relation to the succession of States[1] (*concluded*) (A/CN.4/493 and Corr.1,[2] A/CN.4/496, sect. E, A/CN.4/497,[3] A/CN.4/L.572, A/CN.4/L.573 and Corr.1)**

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING *(concluded)*

1. The CHAIRMAN invited the members of the Commission to continue consideration of the titles and texts of

[1] For the draft articles with commentaries thereto provisionally adopted by the Commission on first reading, see *Yearbook ... 1997*, vol. II (Part Two), p. 14, chap. IV, sect. C.

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

[3] Ibid.

the draft articles on nationality of natural persons in relation to the succession of States adopted by the Drafting Committee on second reading (A/CN.4/L.573 and Corr.1). He reminded them that the text took into account the comments made by Governments in the Sixth Committee and that it would not be wise to try to modify it at the current stage. He assured them, however, that any comments which they might make on the draft articles would be duly reflected in the summary record of the meeting.

PART I (General provisions) (*concluded*)

ARTICLE 8 [7] (Persons concerned having their habitual residence in another State) (*concluded*)

2. Mr. ELARABY said he still thought that paragraph 2 was a contradiction in terms: it was not possible to impose upon the successor State the obligation not to attribute its nationality to persons concerned against their will and at the same time for it to attribute its nationality to them if they otherwise became stateless. He would gladly endorse the suggestion made by the Chairman (2579th meeting) and said that the paragraph should be amended to read: "Subject to the provisions in article 4, a successor State shall not attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned."

3. The CHAIRMAN observed that there had not been a majority in favour of that suggestion and pointed out once again that the provision under consideration had not given rise to any criticism in the Sixth Committee and that neither the Working Group on nationality nor the Drafting Committee had suggested any changes.

*Article 8 was adopted.*

ARTICLE 9 [8] (Renunciation of the nationality of another State as a condition for attribution of nationality)

*Article 9 was adopted.*

ARTICLE 10 [9] (Loss of nationality upon the voluntary acquisition of the nationality of another State)

4. Mr. GOCO said he wondered whether the nationality in question at the very end of paragraph 2 was that of the successor State or that of the persons concerned. In the latter case, it would be necessary to replace the possessive adjective "its" with "their" in the English text and, where necessary, change the other versions accordingly.

5. Mr. CANDIOTI (Chairman of the Drafting Committee) said that it was in fact the nationality of the successor State and that there was therefore no reason to change the possessive adjective, except in the Spanish text, where it might be ambiguous.

*Article 10 was adopted.*

ARTICLE 11 [10] (Respect for the will of persons concerned)

*Article 11 was adopted.*

ARTICLE 12 [11] (Unity of family)

6. Mr. HE said that he had doubts about the appropriateness of including a provision on the unity of the family in the draft articles. The Memorandum by the Secretariat (A/CN.4/497) showed that Governments were also hostile to that provision. First, the interpretation of the term "family" varied from one region to another and even from one country to another within the same region. Secondly, it was not unusual for members of the same family to live together although they had different nationalities.

7. The provision went beyond the scope of the draft articles and its subject matter fell more under private and domestic law.

8. Mr. KABATSI said that he was also opposed to including the provision, which he regarded as vague: what were the appropriate measures in question? If, for example, they were legal or administrative measures, they might be unrelated to the question of nationality. The provision did not relate to the draft articles.

9. The CHAIRMAN acknowledged that doubts had been expressed about the raison d'être of the article. However, it had also attracted broad support. Using balanced terms, article 12 [11] was intended to protect the fundamental rights of persons concerned. There was also a trend towards affording protection to the family in the context of nationality, as demonstrated by the European Convention on Nationality, which, contrary to the draft articles, imposed specific obligations designed to simplify and facilitate the procedure to be followed by members of the same family for the acquisition of nationality.

*Article 12 was adopted.*

ARTICLE 13 [12] (Child born after the succession of States)

ARTICLE 14 [13] (Status of habitual residents) and

ARTICLE 15 [14] (Non-discrimination)

*Articles 13, 14 and 15 were adopted.*

ARTICLE 16 [15] (Prohibition of arbitrary decisions concerning nationality issues)

10. Mr. ECONOMIDES said that a reversal of the order of stages would be more logical: first, the successor State should not arbitrarily deny persons concerned the right to its nationality; secondly, the predecessor State should not arbitrarily deprive persons concerned of its nationality before they had acquired the nationality of the successor State; and then came the right of option.

11. The CHAIRMAN said that the logic changed according to whether the matter was approached from the

angle of the State or the angle of the person concerned. In any case, the sequence followed in article 16 [15] was no less logical, beginning with the predecessor State and moving on to the successor State.

*Article 16 was adopted.*

ARTICLE 17 [16] (Procedures relating to nationality issues)

12. Mr. CANDIOTI (Chairman of the Drafting Committee), replying to a question by Mr. Melescanu concerning the meaning of the adjective "effective" used to qualify an administrative or judicial review, said the idea was that there should be a real possibility for persons who felt they had been harmed by a decision to have it reviewed by an administrative or judicial body, enjoying the guarantees of due process of law. In response to Mr. Goco, who had asked whether, in the context of such guarantees, the Drafting Committee had considered the matter of "reasonable fees", he said that the Working Group and the Drafting Committee had in fact taken up that question, which certain Governments had mentioned in their observations. To be "effective", an appeal should be unimpeded by any obstacle, restriction or unfulfillable condition such as prohibitive costs. The commentary should perhaps be fleshed out to clarify that point.

13. Mr. PELLET said that the commentary should also indicate that, in French, the word *judiciaire* should be understood to mean *juridictionnel*, i.e. that appeals should lie either to administrative courts or to ordinary courts. It was a very important point for Roman law systems.

*Article 17 was adopted.*

ARTICLE 18 [17] (Exchange of information, consultation and negotiation)

*Article 18 was adopted.*

ARTICLE 19 [18] (Other States)

14. Mr. ECONOMIDES said he wished to place on record his "formal" reservation on article 19 [18] for reasons he had previously explained in detail; he continued to believe that the article, of a kind not usually found in international instruments, would create more problems than it would solve.

*Article 19 was adopted.*

*Part I, as amended, was adopted.*

PART II (Provisions relating to specific categories of succession of States)

[FORMER ARTICLE 19]

*Former article 19 was deleted.*

SECTION 1 (Transfer of part of the territory)

ARTICLE 20 (Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State)

15. Mr. PAMBOU-TCHIVOUNDA said he thought that, since the right of option had already been established in principle in article 11, it was unnecessary to say at the end of the first sentence of article 20 that the right of option "shall be granted" to such persons. The text should simply read "their" right of option. He requested that his comment should be placed on record.

*Article 20 was adopted.*

SECTION 2 (Unification of States)

ARTICLE 21 (Attribution of the nationality of the successor State)

*Article 21 was adopted.*

SECTION 3 (Dissolution of a State)

ARTICLE 22 (Attribution of the nationality of the successor States)

16. Mr. GOCO suggested that the words "when a State dissolves" in the English text should be replaced by the words "when a State is dissolved".

17. The CHAIRMAN explained that the terms used in article 22 had been taken from the 1983 Vienna Convention.

*Article 22 was adopted.*

ARTICLE 23 (Granting of the right of option by the successor States)

*Article 23 was adopted.*

SECTION 4 (Separation of part or parts of the territory)

ARTICLE 24 (Attribution of the nationality of the successor State)

18. Mr. CANDIOTI (Chairman of the Drafting Committee) said that the phrase "subject to the provisions of article 26", which survived from an earlier version, should be deleted from the English text. The idea conveyed by that phrase had been expressed by the words "unless otherwise indicated by the exercise of a right of option". As the text of the article in French and Spanish was correct, a corrigendum would be issued referring to the English text only.

*Article 24 was adopted.*

ARTICLE 25 (Withdrawal of the nationality of the predecessor State) and

ARTICLE 26 (Granting of the right of option by the predecessor and the successor States)

*Articles 25 and 26 were adopted.*

*Part II was adopted.*

19. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the whole set of draft articles.

*It was so agreed.*

*The draft articles on nationality of natural persons in relation to the succession of States were adopted on second reading.*

20. Mr. ECONOMIDES said that, if there had been a vote on the draft articles just adopted in their entirety, he would have abstained, in view of the criticisms he had expressed with regard to a number of draft articles.

21. The CHAIRMAN thanked all members of the Commission for their cooperation in the adoption of the draft articles. With regard to the form they should take, if he heard no objection, he would take it that the Commission wished to recommend that the draft articles should be adopted by the General Assembly in the form of a declaration.

*It was so agreed.*

22. The CHAIRMAN welcomed the adoption of a new set of draft articles. He expressed his thanks to Mr. Mikulka, who had been Special Rapporteur on the draft articles before becoming Secretary to the Commission, and also Mr. Candioti, the Chairman of the Drafting Committee.

23. Mr. Sreenivasa RAO commended the excellent work done by the Special Rapporteur, thanks to which the Commission had adopted the draft articles on second reading speedily and without difficulty. He proposed that, as was customary, the Commission should adopt a resolution expressing its gratitude to the Special Rapporteur.

24. The CHAIRMAN welcomed that proposal and said that a resolution paying tribute to the former Special Rapporteur, Mr. Mikulka, would be submitted in due course.

25. Mr. PELLET noted with satisfaction that the Commission had adopted the draft articles on nationality of natural persons in relation to the succession of States on second reading, but asked whether it had yet taken a final position on the question of nationality of legal persons or, more broadly, on the question of the rights and obligations of legal persons in relation to a State succession.

26. The CHAIRMAN said that the Commission would first have to consider the commentary to the draft articles on nationality of natural persons in relation to the succession of States which had just been adopted. After the members had had an opportunity to hold informal consultations, it would then decide what action it intended to take concerning the question of nationality of legal persons in relation to the succession of States.

27. Mr. KUSUMA-ATMADJA said he wished to express his personal gratitude to the Chairman of the Drafting Committee, the Chairman of the Commission and the Special Rapporteur. He was satisfied with the draft articles adopted, although he had some reservations on a few terminological and conceptual matters. He pointed out that there were differences even among countries rooted in the Roman law system; thus, some South-East Asian countries had a code based on the Swiss code, while that of others was based on the German code.

28. Mr. ADDO thanked the Chairman, who had proved an effective Chairman of the Working Group on nationality in relation to the succession of States.

29. The CHAIRMAN said that his task as Chairman of the Working Group and of the Commission had been greatly facilitated by the high quality of the draft articles submitted.

*The meeting rose at 11.25 a.m.*

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## 2581st MEETING

*Thursday, 3 June 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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**Reservations to treaties[1] (A/CN.4/491 and Add.1-6,[2] A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,[3] A/CN.4/L.575)**

[Agenda item 5]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Commission to take up the topic of reservations to treaties. At the fiftieth session, the Special Rapporteur had started to introduce chapter I,

[1] For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

[2] See *Yearbook ... 1998*, vol. II (Part One).

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

section C, of his third report (A/CN.4/491 and Add.1-6) concerning interpretative declarations, but the Commission had not had time to consider all of the draft guidelines included in the third report. Only draft guideline 1.2 (Definition of interpretative declarations), in chapter I, section C, had been transmitted to the Drafting Committee. He invited the Special Rapporteur to continue his introduction of the draft guidelines included in chapter I, section C, and then to proceed with the introduction of chapter II of the third report and his fourth report (A/CN.4/499 and A/CN.4/478/Rev.1).

2. Mr. PELLET (Special Rapporteur) said that, unfortunately, some delay had occurred in the submission of his fourth report, and he had been absent during the early part of the current session for unexpected reasons. However, if the Commission succeeded in adopting the 14 remaining draft guidelines and all of the commentaries, as well as the 3 other draft guidelines referred to the Drafting Committee by the Commission at its fiftieth session, it would have completed satisfactory work.

3. He intended first to take stock of the situation, which would correspond to the introduction to his fourth report, and then to introduce, one by one, the draft guidelines still to be considered.

4. At the fiftieth session, the Commission had managed to consider only the part of his third report which dealt with the definition of reservations and interpretative declarations. Great progress had been made on reservations, with the adoption of a general definition in draft guideline 1.1 (Definition of reservations) and five draft guidelines, including one guideline with no number whose placement in the draft Guide to Practice would be decided at a later date. As the Commission had not followed his own numerical order in adopting the draft guidelines, to avoid confusion he would refer to both sets of numbers where necessary.

5. The five numbered draft guidelines that had been adopted were 1.1.1 (Object of reservations), 1.1.2 (Instances in which reservations may be formulated), 1.1.3 (Reservations having territorial scope), 1.1.4 (Reservations formulated when notifying territorial application) and 1.1.7 (Reservations formulated jointly). The unnumbered guideline stated that defining a unilateral statement as a reservation was without prejudice to its permissibility and its effects under the rules relating to reservations, and it thus made an extremely important clarification. When adopting the draft guidelines that were still to be considered, the Commission must bear in mind that it was not regulating but was exclusively defining, without entering into the area of permissibility or effects.

6. At its previous session, the Commission had decided to return draft guidelines 1.1.5 (Statements designed to increase the obligations of their author) and 1.1.6 (Statements designed to limit the obligations of their author) to the Drafting Committee, which was currently considering them. Those two draft guidelines, which attempted to clarify the very difficult problem of so-called extensive reservations, had mistakenly been reproduced in paragraph 540 of the French version of the report of the Commission to the General Assembly on the work of its fiftieth session[4] as if they had been provisionally adopted. He requested the secretariat to take the necessary steps to correct that error.[5] In accordance with decisions taken at the second part of the fiftieth session in New York,[6] the Drafting Committee was invited to depart from the usual practice and propose new wordings for draft guidelines 1.1.1 and 1.1.3. He had fully agreed with the possibility of reviewing draft guideline 1.1.1 in the light of the definition of unilateral declarations but remained reserved on the need to review draft guideline 1.1.3 together with draft guideline 1.1.1. As the Drafting Committee had nearly concluded its consideration of draft guideline 1.2, it would soon be turning its attention to draft guidelines 1.1.1 and 1.1.3.

7. Another difficulty encountered at the fiftieth session was that a large majority of the members of the Commission had contested the proposed draft guideline on reservations relating to non-recognition, numbered 1.1.7 in his third report. Their reaction had convinced him to withdraw that guideline and propose a different text in his fourth report, which he suggested the Commission should take up at a forthcoming meeting. He trusted the Commission would succeed in resolving at the current session all the problems to which he had referred.

8. Two other matters not covered at the fiftieth session were the definition of interpretative declarations, something which the Commission had merely skimmed, and chapter II of the third report concerning reservations and interpretative declarations in respect of bilateral treaties, which it had not taken up at all. He would confine himself to interpretative declarations; the question of "reservations" to bilateral treaties might be taken up when the general questions concerning interpretative declarations had been concluded.

9. Interpretative declarations were as long-standing a phenomenon as reservations. Although their principle was not contested, the 1969 and 1986 Vienna Conventions made no mention of them; hence the importance of their inclusion in the Guide to Practice. Such was the aim of draft guideline 1.2, which was the counterpart for interpretative declarations of draft guideline 1.1 on reservations. One of the differences between the two was that the Commission could not depend on the texts of generally-accepted treaties for draft guideline 1.2, as none existed. It read:

> "'Interpretative declaration' means a unilateral declaration, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions."

However, the English version omitted the word *préciser*. The phrase in question might therefore read "... purports to specify or to clarify ...". The Commission had considered the text at its fiftieth session and had generally approved it. It seemed that the Drafting Committee, which had met the day before, had also been generally favour-

[4] *Official Records of the General Assembly, Fifty-third session, Supplement No. 10* (A/53/10).

[5] The final text appears in *Yearbook ... 1998*, vol. II (Part Two), p. 99.

[6] Ibid., footnotes 207 and 208.

able to it and the Commission could in all likelihood proceed to consider draft guidelines 1.2.1 (Joint formulation of interpretative declarations), 1.2.2 (Phrasing and name), 1.2.3 (Formulation of an interpretative declaration when a reservation is prohibited), 1.2.4 (Conditional interpretative declarations), 1.2.5 (General declarations of policy) and 1.2.6 (Informative declarations) on the basis of draft guideline 1.2.

10. Draft guidelines 1.2.1 to 1.2.6 were designed to supplement the general definition in draft guideline 1.2 on several points. As draft guidelines 1.2.7 (Interpretative declarations in respect of bilateral treaties) and 1.2.8 (Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party) dealt with bilateral treaties, he proposed that the Commission should skip from draft guideline 1.2.6 to draft guidelines 1.3.0 et seq. concerning the distinction between reservations and interpretative declarations and return to draft guidelines 1.2.7 and 1.2.8 when it came to consider draft guideline 1.1.9 ("Reservations" to bilateral treaties). He proposed that the Commission proceed to take up the draft guidelines in the order he had suggested, beginning with draft guideline 1.2.1.

11. The CHAIRMAN noted that draft guidelines 1.1.5 and 1.1.6 had indeed not been adopted; and they had been omitted from all the language versions of the Commission's report except the French.

12. Mr. HE expressed appreciation to the Special Rapporteur for the draft guidelines and the part of the third report concerning interpretative declarations, which represented a topic of special interest in international law circles and would constitute a valuable contribution to the law of treaty reservations.

13. The present approach to the subject focused on reservations and considered interpretative declarations by way of contrast. He wondered whether that was preferable to a parallel approach. Given the common elements between the reservations and interpretative declarations, the crucial criterion for distinguishing them was the teleological factor: while a reservation was intended to exclude or modify the legal effect of the treaty's provisions, an interpretative declaration sought only to interpret the treaty or some of its provisions. Clarifying the difference between the two was particularly helpful in situations where States tried to cloak reservations as interpretative declarations when a treaty prohibited reservations.

14. As its name indicated, an interpretative declaration was intended to interpret. He was pleased in that connection to hear that the Drafting Committee had completed its consideration of draft guideline 1.2. Although the 1969 Vienna Convention did not mention them, he believed that interpretative declarations could be made under the provisions set forth in articles 31 and 32, in conformity with the letter and spirit of the relevant treaty and its corresponding provisions. On the other hand, any unilateral statement designed to preclude or modify the legal effect of certain provisions of the treaty should be regarded as a reservation, even when presented under the heading of interpretative declaration.

15. Mr. LUKASHUK congratulated the Special Rapporteur on his detailed reports on a topic that was of current interest. The style of the Guide to Practice should be almost the same as that of a manual, but that was not always the case. The definition of reservations in draft guideline 1.1 included a phrase referring to the time when a reservation was made. There was no need for that phrase and it should be placed in a separate guideline. The Special Rapporteur himself seemed to understand that, for in paragraph 132 of his third report he had written that the idea of including limits *ratione temporis* to the possibility of formulating reservations in the definition itself of reservations was not self-evident and, in fact, such limits were more an element of their legal regime. That was entirely correct, and it was for that very reason that the phrase should be in a separate guideline.

16. The Special Rapporteur seemed to have forgotten that it was unwise to go looking for trouble, for example, in the provision on joint reservations. Admittedly, in practice States at present did not resort to joint reservations, but the draft guideline on joint reservations itself raised a whole series of legal problems. Did one of the authors of the reservations have the right to withdraw it, and under what conditions? However, the main issue was that, in proposing a provision on situations that were unlikely to arise, the Commission could be creating the impression that there was no real material for codification, since the situations were merely hypothetical. It would be better advised to concentrate on real problems that actually existed.

17. Mr. PELLET (Special Rapporteur), responding to the comments made by Mr. Lukashuk, said it was surprising to see that he was reopening the question of the time element, which had already been decided with the Commission's adoption of draft guideline 1.1, which in any event merely reproduced the provisions of the 1969 Vienna Convention.

18. As to whether one should be proactive or not, his personal preference was to forge ahead rather than to lag behind. Since joint reservations were beginning to appear on the horizon, the Commission would do better to address the issue, rather than to leave the matter hanging in the void to be dealt with by those who might have to carry on the work in the future and their endeavours might be made all the more difficult by the Commission's very failure to give any guidance.

19. He agreed to some extent with Mr. He's questions about his approach and would try to follow a middle path, using reservations as the central axis but pursuing in future chapters the analysis of the rules applicable to interpretative declarations, in counterpoint to the work on reservations. There was no question that reservations were the linchpin of the draft Guide to Practice, but he was increasingly convinced that, if interpretative declarations were left to one side, the Commission's work would not prove satisfactory. He would perhaps revert to the issue in presenting the remaining part of the fourth report in order to hear what members of the Commission had to say about it.

GUIDELINE 1.2.1

20. Mr. PELLET (Special Rapporteur) said that draft guideline 1.2.1, proposed in his third report, dealt with the joint formulation of an interpretative declaration and was the counterpart, as far as interpretative declarations were concerned, of draft guideline 1.1.7 concerning reservations provisionally adopted by the Commission at its fiftieth session. For the sake of consistency, the Commission might wish to transpose draft guideline 1.2.1 to the end of the section of the Guide to Practice on interpretative declarations, as it had done in the case of reservations.

21. The draft guideline should not pose any major difficulties. At its fiftieth session, the Commission had accepted the idea that, although they were unilateral statements, reservations could be formulated jointly by a number of States or international organizations. In so doing, the Commission had engaged in progressive development of international law rather than of codification *stricto sensu*, for, as far as he knew, no reservation had yet been formulated jointly. In contrast, joint formulation of interpretative declarations had already entered into practice, and a number of examples were given in paragraph 268 of his third report. By including a guideline on joint formulation of interpretative declarations, the Commission would merely be acknowledging a practice that had the merit of making life easier for States, particularly for depositaries, which could treat as a single document a unilateral declaration that came jointly from several States or international organizations. In view of the Commission's discussions at the previous session on the corresponding draft guideline for reservations, however, draft guideline 1.2.1 should be reviewed at the current time to align it with draft guideline 1.1.7 provisionally adopted by the Commission. That task could easily be accomplished by the Drafting Committee if, as he hoped, the Commission submitted draft guideline 1.2.1 to the Drafting Committee together with a recommendation that it should decide on the proper position for the draft guideline.

22. Mr. GAJA said he wondered whether bringing draft guideline 1.2.1 into line with draft guideline 1.1.7 would change its meaning in some way. As already pointed out, when a declaration was formulated jointly, there might either be a series of unilateral acts or a collective act. States might have difficulty in disengaging themselves from something done jointly with other States. The Special Rapporteur's formulation of the draft guideline was more neutral and seemed preferable.

23. Mr. ECONOMIDES said he experienced no difficulty with draft guideline 1.2.1, but would like to know whether the Special Rapporteur was intending to propose at some future date provisions on the withdrawal of joint reservations and interpretative declarations formulated jointly. What should be done with regard to withdrawal when several States had formulated a reservation or made an interpretative declaration? Was unilateral withdrawal possible in such a situation? When would collective withdrawal be required?

24. Mr. PELLET (Special Rapporteur) said that the question would necessarily lead to consideration of the regime for joint reservations or jointly formulated interpretative declarations, to the extent that they raised a number of specific problems already touched on at the previous session. He had been intending for the current session to devote a chapter to withdrawal of reservations and interpretative declarations in which he would take up the specific issue of withdrawal of joint reservations and jointly formulated interpretative declarations. Such issues would inevitably arise in practice, and it would be best to be prepared for that eventuality in the interests, not of inventing problems, but of anticipating those that might occur, in order to try and help States resolve them.

25. Mr. Gaja's comments reverted to a discussion the Commission had already held at length at the previous session. The somewhat academic formulation he had originally proposed had been modified, in the light of the Commission's comments, in the direction of greater precision. The acts in question had been clearly identified as unilateral declarations, something that complicated the Commission's task, but it had been a considered decision on the Commission's part. It was essential to align the provision on interpretative declarations with that of reservations and the Drafting Committee was called upon to engage in what was purely a drafting exercise.

26. Mr. GAJA said that as long as the problem of withdrawal was going to be addressed, the alignment of the texts on reservations and on interpretative declarations was more acceptable.

27. Mr. LUKASHUK said that unlike joint reservations, interpretative declarations formulated jointly gave rise to no legal consequences in respect of the relations among the States that had acted jointly. Reference could be made to estoppel in that connection. But as the Special Rapporteur had already pointed out, the situation addressed by draft guideline 1.2.1 was already starting to arise in practice. The draft should accordingly be approved.

28. Mr. PELLET (Special Rapporteur) said he did not agree with Mr. Lukashuk that interpretative declarations had no legal consequences: they did, but not the same consequences as did reservations.

29. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.2.1 to the Drafting Committee.

*It was so agreed.*

GUIDELINE 1.2.2

30. Mr. PELLET (Special Rapporteur), introducing draft guideline 1.2.2 on the phrasing or name of a unilateral declaration, said that the expression was infelicitous but had been taken from the Vienna definition of reservations. The reason for its inclusion in the draft was that, according to the definition of reservations in the 1969 and 1986 Vienna Conventions, which was incorporated in draft guideline 1.1, the phrasing or name that a State chose to apply to a statement was of no effect in determining whether the statement was a reservation or not. The same was naturally true, by extension, with respect to interpretative declarations, and he had accordingly included the words "phrased or named" in draft guideline 1.2. No objection had been made in the Commission to that for-

mulation, which was also introduced into draft guideline 1.2.1.

31. However, the indifference inherent in the phrasing or name that a State deliberately chose to use to refer to its unilateral declaration was somewhat immoral. It amounted to acknowledging that a State could knowingly practise deceit by designating as a reservation something it knew perfectly well was an interpretative declaration, or conversely, and more frequently and with more serious consequences, by calling an interpretative declaration something that was, in reality, a reservation.

32. Many writers, adopting a moralistic stance, believed that States must be taken at their word in order to prevent them from modifying their initial position concerning the nature of their unilateral declarations. He sympathized with that stance, which also had the advantage of being straightforward: when a State said that it had made a reservation, the rules for reservations would apply, and in the case of interpretative declarations, the rules for such declarations would apply.

33. But it was neither possible nor reasonable nor logical to go that far, for two reasons that were detailed in paragraphs 277 to 283 of his third report. First, such a categorical stance would be completely incompatible with the clear terms of the Vienna definition, and secondly, it would run counter to what was clear and consistent State practice and legal precedents that were well founded if somewhat scarce. The Commission would not only not be engaging in codification or progressive development: it would in fact be legislating, something which was not its task.

34. On the other hand, a small step could and should be taken in the direction of moral rectification of State practice, and that was what he proposed in draft guidelines 1.2.2 and 1.2.3. The proposal was not, however, a proposal *de lege ferenda*. The phrasing or name of a unilateral declaration was never sufficient to designate it as a reservation or as an interpretative declaration, but it could help in proceeding to make such a designation. A number of examples in support of that position, drawn from legal precedent and doctrine, were given in paragraphs 284 to 287 of his third report.

35. Draft guideline 1.2.2 thus struck a good balance between the amoralism of total indifference to the phrasing or name given by a State to a unilateral declaration and the unrealism of an absolute presumption in favour of the terminology adopted by the declarant State itself. Although a State might sometimes wish to deceive others by deliberately choosing an erroneous designation, there were also times when a State deceived itself. States did have ulterior motives at times, but that did not mean they constantly sought to deceive their partners. The dark doubts raised in radical elements of the doctrine about the good faith of States were no more justified than were the assumptions about the angelic nature of their intentions. It would be inadmissible for States to be inexorably cornered by errors committed in good faith.

36. In pursuing a proper balance, the draft guideline eschewed such words as "presumption" in favour of "indication" of the desired objective and it emphasized a particularly striking situation: one in which a State or an international organization simultaneously formulated several unilateral statements, designating some of them as reservations and others as interpretative declarations. The situation was illustrated by the position taken by the European Court of Human Rights in the *Belilos* case: everything pointed to the conclusion that the declarant State had not acted haphazardly but had deliberately made a distinction between what it considered to be a reservation and what it considered to be an interpretative declaration, using two different names. Such a deliberate distinction had to be taken into account in favour of the State or, where necessary, against it. The 1977 decision by the arbitration tribunal in the *English Channel* case was also in keeping with that general philosophy.

37. The Commission would accordingly be doing useful work by including in the Guide to Practice a provision expressing the ideas laid out in draft guideline 1.2.2, which he hoped the Commission would transmit to the Drafting Committee. There was certainly room for considerable improvement of the wording, although he had no specific proposals to make at present. He would also be grateful for the views of members of the Commission as to whether the draft guideline should be placed, not in section 1.2 as it was at the current time, but in section 1.3 (Distinction between reservations and interpretative declarations), since the draft guideline dealt with a problem that arose in connection with both types of statement and not just with interpretative declarations.

38. Mr. SIMMA agreed with the Special Rapporteur that draft guideline 1.2.2 belonged more properly in section 1.3 of the Guide to Practice and suggested that draft guideline 1.2.3, which seemed to address the same issue, should also be moved.

39. Mr. GOCO, noting that the implication of draft guideline 1.2.2 was that the phrasing or name of a unilateral declaration was immaterial, asked whether it would be necessary, under those circumstances, to rely on a particular interpretation of the unilateral declaration to determine the legal effect it sought to produce.

40. Mr. PAMBOU-TCHIVOUNDA joined other members in congratulating the Special Rapporteur on the calibre of his work and said that he agreed with the suggestion to move draft guideline 1.2.2 to section 1.3. However, he had misgivings about the wording, which not only lacked elegance but also detracted from the clarity of the definition of an interpretative declaration in draft guideline 1.2. The first sentence cautioned against accepting the phrasing or name at face value because what was really important was the legal effect that the declaration sought to produce. But how was that effect to be determined a priori? If there had been a reference to content rather than legal effect, he could have found the wording acceptable. Otherwise, the Commission would be engaging in a pedagogical exercise. For stylistic reasons, he also suggested beginning with "The phrasing or name" rather than "It is not the phrasing or name" and rearranging the sentence accordingly.

41. According to the second sentence, the phrasing or name provided an indication of the desired objective. More emphasis should be placed on the fact that it was only one of several possible indications of the desired

objective. Again, he wondered whether there was any point in including the third sentence. A reservation purported to exclude or modify the legal effect of certain provisions of a treaty, whereas an interpretative declaration purported to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions. The distinction was thus clear from the content of the unilateral declaration.

42. Mr. ECONOMIDES noted that the definitions of both a reservation and an interpretative declaration contained the phrase "however phrased or named". But a guideline entitled "Phrasing and name" was included only in the section on interpretative declarations. Was the discrepancy intentional or simply an omission? Perhaps an identical guideline should be inserted in the section on reservations.

43. He found the word "phrasing" in draft guideline 1.2.2 somewhat ambiguous, since it could designate both the title of a declaration and its entire content. As to Mr. Pambou-Tchivounda's suggestion to replace the words "legal effect" by the idea of content, the content of a legal instrument or declaration was, of course, far more pertinent and instructive than its title. And it was the content that produced, at a later stage, the legal effect contemplated by the signatory or declarant. He suggested that the draft guideline should refer to both content and legal effect in order to reflect both stages of the exercise.

44. Apparently, the Special Rapporteur had been referring to a preliminary indication in the phrase "an indication of the desired objective". In the vast majority of cases, when a State made a reservation or an interpretative declaration, it respected the designation it had chosen. In exceptional cases, however, the designation might be spurious: a reservation might be misrepresented as an interpretative declaration and vice versa. Hence, it was not the phrasing and name but the content that was important. The commentary should reflect that fact and should also state that, in practice, the phrasing and name were only an indication of content.

45. It was too soon to decide on where to place draft guideline 1.2.2. Some provisions were applicable to both reservations and interpretative declarations. Others related solely to one or the other. The Commission might later opt for a threefold division into common rules, rules governing reservations and rules governing interpretative declarations. At the present stage, it should seek to assign each draft guideline to one of the three categories.

46. Mr. HERDOCIA SACASA congratulated the Special Rapporteur on his work and his willingness to reflect the proposals of other members of the Commission in the Guide to Practice.

47. With regard to draft guideline 1.2.2, article 2, paragraph 1 (*a*), of the 1969 Vienna Convention stipulated that a treaty was an international agreement concluded between States "whatever its particular designation". That principle was reflected in the draft guidelines. But the statement that the phrasing and name of a unilateral declaration provided an indication of the desired objective went a step further and would perhaps motivate States to make a greater effort to coordinate the names of instruments and their content.

48. He agreed with Mr. Economides on the desirability of including a reference to both content and legal effect. In addition, as draft guideline 1.2.2 effectively covered both reservations and interpretative declarations, he supported the proposal to move it to section 1.3.

49. Mr. MELESCANU, referring to the suggestion to replace "legal effect" by the idea of content, said that draft guideline 1.2.2 was based entirely on the notion of legal effect. The phrasing, name or even content of a unilateral declaration were unimportant when it came to assigning it to a particular category. What mattered was the legal effect. If a unilateral declaration modified the legal effect of the provisions of a treaty, it was a reservation. If not, it was an interpretative declaration. He therefore endorsed the present wording of the draft guideline.

50. He agreed with Mr. Economides that the question of the structure of the Guide to Practice could be settled at a later stage in the discussions. For the time being, however, he supported the proposal to move draft guideline 1.2.2 to section 1.3.

51. As a member of the Drafting Committee, he reserved the right to make drafting proposals on reservations to treaties in the Drafting Committee.

52. Mr. Sreenivasa RAO thanked the Special Rapporteur for providing important practical guidelines for Governments that were about to accede to treaties or had already become parties. The way in which States sought to implement a treaty was determined by the types of statements they made at the outset.

53. As to whether the nature of a declaration should be determined by its content or the effect it produced, he believed that the legal effect was ultimately the crucial factor. However, content was also important and he therefore submitted that the two factors played an interactive role. For example, when a State, on acceding to a treaty on the elimination of child labour, undertook to comply to the extent that its resources or prevailing social conditions permitted, the question arose as to whether its unilateral declaration amounted to a reservation or an interpretative declaration. The manner in which the unilateral declaration was drafted, i.e. its content, was very important. It could be counterproductive to denounce as inadmissible reservations any limitations placed by States on compliance with obligations that they were otherwise willing to accept. The policy of promoting the broad objectives of a treaty must be kept in view in deciding on the legal effect of a unilateral declaration. The whole idea of reservations and interpretative declarations was to encourage more parties to accede to a treaty. The Special Rapporteur had carried out an admirable clinical analysis, but a little more flexibility and less emphasis on cut-and-dried principles would encourage more States to use the Guide to Practice.

54. He suggested that the Special Rapporteur should consider drafting a new guideline on how the legal effect of a unilateral declaration was to be determined.

55. Mr. LUKASHUK stressed the importance of the problem raised by Mr. Sreenivasa Rao. A reservation turned hard law into soft law. Perhaps it would be possible to make determination of the legal effect of a unilateral declaration the subject of a separate provision.

56. Mr. KUSUMA-ATMADJA said he had at first been heartened by what had appeared to be a consensus in favour of placing draft guideline 1.2.2 in section 1.3. However, differing views had emerged subsequently. There did seem to be agreement that there was a difference between reservations and interpretative declarations. The topic was a highly complex one, which the Special Rapporteur had subjected to a detailed analysis that would be of value to academics and practitioners alike.

57. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the name given by a State to an instrument—whether a declaration or a reservation—ultimately had no decisive bearing on its real substance. On the other hand, the classification assigned by a State to an instrument could not be wholly disregarded: the fact that a State chose to designate an instrument as a "reservation" must be in some way significant.

58. In passing, he noted an inconsistency in the matter of definitions: in draft guideline 1.1, a reservation was defined as "a unilateral statement", whereas in draft guideline 1.2 an interpretative declaration was defined as "a unilateral declaration". The difference between the terms "declaration" and "statement" was not immediately apparent to him, and there might perhaps be a case for harmonizing the terminology employed.

59. As to declarations, reliance on a purely textual analysis of their content was too passive an approach. More important was an analysis of the State's intention, but even that approach could not fully explain the meaning of an instrument, for the result and the intention might differ. And it was the final result—what the Special Rapporteur attractively termed the "legal effect"—that, in his view, was the most important criterion. The problem of a potential conflict between the intended legal effect and the actual legal effect would also need to be taken into account. Mr. Economides had proposed a compromise solution whereby both terms would be used. All those comments should be taken into account by the Drafting Committee in determining the final form the guideline should take. As to the question of placement, his first reaction was that draft guideline 1.2.2 belonged in section 1.3, in which the relationship between the two types of instrument was analysed. However, that question could be decided at a later stage.

60. Mr. ECONOMIDES, developing his earlier proposal, said it was not the phrasing or name of a unilateral declaration that determined its legal nature, but the legal effect derived from its content.

61. Mr. ELARABY said that in making a distinction between interpretative declarations and reservations one must always take into consideration what the State had in mind. The content, as intended by the State, was very important, and he thus supported Mr. Economides' comment concerning the need for a reference thereto.

62. Mr. PELLET (Special Rapporteur) said that, although it was important for the Commission to take a final position on draft guideline 1.2.2 in the course of the current meeting, he nonetheless needed to respond to a number of points raised. Mr. Kusuma-Atmadja claimed to have detected differences of opinion regarding draft guideline 1.2.2. He himself had detected no such differences: on the contrary, there seemed to be a considerable convergence of views.

63. There was no need for the Commission to take an overhasty decision on the question of the placement of the guideline, raised by Mr. Simma. He agreed with Mr. Simma that if it was decided to relocate draft guideline 1.2.2 in section 1.3, draft guideline 1.2.3 should be accorded the same treatment.

64. Mr. Economides had made the intriguing claim that there was a lack of symmetry between the treatment accorded to reservations and to interpretative declarations, as draft guideline 1.2.2 had no counterpart applying to reservations. In fact, it was for that very reason that he had proposed moving draft guideline 1.2.2 to section 1.3, which dealt with both types of instrument. However, an immediate decision on that matter was not indispensable.

65. Mr. Goco had asked what the *ratio legis* for draft guideline 1.2.2 was. That question seemed to have been answered adequately by the Chairman, in his statement made as a member of the Commission. The assumption, closely akin to the concept of good faith, was that as a general rule States did not make random assertions. The fact that a State adopted a given position must have some significance, even if, for purposes of definition, the phrasing or name did not play a decisive role. However, though States were almost always consistent, exceptions could nevertheless arise. Thus, the phrasing and name were merely an "indication" of the desired objective. On the other hand, the principle of good faith allowed one to draw certain inferences: the term "indication" thus constituted an attractive compromise. A distinction must also be drawn between draft guidelines 1.2.2 and 1.2.3. The latter on the formulation of an interpretative declaration when a reservation was prohibited, involved a presumption in favour of the interpretative declaration, as States were presumed to act in good faith in international law; whereas in the case of draft guideline 1.2.2, the very definition of a reservation meant that the phrasing did not in itself constitute a presumption. The Commission was tied by the definition contained in the 1969 Vienna Convention.

66. Mr. Pambou-Tchivounda had said that draft guideline 1.2.2 detracted from the clear definition contained in draft guideline 1.2. That remark illustrated a Cartesian approach and, as a matter of fact, draft guideline 1.2.2 was a "non-Cartesian" provision, intended to introduce some flexibility into a quite rigid definition, thereby facilitating the task of States. Mr. Pambou-Tchivounda seemed not to be opposed to the provision in principle, but to regard the first sentence as unnecessary. It was true that the first sentence did little more than reproduce the definitions found in draft guidelines 1.1 and 1.2. That was a question the Drafting Committee might wish to consider. However, Mr. Pambou-Tchivounda's claim that the third sentence of draft guideline 1.2.2 was also unnecessary, serving merely as a particular illustration of the second sentence, the true heart of the provision, was more debatable. The third sentence covered a situation which arose frequently in practice and it ought not simply to be consigned to the commentary.

67. Mr. Pambou-Tchivounda had also raised the question of the legal effect sought by the unilateral declaration, and had been supported in his views by most other members of the Commission, who had emphasized the importance of the content of the declaration. He could not endorse that point of view. He accepted that the content of a provision was important and that it could throw light on a State's intention, but he could not accept that it should be incorporated in the actual definition itself, which was drawn from the 1969 Vienna Convention and was thus sacrosanct. The definition said that the declaration "purported" to produce certain effects. To reconsider the question of definitions would be tantamount to going back to square one. In his view, it was in the context of draft guideline 1.3.1 (Method of distinguishing between reservations and interpretative declarations), which the Commission had yet to consider, that the question of content became essential. That would be the appropriate place in which to incorporate the issue of content, and draft guideline 1.3.1 should perhaps be reviewed from that standpoint. There was thus a significant difference of opinion between some members of the Commission and himself on that issue. That being said, the matter need not be settled at the current meeting, and could be resolved subsequently, preferably in the Drafting Committee.

68. Mr. Economides had also commented on the use of the word "phrasing". True, the words "phrased" and "named" were not very clear. However, the Commission's hands were to some extent tied by the definition contained in the 1969 Vienna Convention. He was not hostile to Mr. Economides' comment that it was the content that produced the legal effect, but that question could, of course, be dealt with in draft guideline 1.3.1, as could Mr. Sreenivasa Rao's observations in that connection. Lastly, he was not fully convinced by Mr. Lukashuk's assertion that reservations turned hard law into soft law. With those remarks, he urged the Commission to refer draft guideline 1.2.2, on which there appeared to be broad consensus, to the Drafting Committee.

69. Mr. PAMBOU-TCHIVOUNDA said it was not clear from the Special Rapporteur's comments whether the 1969 Vienna Convention had defined an interpretative declaration. If that was not the case, it was all the more important that the Commission should highlight its special status as distinct from a reservation.

70. The CHAIRMAN noted that the French text of article 2, paragraph 1 (*d*), of the 1969 Vienna Convention spoke of *une déclaration unilatérale*, whereas the English text referred to "a unilateral statement". The English text of draft guideline 1.2 should thus be amended to read "'interpretative declaration' means a unilateral statement".

71. He said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.2.2 to the Drafting Committee.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

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# 2582nd MEETING

*Friday, 4 June 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

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## Reservations to treaties[1] (*continued*) (A/CN.4/491 and Add.1-6,[2] A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,[3] A/CN.4/L.575)

[Agenda item 5]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

GUIDELINE 1.2.3

1. Mr. PELLET (Special Rapporteur) said that draft guideline 1.2.3 (Formulation of an interpretative declaration when a reservation is prohibited) was similar to draft guideline 1.2.2 (Phrasing and name), with the difference that draft guideline 1.2.3 dealt with the consequences of the fact that reservations were prohibited by the treaty itself in terms of the definition of unilateral declarations formulated in respect of the provisions of that treaty, whereas draft guideline 1.2.2 related to the phrasing chosen by the declaring State. The object of draft guideline 1.2.3 actually raised the question whether it might not be preferable for that provision to appear in section 1.3 (Distinction between reservations and interpretative declarations) of the Guide to Practice. Whatever the answer to the question of the placement of draft guideline 1.2.3 in the Guide to Practice as a whole—a question that was not of fundamental importance—the underlying idea was, basically, that States were not presumed to be acting in bad faith and that, in principle, if a treaty prohibited reservations, the States parties respected the prohibition and the unilateral declarations they formulated in respect of the treaty were not reservations, but interpretative declarations. That was an indication, and probably even a presumption which, short of contradicting the principle that it did not matter what title was chosen, was not irrebuttable. The second sentence therefore specified that, if a declaration sought to exclude or modify the legal effect of

[1] For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

[2] See *Yearbook ... 1998*, vol. II (Part One).

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

the treaty's provisions, it was not enough for the declaring State to call it "interpretative" in order to make it unassailable. That being said, there was a problem with the word "impermissible" at the end of the provision, since its inclusion meant going beyond the definition of interpretative declarations and reservations and entering by stealth into that of their permissibility. He had nevertheless considered that there could scarcely be any objection to using the word "impermissible", as it was so obvious that there could be no reservations to a treaty which expressly prohibited reservations. That was another case where the Commission might give the Drafting Committee instructions on the course it should follow.

2. Mr. KABATSI said that, where a treaty specifically prohibited reservations, the only choice open to States should be between accepting the treaty and refusing to be bound by it. A provision in the Guide to Practice ought not to be based on the idea of a possible third choice.

3. Mr. GOCO asked whether draft guideline 1.2.3, which began with the words "When a treaty", related only to bilateral or multilateral treaties or whether it also dealt with conventions. States unwilling to incur notoriety by failing to become parties to a certain convention, the convention banning anti-personnel mines, say, or the International Covenant on Civil and Political Rights, might want to interpret the instrument in question in their own way without going so far as to formulate a reservation and the interpretative declaration was a tool that enabled them to do so.

4. Mr. ECONOMIDES said that he wished to raise three points. First, why did a unilateral declaration in respect of a treaty prohibiting reservations—which could therefore not constitute a reservation—necessarily have to be an interpretative declaration and not a declaration of general policy or an informative declaration? Secondly, why should an interpretative declaration seeking to exclude or modify the legal effect of certain provisions of the treaty be considered impermissible only in the case of treaties which prohibited reservations and not in cases of reservations that were incompatible with the object and purpose of the treaty? The last case should also be covered. Thirdly, was the term "impermissible" appropriate in the light of the principle that it must be presumed that States were acting in good faith? According to the second sentence of draft guideline 1.2.3, it would be better to say that the declaration would be inoperative, inadmissible or void rather than "impermissible".

5. Mr. MELESCANU said he agreed with the Special Rapporteur that draft guideline 1.2.3 would be more appropriately placed in section 1.3. He also noted that the first sentence of the provision was based on a presumption of the good faith of States, whereas the second sentence spoke peremptorily of an "impermissible" reservation. The introduction of the new concept of impermissible reservations gave rise to many problems. Who was it that had to consider the declaration an impermissible reservation? And what would be the legal effect of such a conclusion? If the Commission decided to maintain the concept, it would have to provide a general definition of impermissible reservations covering all other cases of impermissible reservations. It might be preferable, as Mr. Economides had suggested, to speak of a declaration that was void.

6. Mr. ROSENSTOCK said he also thought that draft guideline 1.2.3 would raise fewer problems if it were placed in section 1.3. With regard to the first point raised by Mr. Economides, he noted that draft guideline 1.2.3 referred only to interpretative declarations because it was hard to imagine a situation where a distinction could not be drawn between a declaration of general policy or an informative declaration and a declaration by means of which a State might attempt to formulate a reservation. The provision had a common sense element which made it superfluous to say that it applied to all types of declarations. As to the use of the term "impermissible", the Drafting Committee might perhaps find another wording that would state, in substance, that the declarations referred to in the second sentence of draft guideline 1.2.3 constituted reservations of the kind that was prohibited. In any event, the two main points of the provision—the good faith of States and the rejection of what would constitute a reservation where reservations were prohibited—should be maintained.

7. Mr. LUKASHUK said that draft guideline 1.2.3 was useful and should be maintained. While it would indeed seem difficult to confuse interpretative declarations with declarations of general policy, he would nevertheless recommend an addition to the text to cover situations where the true purpose of the declaration could not be agreed upon.

8. Mr. HERDOCIA SACASA said that, although draft guideline 1.2.3 served a useful purpose in the Guide to Practice, the word "impermissible" should be replaced by the word "prohibited".

9. Mr. MELESCANU asked whether the English term "impermissible" fully corresponded to the French term *illicite*.

10. Mr. PELLET (Special Rapporteur) said that he had first used the word "validity", but, after a debate, the Commission had systematically employed the words "impermissible" in English and *illicite* in French.

11. Mr. CANDIOTI, noting that in the additional unnumbered guideline provisionally adopted by the Commission on first reading at the fiftieth session, the English word "permissibility" was rendered as *recevabilité* in French and as *permisividad* in Spanish, said that it might be possible to use the French word *irrecevable* for the English word "impermissible".

12. Mr. HERDOCIA SACASA, noting that the French text of the draft guidelines used the words *illicite*, *irrecevable* and *interdite*, requested the Special Rapporteur to clarify the situation so that the Commission could move ahead in its work.

13. The CHAIRMAN said that he thought the Special Rapporteur and the Drafting Committee would be able to solve the language problem and produce standard texts in all languages.

14. Mr. ADDO said that draft guideline 1.2.3 had a place in the future Guide to Practice. To his mind, the word "impermissible" (*illicite* in French) meant that the reservation was not authorized or was prohibited. The term was perfectly appropriate in the context, but, if it

created problems, the Commission might consider replacing it by the word "inadmissible" (*irrecevable* in French).

15. Mr. HE said that he saw draft guideline 1.2.3 as a key element of the future Guide to Practice, of which it formed a logical part. It dealt with situations where a State party to a treaty that prohibited reservations of any kind sought to formulate a reservation under the guise of an "interpretative declaration". The word "impermissible" was entirely appropriate in the English text.

16. The draft guideline could be included provisionally in section 1.2 (Definition of interpretative declarations), but it could, of course, also appear in section 1.3.

17. Mr. PAMBOU-TCHIVOUNDA said that he agreed with the substance of draft guideline 1.2.3, which was one of the key provisions of the future Guide to Practice. In an effort to establish a basis for treaty relations, it set out to frustrate any attempt by States or international organizations, where a treaty prohibited reservations, to make use of the possibility of formulating a declaration in order to promote their own interpretation of a particular provision and, in that way, to convey a different message. The problem was a political one and called for a solution. In that spirit, he thought that the last phrase of the draft guideline, which read "the declaration must be considered an impermissible reservation", was too weak because it did not say enough. Was the impermissibility relative or absolute?

18. It was also necessary to determine what punishment should be imposed in the event of a false interpretative declaration, i.e. a reservation in disguise. Noting that the term "impermissibility" was to international law what the term "unlawfulness" was to internal law and that, in French law at least, unlawfulness was punishable by the heaviest penalty of all in the sense that an illegal or unlawful act was considered to be non-existent, he suggested that the Drafting Committee might consider specifying that the declaration in question was considered not to exist, to be null and void or have no validity.

19. The CHAIRMAN, speaking as a member of the Commission, said that, as far as substance and purpose were concerned, he endorsed the inclusion of such a guideline in the future Guide to Practice. However, he was somewhat hesitant about the way in which the first sentence was phrased: it presumed that any unilateral declaration made in cases in which a treaty prohibited reservations should automatically be treated as an interpretative declaration. He wondered whether that was what the Commission really wanted to say, since it could also be a general declaration of policy (draft guideline 1.2.5), as pointed out by Mr. Economides, or an informative declaration (draft guideline 1.2.6). It would be useful if the Special Rapporteur could enlighten the Commission so that it could proceed with full knowledge of the facts.

20. Mr. PELLET (Special Rapporteur), replying to the questions asked, said that the last problem referred to was real and was the most difficult of all. Logically, of course, a State could not make a reservation if a treaty prohibited all or some reservations, but it could make an interpretative declaration, a general declaration of policy or an informative declaration. The problem was rather theoretical because the declaration which would be made would no doubt automatically come within one of those three categories, but the problem existed nevertheless. Admittedly, there was a presumption, which was negative: it was not a reservation, in principle, because reservations were prohibited. But was it really an interpretative declaration? Nothing, in terms of the prohibition of reservations, made it possible to state that.

21. Logically arguing that, if a reservation was prohibited, States could not formulate any, Mr. Kabatsi had reasoned as a legal expert. It had to be said, however, that States formulated reservations regardless, even if they were prohibited. Hence the need to know what those reservations were. He proposed a simple and obvious reply: they were impermissible reservations, their impermissibility being the consequence of the fact that they were prohibited. In that connection, he did not share Mr. Economides' view that the word "impermissible" presupposed bad faith on the part of States. Impermissibility was objective: it was something that was contrary to the rule of law.

22. Actually, he was uncomfortable with the use of the word "impermissible" in the draft guideline under consideration because it was premature, since the impermissibility of reservations was the subject of a later chapter and there might be other categories of impermissible reservations. He admitted to introducing the notion of "impermissible" reservation for want of a better term and because he had been hoping to receive proposals. However, it was not enough simply to say that the declaration in question "is a reservation" or "must be considered a reservation". That would suggest that the reservation might be permissible, and that was obviously not the case.

23. As to the proposal that the reservation should be characterized as "inadmissible", he thought that that term referred to the procedure, which was restrictive. If a reservation was prohibited, it was impermissible. Inadmissibility was only one element of impermissibility. Introducing that concept at the current stage was somewhat risky. Given the consequences of prohibiting a reservation, the word "impermissible" was more neutral. Referring in that context to the use of the word *recevabilité* in the French text of the unnumbered guideline provisionally adopted by the Commission on first reading at its fiftieth session, he said that that was a mistranslation of the English word "permissibility" which he had inadvertently allowed to slip through.[4] He intended to go back to that translation when the Commission considered the desirability of extending the draft guideline to include interpretative declarations.

24. Mr. Herdocia Sacasa's proposal that the word "impermissible" should be replaced by the word "prohibited" would simplify matters, but it would result in a tautology. It would therefore be better to keep the idea that, if making a reservation to a treaty was prohibited, an interpretative declaration aimed at excluding or modifying the legal effect of certain provisions of a treaty was an impermissible reservation because it was prohibited by the treaty.

[4] See 2581st meeting, footnote 5.

25. He endorsed Mr. Pambou-Tchivounda's comments on the relationship between the words "impermissible" and "unlawful", but thought that considering the interpretative declaration to be non-existent would be going too far. As to the unjust criticism that he had been too lenient, he pointed out that the words *est réputée* presupposed a simple presumption, whereas the words *doit être considérée* were more affirmative and stronger.

26. The best solution, although he was sure that it would not satisfy the Commission, would be to say that such a declaration was a reservation, even if it meant qualifying the reservation at a later time, once the criteria for the impermissibility of reservations had been defined. For that reason and in view of the Commission's usual cautiousness, he had proposed the wording "it [the declaration] must be considered an impermissible reservation". Actually, he would prefer to speak of reservations which were not valid: that was the appropriate legal expression, at any rate in French.

27. Replying to Mr. Economides, he acknowledged that the unilateral declaration in question might be something other than an interpretative declaration. It was up to the Drafting Committee to find a solution to that problem, which was a real one. The suggestion that there should be a general provision taking account of all cases in which a reservation was impermissible was premature at the current stage. Obviously, the question of when a reservation was permissible and when it was impermissible would have to be settled: it was impermissible because it was contrary to the object and purpose of the treaty or because it was prohibited by the treaty. It might also be possible to define an impermissible reservation, but what would be the point? If it were to do so, the Commission would get itself involved in something from which it would have difficulty extricating itself. Cases in which a reservation was prohibited should be enumerated, but that exercise could not be undertaken at the present stage, which was that of definitions.

28. Replying to a comment by Mr. Goco, he said that he had relied on the definition of the word "treaty" in article 2, paragraph 1 (*a*), of the 1969 Vienna Convention, namely, "an international agreement concluded between States in written form ... whatever its particular designation". There was no reason to draw a distinction between convention and treaty and he was not even sure whether criteria existed for doing so. Hence, the reservations under consideration were reservations to all treaties, regardless of whether they were covenants, conventions, charters, protocols or annexes. Replying to Mr. Melescanu, who considered that the second sentence of the draft guideline was peremptory, he said that it was based on the definition of the term "reservation" in the 1969 Vienna Convention.

29. As to who would be empowered to find that a statement was impermissible, he thought that it should be a matter for States to decide, each State being the judge of international impermissibility. That question would be settled in the context of the implementation of the Guide to Practice.

30. The Commission might take a decision on Mr. He's question about the place of the draft guideline in the Guide to Practice once it had adopted all the guidelines. That was a problem of the relationship between reservations and interpretative declarations, but it did not prevent the Drafting Committee from doing its work.

31. He had the impression that the members of the Commission endorsed the two main ideas underlying the draft guideline, which would certainly keep the Drafting Committee very busy.

32. Mr. GOCO, referring specifically to the International Covenant on Civil and Political Rights, asked what exactly the words "When a treaty prohibits reservations" covered. The word "reservation" did not appear in any provision of the Covenant, thus suggesting that reservations were not allowed; yet in cases of exceptional national emergencies and until they ended, a State which ratified the Covenant could derogate from some of the obligations for which it provided. For example, when the Philippine Government had ratified that instrument, it had made a statement asserting the right of derogation because, at the time, martial law had been in force in the Philippines.

33. He therefore asked whether the case of the International Covenant on Civil and Political Rights came under the wording "When a treaty prohibits reservations" and, if so, whether a State was allowed to make an interpretative declaration.

34. Mr. Sreenivasa RAO proposed that, in order to deal with the terminological problem of the word "impermissible", the Special Rapporteur and the Drafting Committee might consider merging the two sentences of the draft guideline, which would then read: "When a treaty prohibits reservations to all or some of its provisions, a unilateral declaration formulated in respect thereof by a State or an international organization may be considered to constitute an interpretative declaration, provided that the declaration does not seek to exclude or modify the legal effect of certain provisions of the treaty".

35. Mr. PAMBOU-TCHIVOUNDA said that the proposal to shorten the wording and thereby circumvent the difficulty associated with the words "impermissible reservation" was very useful. Another way of avoiding the difficulty might be to introduce the idea of "relevance", a relatively neutral term in international law which would cover admissibility, validity and permissibility. He suggested the following possible wording: "it shall be deemed irrelevant".

36. Mr. HE suggested that the Special Rapporteur and the Drafting Committee should try to find more concise wording for the first sentence which would link it more closely to the second sentence and cover States which attempted to make a reservation by calling it an interpretative declaration.

37. The CHAIRMAN suggested that, in view of the various drafting suggestions made, the Commission should refer draft guideline 1.2.3 to the Drafting Committee.

*It was so agreed.*

GUIDELINE 1.2.4

38. Mr. PELLET (Special Rapporteur) said that, with draft guideline 1.2.4 (Conditional interpretative declarations), the Commission was entering an area that was both extremely important and comparatively difficult because of the need to draw a distinction, within the general category of interpretative declarations, between two subcategories: declarations that were simply "proposed interpretations" by the declaring State to which it did not subordinate its consent to be bound, and "conditional interpretative declarations", which, as their name indicated, constituted a condition for acceptance of the treaty by the State or international organization that made the declaration. That distinction, attested by the State practice of which he had provided examples in paragraphs 309 et seq. of his third report (A/CN.4/491 and Add.1-6), had been discussed in a particularly clear and generally convincing way by McRae in a ground-breaking article in which the author referred to "qualified interpretative declarations" (corresponding to *déclarations interprétatives conditionnelles* in French),[5] i.e. those which, unlike "simple" interpretative declarations, purported to bind the other contracting States. In such cases, the declaring State—or possibly the international organization—affirmed its willingness, as it were, to commit itself and be bound by the treaty on condition that it was interpreted (or that some of its provisions were interpreted) in the way it stated.

39. The situation thus created was unquestionably closer to that ensuing from reservations than to that resulting from simple interpretative declarations. The State not only intended to be bound itself by the proposed interpretation, but was trying to bind the other States, or the other contracting parties, by the interpretation, barring which the legal effects of the declaration—which the Commission would have to study carefully at a later stage—would probably be identical or similar to those of a reservation. That raised the question whether conditional interpretative declarations should not simply be placed in the same category as reservations. That seemed, broadly speaking, to be McRae's argument, but it was not one to which he himself subscribed, for reasons that he had developed at length in his third report. Conditional interpretative declarations looked and behaved like reservations in many respects, but they were not reservations for the simple reason that, unlike reservations, they did not purport "to exclude or to modify the legal effect of certain provisions of the treaty in their application to" their author, which was the criterion applicable to reservations according to the definitions in the 1969, 1978 and 1986 Vienna Conventions reproduced in draft guideline 1.1 (Definition of reservations). Such declarations merely purported "to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions" and thus fully corresponded to the definition of interpretative declarations proposed by draft guideline 1.2 (Definition of interpretative declarations). They were, however, a special kind of interpretative declaration inasmuch as the State not only proposed an interpretation, but sought to impose it on its partners; that raised very difficult legal issues, although they concerned the legal scope of such declarations rather than their definition. The question thus arose: as the "conditionality" that the declaring State or international organization sought to produce by means of the declaration unquestionably had consequences for the legal regime pertaining to interpretative declarations, should draft guideline 1.2.4 reflect that fact or would it be enough to spell out the differences in legal regime between a simple and a conditional interpretative declaration when the Commission considered the question of the impact of reservations and interpretative declarations? He had no strong opinion on the matter and had therefore left the last phrase—"which has legal consequences distinct from those deriving from simple interpretative declarations"—in square brackets. He saw it as a doctrinally important point, but one that was not necessarily indispensable in normative or quasi-normative terms. It was not really "definitional", but it could nevertheless be useful to state the point at the outset in order to cover all the differences between simple and conditional interpretative declarations.

40. One of those differences related to the temporal element embodied in the definition of reservations, since, according to the wording of article 2 of the 1969, 1978 and 1986 Vienna Conventions reproduced in draft guideline 1.1, "'Reservation' means a unilateral statement ... made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty ...". For reasons that he had set forth in considerable detail at the Commission's preceding session and that had been accepted by the majority of its members, he was not in favour of transplanting the temporal limitation applicable to reservations to the definition of interpretative declarations in general. The main reason for that position was that reservations pertained to the conclusion of the treaty, as borne out by their inclusion in Part II of the 1969, 1978 and 1986 Vienna Conventions, whereas interpretations—and hence interpretative declarations—related to the application of the treaty, as borne out by the inclusion of rules of interpretation in Part III of the 1969, 1978 and 1986 Vienna Conventions on application. On that point, he was in complete agreement with Sir Humphrey Waldock, who had written, in his fourth report on the law of treaties, that an interpretative declaration could be made at any time, "during the negotiations, or at the time of signature, ratification, etc., or later, in the course of the 'subsequent practice'".[6] State practice followed that pattern, although it was still relatively limited, and it was precisely in order to evade the rigours of the regime governing reservations *ratione temporis* that a State might decide to call something which had all the appearances of a reservation an "interpretative declaration". Some examples of such efforts were given in paragraph 333 of the third report.

41. That attitude attested to States' conviction that interpretative declarations were possible at times when reservations were not, a fact which, if they were real interpretative declarations and not reservations in disguise, carried no great risk for the stability of treaty-based

[5] D.M. McRae, "The legal effect of interpretative declarations", *The British Year Book of International Law, 1978*, vol. 49, pp. 155-173, at p. 161.

[6] *Yearbook ... 1965*, vol. II, p. 49, document A/CN.4/177 and Add.1 and 2.

legal relations because, unlike reservations, simple interpretative declarations did not modify the legal effects of the treaty or some of its provisions for the declaring State nor did they affect the entry into force of the treaty for the declaring State or the relations of the declaring State with other contracting parties; the only effect of simple interpretative declarations was to put forward an interpretation that was binding only on the declarant itself, unless an estoppel was raised. Draft guideline 1.2 thus omitted the temporal element in the case of simple interpretative declarations.

42. Conditional interpretative declarations were a different matter. Their definition should incorporate the temporal element as a matter of course because the author of the declaration, by virtue of the fact that it was making its interpretation the condition of its consent to be bound, could only make its declaration before or at the time of giving its consent, for the same eminently practical and pragmatic reasons that had led to the inclusion of a temporal element in the definition of reservations: the other contracting States must be in a position to react and, where appropriate, to prevent the proposed interpretation from prevailing, and that would be conceivable only if the declaring State formulated its interpretation no later than when expressing its final consent to be bound.

43. Mr. YAMADA said that he found the Special Rapporteur's analysis of the distinction between a simple interpretative declaration and a conditional interpretative declaration very interesting and very useful for government practice in terms of the different legal effects ensuing from the two categories. In Japan, the Government's general policy was to avoid entering reservations if possible and also to avoid making interpretative declarations that produced virtually no legal effect. As a result, most of its interpretative declarations could be characterized as conditional interpretative declarations in the light of the distinction made by the Special Rapporteur. For example, when Japan had ratified the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, the Government had deposited with the Secretary-General a declaration consisting of three reservations and one interpretative declaration.[7] Referring in that connection to Mr. Goco's comment, he pointed out that the Covenants contained no provision prohibiting reservations and that the other contracting parties had not objected to the three reservations entered by the Japanese Government. The interpretative declaration applied, inter alia, to article 8 of the International Covenant on Economic, Social and Cultural Rights. Paragraph 1 of that article guaranteed three basic labour rights, namely, the right to form trade unions, the right to engage in collective bargaining and the right to strike, while paragraph 2 permitted the imposition of lawful restrictions on the exercise of those rights by members of the armed forces or of the police or of the administration of the State. In Japan, members of the armed forces were prohibited from exercising any of the three basic rights, the members of the police could exercise the right to form trade unions, but not the other two rights, while civil servants enjoyed the right to form trade unions and the right to engage in collective bargaining, but not the right to strike.

44. The fire brigade, which had previously formed part of the police force, had become an independent agency, but continued to have the same status as the police in respect of labour rights, i.e. its members had the right to form trade unions, but not to engage in collective bargaining or to strike. On ratifying the International Covenant on Economic, Social and Cultural Rights, Japan had declared that members of the police, within the meaning of article 8, paragraph 2, of the Covenant, were to be understood as including the members of the fire brigade. The Japanese Government meant by the declaration that, in its interpretation, the fire brigade was covered by article 8, paragraph 2, of the Covenant, but also that it was requesting the other States parties to the Covenant and the body responsible for monitoring the implementation of the instrument, the Committee on Economic, Social and Cultural Rights, to accept its interpretation of the scope of article 8, paragraph 2. He therefore felt uneasy about the statement by the Special Rapporteur in paragraph 326 of the third report that it seemed fairly obvious that the legal regime of conditional interpretative declarations would be infinitely closer to that of reservations.

45. He also found it difficult to accept the introduction of the temporal element into draft guideline 1.2.4. It implied that conditional interpretative declarations could be made only when a State expressed its consent to be bound and no later. But given the recent tendency to entrust certain tasks traditionally performed by the civil service to independent agencies or even private entities, a Government might wish—and should be able—to make a conditional interpretative declaration, concerning article 8, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights in the case in point, even after ratification. Such a declaration did not purport to modify or exclude the legal effect of the provision concerned and there was therefore no reason to make it subject to a time limit.

46. Mr. GAJA said that he supported the distinction drawn by the Special Rapporteur between simple and conditional interpretative declarations, but was unsure as to the nature of the latter category. Should one consider a conditional interpretative declaration to be neither an interpretative declaration in the strict sense nor a reservation, but as something in between, or should one see it as falling within the scope of the definition of a reservation in the sense that the State or international organization formulating it intended to modify to some extent application of the treaty to itself, as all other possible interpretations have been set aside? The authorities referred to by the Special Rapporteur either considered conditional interpretative declarations to be reservations or treated them in the same way as reservations. Thus, an interpretative declaration probably had been totally identified with a reservation in the decision by the arbitration tribunal in the *English Channel* case. There was similar treatment in the report of the European Commission of Human Rights in the *Temeltasch* case, confirmed thereafter by the Committee of Ministers of the Council of Europe. Also, in the judgement of the European Court of Human Rights in the *Belilos* case, interpretative declarations had been treated in the same way as reservations. He would like the Commission to state in positive terms that a conditional

[7] See United Nations, *Treaty Series*, vol. 1138, No. 14531, pp. 452 and 456.

interpretative declaration, insofar as the State or international organization formulating it intended to impinge on the legal effect of a treaty provision in respect of itself, was a reservation or should be treated as such.

47. He conceded that a State or international organization could not only limit its own obligations under the treaty, but might also try to voice an interpretation and to impose it on all other States parties to the treaty. It could thus be seen as a true interpretative declaration, and some language should be found which preserved that possibility, while making it clear that, if a State or international organization could only accept one of the possible interpretations, the declaration should also be treated as a reservation.

48. Mr. BROWNLIE, after welcoming the scholarship and creativity of the third report of the Special Rapporteur, said that, at any rate in the English version, draft guideline 1.2.4 suggested that a conditional interpretative declaration was *sui generis*. He wondered whether it was truly a reservation of any sort because the provision stated that, by that declaration, "the State or international organization subordinates its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof" and that the situation was thus one in which a State set up a particular proposition as a threshold statement of conditionality. Typical reservations, whether pure reservations or one of the relatives of reservations, usually related to the treaty having, so to speak, come into force. Reservations operated in the umbrella of treaty obligations, although they might try to dilute, vary or even increase them. He thus thought that the conditional interpretative declarations provided for in draft guideline 1.2.4 did not seem to be part of the tribe of reservations, even if defined in a broad sense.

49. Mr. ROSENSTOCK asked Mr. Yamada what the situation would be if, after a treaty had been in force for some time, Japan made a conditional interpretative declaration that the majority of other States parties to the treaty found unacceptable. His own view was that Japan's obligation vis-à-vis those States would be the same as that which had existed before the making of the conditional interpretative declaration, given that that declaration could not have any legal effect on States that rejected it. In that sense, the Special Rapporteur's analysis of the temporal element might be pertinent.

50. Mr. YAMADA said that the fact that a State rejected such a declaration would mean that it amounted to a reservation in the sense that it intended to exclude or modify the legal effect of the treaty and it was clear that Japan could not make such a reservation, but, as long as that declaration was within the scope of the original treaty, it remained an interpretative declaration. The other States parties should not object to it unless they had a valid reason for saying that it was a reservation.

51. Mr. ROSENSTOCK said he thought that that approach obliterated the distinction between simple and conditional interpretative declarations, in that it made conditionality disappear. It was only when dealing with conditionality that the time at which the declaration was made was significant.

52. Mr. LUKASHUK said he thought that draft guideline 1.2.4 reflected States' practice and was therefore justified. It referred only to declarations that did not modify the legal effect of the provisions of a treaty. In making a conditional interpretative declaration, the State made an interpretation which seemed to it the only possible one with respect to itself. It should perhaps be explicitly stated that a conditional interpretative declaration must not exclude or modify the legal effect of a treaty. However, difficulties would arise when the Commission came to examine the phrase within square brackets at the end of the text of the draft guideline, at which point various problems would have to be resolved. For example, would a State that had recognized a conditional interpretative declaration subsequently be able to denounce it or would it be of permanent application? Would the declaring State be able to reject or denounce the treaty if another State did not accept that declaration? Those questions should be left pending until such time as the Special Rapporteur had defined the legal consequences of the conditional interpretative declaration.

53. Mr. ECONOMIDES said that the nature of conditional interpretative declarations was an extremely thorny question. It was clear that a declaration of that sort was not an ordinary declaration, for two reasons. First, the State making the declaration placed a condition on its consent to be bound by a treaty; secondly, if it made the declaration, that was because it did not follow the accepted interpretation of the treaty; otherwise, it would not be necessary for it to make a supported declaration. It was thus a declaration that deviated from the line of the treaty, but not to such an extent as to become a reservation. It did not exclude or modify the provisions of the treaty and its legal effects. It thus constituted some intermediate category; hence the difficulties raised by that provision. It was difficult to grasp the precise nature of a conditional interpretative declaration, which could also be described as one making a derogation. It should be noted that, if a conditional interpretative declaration was made, but not accepted by the other States, it had no validity. In other words, in order for such a declaration to produce effects, it must be accepted. The concept of acceptance should therefore be included in the wording of the guideline. That addition would also provide some security because it would make it clear that a State could not make a conditional interpretative declaration unilaterally and then claim that that declaration produced legal effects. The element of acceptance had been present in the example given by Mr. Yamada: Japan had sought the acceptance of the other States, but also that of the body responsible for monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights, concerning the scope of a provision of the Covenant. Specifically, he asked the Special Rapporteur whether he considered it desirable to introduce the concept of acceptance into the wording of the guideline.

54. Mr. Sreenivasa RAO raised the question of the nature of the declarations made concerning freedom of navigation in the context of the Geneva Conventions on the Law of the Sea. The interpretation regarding the passage of warships varied from State to State: some considered that it must be subject to consent, others that it should be subject to notification, while others again considered that it should be subject only to the right of innocent passage. Could those declarations be regarded as conditional interpretative declarations? Noting that it was very difficult to define conditional interpretative declarations with

any precision, he wondered whether it was justified to make them a separate category. Some declarations clearly affected other States; that had been the case when some States had considered that they could extend the limit of their territorial sea to 200 miles. In other cases, such as the human rights conventions, it appeared that interpretative declarations by States affected only their own citizens, although some maintained that human rights were not simply a domestic matter to be left to individual States. Furthermore, conditional interpretative declarations could not be linked to the 1969 Vienna Convention, as, under the terms of that Convention, the treaty must be interpreted in context and in the light of its object and purpose. The idea of conditional interpretative declarations, as conceived by the Special Rapporteur, was thus very interesting, but care must be taken to ensure that it did not cause more difficulties than it solved.

55. Mr. HE suggested that the temporal element could be introduced into draft guideline 1.2.4 by using the same expression as in draft guideline 1.1.2 (Moment when a reservation is formulated), as proposed by the Special Rapporteur in his third report, namely, "... when that State or that organization expresses its consent to be bound ...".

*The meeting rose at 1 p.m.*

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## 2583rd MEETING

*Tuesday, 8 June 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

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**Reservations to treaties[1] (*continued*) (A/CN.4/491 and Add.1-6,[2] A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,[3] A/CN.4/L.575)**

[Agenda item 5]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

GUIDELINE 1.2.4 (*concluded*)

1. Mr. RODRÍGUEZ CEDEÑO said that the Special Rapporteur was right to draw a distinction between a simple and a conditional interpretative declaration in draft guideline 1.2.4 (Conditional interpretative declarations). The former referred exclusively to the interpretation that a State might make a priori, without seeking to exclude or modify the legal effects of the provision or provisions of a treaty. It was intended to clarify the meaning or scope of one or more of its provisions, whereas a conditional declaration was linked to the expression of consent or a further refinement of the expression of consent. Those were two quite distinct cases, and it was worth drawing attention to that distinction in the draft guidelines.

2. The two cases had something in common. Like reservations, from the formal standpoint they constituted a unilateral declaration of the State, although it was hard to consider them outside the context of the treaty because, ultimately, the obligations that States could acquire by formulating such a declaration were linked to an existing text. In his view, the declaration might be regarded as purely unilateral when the State acquired obligations that went beyond those assumed under the treaty. Such obligations might be autonomous unilateral obligations not linked to the treaty, so that the rules applicable would differ from those applicable to treaty norms.

3. On the other hand, a unilateral declaration could not constitute a reservation, still less an interpretative declaration, if it was intended to diminish the obligations assumed, since, by reducing its obligations, the State would also, *a contrario*, be reducing the rights of another State or States, something which would be tantamount to imposing obligations upon that State or States.

4. While it was useful to draw a distinction between simple and conditional interpretative declarations, it was nevertheless difficult to decide in which category a given declaration belonged, and, in particular, what the legal effects of conditional interpretative declarations were. Simple interpretative declarations did not presuppose a reaction by States. A State formulating such a declaration simply tried to establish the meaning or scope it attributed to a provision of the treaty. However, in the case of a conditional interpretative declaration, a State interpreted a provision, but that interpretation entailed acceptance by the other parties in order for it to produce the effect sought, namely, a refinement of the expression of consent.

5. The timing of the formulation was critical to the definition of conditional declarations. In his view, such declarations could be formulated only when a treaty was signed, ratified, confirmed, accepted or acceded to. A State could not formulate such declarations subsequently, in other words, once it had consented to be bound by the treaty. In that respect, conditional interpretative declarations resembled reservations, in that they could have a legal effect on the treaty, as consent could be further refined only if the other States accepted the conditions imposed by the declarant State by means of that declaration. It was not seeking to produce a legal effect on a

[1] For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

[2] See *Yearbook ... 1998*, vol. II (Part One).

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

given provision, but on the treaty as a whole. That was the meaning of the conditionality of the interpretative declaration. Further consideration needed to be given to the legal effects of the two types of declaration.

6. Mr. PELLET (Special Rapporteur) said he could not fully subscribe to Mr. Rodríguez Cedeño's assertion that an interpretative declaration was not intended to produce legal effects. States did not act gratuitously: in formulating an interpretative declaration, they did so in order to produce legal effects, even though the effects produced differed from those of a reservation. That being said, the Commission's immediate concern was with the definition of an interpretative declaration, and the definition did not enter into the question of legal effects.

7. The most sensitive issue raised, one to which Mr. Rodríguez Cedeño had also referred, was the question of the point in time at which the conditional interpretative declaration was formulated. Mr. Yamada, citing (2582nd meeting) the reservation entered by Japan to article 8 of the International Covenant on Economic, Social and Cultural Rights,[4] had said that it should be possible for a reservation of that type to be entered at any time. He could not agree with Mr. Yamada on that point. There were two possibilities: either Japan made that interpretation the condition for its consent to be bound—in which case he could not see how it could impose that condition on the other parties other than at the time at which it expressed its consent to be bound; or else Japan offered its interpretation and, with the passing of time, explained that firemen were not covered by the relevant provision of the Covenant—in which case the declaration could not be conditional, because the condition related to consent to be bound. Once that consent had been given, a State could not claim ignorance of the conditions it had itself imposed on its consent. He thus agreed with Mr. Rosenstock that it was an interpretation and, like all interpretations, open to dispute and amenable to settlement by the usual means. He was not claiming that Japan could not make an ex post facto interpretative declaration. What he was saying was that it could not make that declaration a condition of its consent to be bound. Consequently, he was convinced that the crucial difference between the two types of interpretative declaration was the timing.

8. He could not entirely agree with Mr. Gaja's claim (ibid.) that by making an interpretative declaration a State intended, in a certain manner, to modify the treaty by excluding other interpretations. In his opinion, assuming it was acting in good faith, the State offered the interpretation in the light of which it could consent to be bound by the treaty. That did not mean the State intended to modify the treaty by so doing. The fact remained that conditional interpretative declarations probably should be treated as though they were reservations. The crucial point was that draft guideline 1.2.4 sought to reintroduce the temporal element by aligning conditional interpretative declarations with reservations in that respect and restricting the scope *ratione temporis* for making such declarations.

9. He agreed with Mr. Brownlie that the essential difference between an interpretative declaration and a reservation lay in the effect intended. But there was another difference: an interpretative declaration clarified the meaning of the treaty itself, whereas a reservation concerned the rather different question of the intended effects of the treaty. If the treaty were drafted in vague or imprecise terms, the interpretative declaration could have added to and clarified them, whereas a reservation subtracted from the treaty and affected the manner in which it was to be applied.

10. Mr. Lukashuk had said (ibid.) that the State attempted to convince itself of a certain interpretation. That might be, but was not always, true: it might also be attempting to convince the other parties. Nor was it necessarily true, as Mr. Economides contended (ibid.), that a conditional interpretative declaration constituted a "deviation" from the treaty but not one sufficient to constitute a reservation. The matter would become clearer once an authentic interpretation had been given, or when a jurisdictional body had issued a ruling with force of *res judicata*. A priori, it was a clarification, and one could not infer therefrom that the State was "deviating" from the treaty. That, however, was a question of philosophical approach, on which Mr. Economides and he were often divided. There was not necessarily one and only one correct interpretation of a treaty, one and only one legal truth.

11. On the other hand, Mr. Economides' remark to the effect that an interpretative declaration was in some sense a derogation, and that, to produce effects it must be accepted, was probably correct, as it would be in the case of reservations, with which the legal regime of conditional interpretative declarations should be broadly aligned. The problem of legal regimes was one to which the Commission would have to return.

12. As for Mr. Sreenivasa Rao's comments (ibid.) concerning the complexity of the problem, it was precisely because the issue was so complicated that it should be dealt with in the draft guidelines. Lastly, Mr. He had made the constructive proposal (ibid.) that the numbering might be simplified and a reference included to the moment at which consent to be bound had been definitively given. That question could be taken up by the Drafting Committee in the first instance.

13. Mr. BROWNLIE said he wished to reiterate a point he had made (ibid.). The attitude of other members—and, apparently, of the Special Rapporteur—towards draft guideline 1.2.4 was that the emphasis was on conditional interpretative declarations. In his view, however, draft guideline 1.2.4, as now drafted, was not, of course, a reservation at all. The fact of the matter was that the conceptual and technical world of reservations came under the umbrella of treaty obligation. The reserving State might squirm a little within the obligation system, but basically it accepted that system. That was why draft guideline 1.1 (Definition of reservations) referred to "a unilateral statement [...] whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization". Draft guideline 1.2.4 referred to "a unilateral declaration [...] whereby the State or international organization *subordinates its consent to be bound by the treaty to a specific interpretation of the treaty**". It might be that as a matter of convenience and exposition the problem should be dealt with in the frame-

[4] See 2582nd meeting, footnote 7.

work of the draft guidelines, but a problem of classification remained. The conditionality was thus of rather a radical character, and did not clearly fall within the umbrella of treaty obligation. In short, draft guideline 1.2.4 had certain special features that required clarification.

14. Mr. GOCO said that the process of consent to a treaty involved several stages and that signature of a treaty did not constitute consent to be bound thereby. Should a State make an interpretative declaration at that initial stage, the effect was to be construed as subordinating the State's consent to a particular interpretation of the treaty or of certain provisions thereof—an interpretation which at that stage had yet to be specified. Ultimately, it remained an interpretative declaration purporting to clarify, and not a reservation, whereas at the outset, consent to be bound had been made conditional on a specific interpretation of the treaty.

15. Mr. LUKASHUK said he fully agreed with the Special Rapporteur that interpretative declarations were not without legal effect, and that a provision on the legal effects of consent was entirely justified. A unilateral interpretative declaration was unilateral only at its initial stage: it needed the consent of the other parties, whereupon the relationship became a bilateral one.

16. His chief concern, however, was a more complex issue: subsequent practice could lead to substantial changes to the provisions of a treaty. That subsequent practice might be initiated by a unilateral declaration given the name "interpretative declaration", which not only interpreted the treaty but also, in the event of recognition by the other party, resulted in a modification of its content. The Special Rapporteur should ponder that very important question.

17. Mr. ELARABY said he agreed with the Special Rapporteur that there was no conventional wisdom with respect to interpretative declarations, and that the outcome would depend on how the Commission chose to innovate. It was clear from draft guideline 1.1 that a reservation purported to exclude or modify certain provisions of a treaty, whereas, under draft guideline 1.2 (Definition of interpretative declarations), an interpretative declaration purported to clarify the meaning or scope thereof. Draft guideline 1.2.4, however, while attempting to create an intermediate category, succeeded only in creating a grey area. In his view, the situation covered by draft guideline 1.2.4 in fact fell within the realm of reservations.

18. Mr. PELLET (Special Rapporteur), responding to Mr. Goco, said he did not agree that there was a temporal progression between the three categories. It was possible, at any of the stages of consent to a treaty, to make either a simple interpretative declaration, a conditional interpretative declaration, or a reservation.

19. He entirely agreed with Mr. Lukashuk that interpretation was an ambiguous exercise, as it was well known that treaties were sometimes profoundly modified by what purported to be an interpretation. That was sometimes a good way of "allowing the law to breathe". Care should be taken, however, not to do violence to the law in the name of interpretation. As for Mr. Brownlie's comments, he certainly did not claim that interpretative declarations were reservations, and the idea of setting the definition of draft guideline 1.2.4 against the definition of reservations in draft guideline 1.1 seemed rather questionable. If anything, it should be set against draft guideline 1.2, which contained the definition of an interpretative declaration. If Mr. Brownlie meant that interpretative declarations were not reservations because they did not purport to modify or exclude the application of the treaty, he could go along with that view, which, however, could be inferred from draft guideline 1.2.

20. Replying to Mr. Elaraby, he agreed that matters were made complicated, but that was simply because the drafters of the 1969 Vienna Convention had not complicated matters enough and had left behind a legal void in regard to interpretative declarations. In any event it was not the Commission but States practice which created an intermediate category. Conditional interpretative declarations were not at all infrequent and in fact probably constituted the majority of interpretative declarations. He concurred that the legal regime on conditional interpretative declarations should be clarified later in the part of the report that would deal with the effects of reservations and interpretative declarations.

21. Interpretative declarations were almost as numerous as reservations and the conditional kind probably formed the large majority. They were an important international legal phenomenon and the Commission could hardly pretend they did not exist. During the debate in the Sixth Committee, the Commission's decision to consider the legal regime of interpretative declarations in parallel with reservations had been widely approved.

22. Mr. BROWNLIE said he had no objection whatsoever to including conditional declarations in the draft guidelines, but they did appear to have *sui generis* characteristics. Obviously, they were not reservations, but with all due respect to Mr. Pellet, they did not really fall within the purview of draft guideline 1.2. In the case both of reservations (draft guideline 1.1) and of interpretative declarations (draft guideline 1.2), the declaring State was standing under the umbrella of obligation but was trying to vary the content of the obligation. Whether or not it succeeded related to another stage. What was striking about draft guideline 1.2.4 was the fact that the declaring State was attempting to state its position vis-à-vis the entire system of obligation, as was indicated by the very strong and clear wording, "subordinates its consent to be bound by the treaty to a specific interpretation". He accepted the value of including interpretative declarations and draft guideline 1.2.4, but he wished to point out its rather unusual characteristics.

23. Mr. ELARABY said that some years ago the Commission had the exercise of making a distinction between reservations and interpretative declarations, taking into account the lacuna in the 1969 Vienna Convention. It had adopted a definition for reservations and one for interpretative declarations. With reference to draft guideline 1.2.4, what yardstick could be used for the distinction? Either the State purported "to modify or exclude" or purported "to clarify the meaning or scope". If draft guideline 1.2.4 essentially purported "to clarify the meaning or scope", it was an interpretative declaration. As to

the phrase in square brackets, "[which has legal consequences distinct from those deriving from simple interpretative declarations]", he wondered whether a conditional interpretative declaration should be considered a reservation or whether, although conditional, it should be dealt with like any other interpretative declaration.

24. Mr. KAMTO said that draft guideline 1.2.4 raised the problem of creating a category of "disguised reservations": certain conditional interpretative declarations might appear to be disguised reservations and they might therefore be placed in the category of reservations from the standpoint of their legal effects. However, when establishing a definition the Commission must be aware of the legal regime. Perhaps the legal effects of conditional interpretative declarations might be set out in the commentary. As they might in certain cases modify the scope of a legal rule or modify a legal regime, they could come very close to the definition of a reservation and their legal effects might be the same as those of reservations. That situation should be covered in the draft guidelines, but should be directly linked to the legal effects attached to conditional interpretative declarations. Generally speaking, if the Commission wished its classifications to be easily implemented, whenever it established a definition it should be aware of the ensuing legal effects.

25. Mr. PAMBOU-TCHIVOUNDA asked whether, in addition to the case mentioned in draft guideline 1.2.4, the Special Rapporteur had encountered other considerations which might be invoked by a potential party to a treaty as a condition for accession.

26. Mr. PELLET (Special Rapporteur) said that the answer to Mr. Pambou-Tchivounda's question was in the negative. To his knowledge, the draft guidelines covered, in that respect, all situations which had arisen in connection with declarations made when acceding to a treaty.

27. As to Mr. Brownlie's and Mr. Elaraby's comments, there was nothing extraordinary about establishing two categories, reservations and interpretative declarations, and a subdivision of the latter, conditional interpretative declarations. The criterion for distinguishing reservations from interpretative declarations was the goal that was being sought by the State: was it purporting to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State, or was it purporting to clarify the meaning or scope attributed to the treaty or to certain of its provisions? The second category, interpretative declarations, contained a subcategory based, as Mr. Brownlie had said, on a particular criterion: conditionality. That criterion made it possible to distinguish between simple interpretative declarations and conditional interpretative declarations. He had set out the relevant criteria in draft guidelines 1.3.0 (Criterion of reservations), 1.3.0 bis (Criterion of interpretative declarations) and 1.3.0 ter (Criterion of conditional interpretative declarations), which he would be introducing in due course.

28. Replying to Mr. Kamto, he said a disguised reservation was a statement that was called an interpretative declaration but actually met the definition of reservation. Conditional interpretative declarations, on the other hand, met the definition of interpretative declarations within the meaning of draft guideline 1.2 but carried an additional criterion, that of conditionality. Thus the problem of disguised reservations and that of conditional interpretative declarations did not necessary overlap. If a conditional interpretative declaration actually sought to modify the effect of a treaty it would become a disguised reservation, but that was not the nature of a conditional interpretative declaration in itself. Concerning Mr. Kamto's second remark, he agreed that a definition could not be separated from its legal effects. He had not provided preliminary considerations on the possible legal effects of interpretative declarations and conditional interpretative declarations out of a desire to avoid errors. In that connection, he noted that the Commission was in familiar territory concerning reservations, with articles 19 et seq. of the 1969 Vienna Convention; interpretative declarations, about which there were simply a few scattered remarks in international law textbooks, were quite a different matter. The Commission must first make some classifications to see how problems arose, taking an intuitive approach, and delve more thoroughly into the legal effects at a later stage.

29. The CHAIRMAN said he imagined the Drafting Committee would have a difficult job placing conditional interpretative declarations in the draft. The discussion had been very useful and had highlighted members' doubts and differences of opinion. He believed everyone accepted the existence of conditional interpretative declarations. The difficulty lay in classifying them in terms of the already-existing reservations and simple interpretative declarations. Some members appeared to feel that conditional interpretative declarations were in fact disguised reservations, others were of the opinion that they were interpretative declarations and still others felt they were a new species whose specific differences had to be identified. They would ultimately be dealt with by the Drafting Committee, on the basis of the discussion.

30. Mention had also been made of the phrase between square brackets at the end of draft guideline 1.2.4. As the Commission was still in the stage of defining the draft guidelines, the square brackets indicated the Special Rapporteur's hesitation to add material which went beyond definitions and dealt with legal consequences. As the Special Rapporteur had indicated, the Drafting Committee would consider whether the phrase in square brackets was necessary. Speaking as a member of the Commission, he said that he agreed with those who considered conditional interpretative declarations to be closer to reservations than to simple unilateral declarations.

31. Speaking as Chairman, he said that, if he heard no objection, he would take it that the Commission agreed to refer draft guideline 1.2.4 to the Drafting Committee.

*It was so agreed.*

GUIDELINE 1.2.5

32. Mr. PELLET (Special Rapporteur) drew the attention of the members of the Commission to the definitive text of draft guideline 1.2.5 (General declarations of policy), which appeared in his third report (A/CN.4/491

and Add.1-6). So far the Commission had met only two major categories of unilateral declarations, namely reservations, covered in draft guidelines 1.1 et seq., and interpretative declarations, covered in draft guidelines 1.2 to 1.2.4. In practice, however, when they concluded treaties, States frequently made statements whose purpose was neither to exclude nor to modify the treaty's legal effects, nor to interpret them nor clarify their meaning or scope. It was useful from a legal standpoint to identify such statements, as the rules governing reservations and interpretative declarations, or more generally the law of treaties, were probably not applicable to them. The Commission had already encountered unilateral statements of that type when discussing reservations, especially so-called extensive reservations, even though a satisfactory formulation had not yet been found. That was the case with declarations whereby a State said it was going to do more than was required by the treaty. The same was true of general declarations of policy, covered by draft guideline 1.2.5. That provision related to remarks about the treaty or the subject area covered by the treaty which States customarily made regarding instruments which dealt with sensitive areas that had been the subject of difficult negotiations. Examples were found in paragraphs 360 to 364 of his third report. Such statements were made about a treaty, but the treaty was not really their subject. Thus the law of treaties did not apply to them, and the draft guideline might say so, either negatively, as in the phrase in square brackets, or positively, in a phrasing such as "and is subject to the law applicable to unilateral acts of States". Although that would be prejudging their legal regime, since general declarations of policy were neither reservations nor interpretative declarations, the Commission would almost certainly not be taking them up again later in the draft, and the exclusion clause in draft guideline 1.2.5 might be useful. However, if the members of the Commission wished simply to delete the material in square brackets he would not object.

33. Mr. KABATSI said that, although he agreed with the spirit of draft guideline 1.2.5, he was somewhat uncomfortable with the formulation. First, he was not certain that all such statements referred to policy. Secondly, the heading contained the word "policy" whereas the body of the draft guideline did not. It might therefore be clearer if the beginning of the draft guideline were to read "A unilateral declaration of policy", but that matter would best be left to the Drafting Committee. He agreed with the Special Rapporteur about the material in square brackets. Perhaps it was not necessary, but again it could be refined by the Drafting Committee.

34. Mr. ROSENSTOCK said he wondered whether it really was necessary or useful to include draft guideline 1.2.5. The Lord's Prayer, declarations of war and many other things were not reservations or conditional interpretations. Why, in addition to reasonably helpful definitions of interpretative declarations and reservations, was there a need to deal with the question as one of the things which the aforementioned were not? As he saw it, it was an unnecessary complication and the declarations in question did not form a separate category. Such material might, however, usefully appear at different places in the commentaries to other identified categories.

35. Mr. PELLET (Special Rapporteur) said that an interesting problem of principle arose. If the Commission followed Mr. Rosenstock, at least it would not have to trouble itself too much about draft guideline 1.2.5. He thought that it was necessary to clarify matters and say, in negative terms, that a unilateral statement might be neither a reservation, nor an interpretative declaration, because it was usually dealt with as though it was indeed a reservation or an interpretative declaration. The best illustration was to be found in *Multilateral Treaties Deposited with the Secretary-General*, which some call "the Bible", the longest section of which concerned the two major categories of declarations and reservations formulated when notifying territorial application. All the examples he had given in his third report, such as China's interpretation of the Comprehensive Test-Ban Treaty[5] or the Holy See's interpretation of the Convention on the Rights of the Child,[6] figured in *Multilateral Treaties Deposited with the Secretary-General* in a completely indiscriminate fashion. It was not specified that they were general declarations of policy, but they were statements which belonged under that heading. Of course, it was possible to do without draft guideline 1.2.5, but he was afraid that if the Commission wanted to produce a Guide to Practice that did not require States constantly to consult the commentary—which was very inconvenient and was never a good solution—then it would be a shame not to say that such statements were neither reservations nor interpretative declarations. He noted that, at the fiftieth session, in connection with a number of non-reservations to which he had alluded, several members had raised the problem, but eventually it had been decided that it was better to have both positive and negative provisions. The provisions in draft guidelines 1.2.1 et seq. served to explain section 1.2, and the latter was made clearer by giving examples of both what interpretative declarations were and what they were not. It was done for practical reasons, namely to warn the reader of the publication, which was often used by States or international organizations, that it was not because a text appeared in "the Bible" that it was the truth. Hence, the need to retain the provision was based more on practical than on theoretical considerations.

36. Mr. DUGARD said that, like Mr. Rosenstock, he had questions about the purpose of the provision, but that unlike him, thought that it was useful. As the Special Rapporteur himself had explained, it constituted a warning to States that there was a "creature" which did not quite belong in the law of treaties. His own question related to the Special Rapporteur's point, made chiefly in paragraph 374 of the third report, that statements of that kind were generally made for internal, constitutional or political effect. Perhaps a reference could be made to the fact that such statements were generally made for internal effect and draft guideline 1.2.5 was not really a guideline, but a warning. For that reason, general declarations of policy really had no place in the law of treaties.

[5] *Multilateral Treaties Deposited with the Secretary-General* (United Nations publication (Sales No. E.99.V.5), document ST/LEG/SER.E/17), p. 859.

[6] Ibid., pp. 222-223.

37. Mr. HAFNER said that like Mr. Rosenstock, he saw no pressing need to include draft guideline 1.2.5. For one thing, such declarations were commonly made, for example when an instrument was officially signed. The question, then, was whether it was necessary to deal with the legal nature of such declarations in the context of reservations and interpretative declarations. For the sake of consistency, the Commission should follow the same approach as it had with the topic of State responsibility, from which all definitions couched in negative terms had been excluded. A positive definition would certainly suffice. One source of confusion might concern which declarations were meant. Was it necessary to distinguish between the declarations in draft guideline 1.2.5 and others made in the context of treaties? Did a different legal regime have to be applied to those particular declarations? The inclusion of such a definition could also give rise to other questions of a legal nature. For instance, all questions relating to interpretative declarations could also be asked about such statements, and he did not think that that was necessary.

38. As pointed out by Mr. Kabatsi, the title was not consistent with the content of the draft guideline. He therefore shared the view that the Commission should not trouble itself too much about the provision. Regarding Mr. Dugard's remarks, a warning might be included—but only in the commentary—that such general declarations existed and must be distinguished from reservations and interpretative declarations. When trying to define reservations and interpretative declarations, it would be wise to have a reference to the existence of other kinds of statements. But that did not warrant the inclusion of draft guideline 1.2.5 in the Guide to Practice.

39. Mr. ECONOMIDES said that draft guideline 1.2.5 was unquestionably useful. It was important to deal with as many cases as possible in the Guide to Practice, not only reservations but also unilateral statements which were not reservations or interpretative declarations. It would render a service to States if any declaration sent to an international depositary could be analysed and defined. Clearly, the case contemplated under draft guideline 1.2.5 often occurred in practice.

40. The title obviously had to be changed. It would be better to speak of "Declarations of a political nature", because that covered everything. Mr. Kabatsi was right to say that the body of the provision should also contain the wording of the title. In the earlier version of the draft guideline,[7] there was a time limit for making such a declaration. It was his impression that in practice, the declarations in question were made when the State ratified the treaty. That aspect should appear at some point, at least in the commentary.

41. The new version of draft guideline 1.2.5[8] concerned either the treaty or the subject area of the latter. In his opinion those two elements were too restrictive, because other questions could also be involved. Hence the need either to include an indicative enumeration, which he favoured, or to improve upon the formulation of the draft guideline. Lastly, he concurred with other members that the phrase in square brackets was not necessary. Such a remark was not made in any of the other draft guidelines either.

42. Mr. KATEKA agreed with those who had expressed doubts as to the need for the draft guideline under consideration, a general omnibus guideline which might bring confusion to the Vienna regime. For example, what was meant by "policy"? Even if the qualification proposed by Mr. Economides, namely the reference to "a political nature" was included, the formulation was still so broad as to include everything. Mr. Dugard had said that such statements might be used for internal purposes, but draft guideline 1.2.6 (Informative declarations) would cover that matter.

43. If the Commission decided to retain draft guideline 1.2.5, he would suggest replacing the word "interpret" by "clarify". Again, he too shared the view of those who wanted to delete the phrase in square brackets.

44. Mr. RODRÍGUEZ CEDEÑO said that clearly a State might make a general statement of policy, as indicated by the Special Rapporteur. He thought that the provision was useful, but he agreed with Mr. Rosenstock and others that it should not be included in the set of guidelines. The Commission was producing a Guide to Practice, whereas draft guideline 1.2.5 did not have legal effect, but had very clear political effect. He preferred to include it in the commentary on general interpretative declarations. Even if such a guideline was incorporated in the Guide to Practice, it should not be included under interpretative declarations, because strictly speaking, it was no such thing.

45. Mr. HE said he agreed with those who were opposed to the inclusion of draft guideline 1.2.5. The question was whether it was within the Commission's mandate to codify all statements which were unrelated to reservations or interpretative declarations. Moreover, the title of the provision was not consistent with the content.

46. Mr. ELARABY said that he would like to come to the defence of the Special Rapporteur. Draft guideline 1.2.5 might need some redrafting, but it was nevertheless useful. After all, it related to something frequently encountered in State practice.

47. He asked the Special Rapporteur what the difference was between a State or international organization expressing its view on a treaty and its purporting to clarify

[7] The original version of draft guideline 1.2.5 as proposed by the Special Rapporteur read:

"A unilateral declaration formulated by a State or an international organization when that State or international organization expresses its consent to be bound which does not purport to exclude or modify the legal effect of the treaty in its application to that State or that international organization, or to interpret it, constitutes neither a reservation nor an interpretative declaration [and is not subject to application of the law of treaties]."

[8] The version contained in the corrigendum (A/CN.4/491/Add.6/Corr.1) read:

"A unilateral statement made by a State or by an international organization whereby that State or that organization expresses its views on the treaty or on the subject area covered by the treaty without purporting to exclude or to modify the legal effect of its provisions, or to interpret it, constitutes neither a reservation nor an interpretative declaration [and is not subject to application of the law of treaties]."

the meaning of the scope of the treaty. That seemed to be splitting hairs. As for the title, he agreed with other members that some reference must be made to a declaration of a political nature, and that such a phrase should also be included in the body of the text. On a minor point, draft guideline 1.2.5 was very close to the definition in draft guideline 1.2 and should therefore be placed immediately after it.

48. Mr. ADDO said he agreed with Mr. Rosenstock and others who did not see the point of including draft guideline 1.2.5. It seemed only too obvious that the kind of statement in question did not aim to modify the legal effect of a treaty's provisions or interpret them, and surely it was neither a reservation nor an interpretative declaration. If, as Mr. Dugard had said, its inclusion was meant solely to issue a warning, then it might as well be omitted. States always made such statements, either for informative or policy purposes. But if, strictly speaking, they were neither reservations nor interpretative declarations, there was no need to define what they might be.

49. Mr. LUKASHUK said he endorsed the views of those in favour of retaining the provision. If the Commission was developing a legal instrument, then that would be another matter, but the statements under consideration did not apply to such a legal instrument and had no legal consequences. The Commission was preparing a Guide to Practice, and when it became clear that the statements involved, which were very common, were neither interpretative declarations nor reservations but something quite different, then the provision would prove useful. Mr. Kabatsi was, of course, correct to say that the title "General declarations of policy" was not felicitous, but to speak of a declaration of a political nature would be even worse, since all declarations were of a political nature. It might perhaps be more accurate to refer to an "Exclusively political declaration", but at the present stage, he was in favour of retaining the title as it stood.

50. As to the phrase in square brackets, general policy declarations were not only not subject to the application of the law of treaties—they did not have any legal nature whatsoever. To make the point clear, perhaps it should be said that such statements were neither interpretative declarations nor did they have legal consequences.

51. Mr. BROWNLIE said he was in favour of including the draft guideline for reasons of ease of exposition and general practicality, because the overall title of the exercise was "Guide to Practice". It was not reasonable to suppose that the inclusion of the provision or other similar ones would mislead Governments, and if the Commission started segregating guidelines as though they were all normative, it would be rather like having a bathymetric chart which stopped at a political boundary on the continental shelf. It would be very impractical. The term "guideline" had perhaps caused problems and made it seem that what the Commission was doing was more normative than was the underlying intention.

52. Like other members, he did not see the need for the phrase in the square brackets. Including it might even be ambiguous, because in a way that kind of declaration was subject to the law of treaties, if only in the negative sense.

53. Mr. KAMTO said he agreed with those who supported the inclusion of the provision. The problems concerning draft guideline 1.2.5 had to do with the unique nature of the exercise in which the Commission was engaged. It was not a classic case of codification.

54. The title of the provision should be retained, because if it was changed to refer merely to political declarations, that would advert to other types of declarations, whereas by speaking of "general declarations of policy", such types of declarations were placed on another level, one which it was easy to understand in practice. Indeed, he was concerned as to whether the current classification covered all of the various categories of declarations to be found in practice. He suggested indicating that any other future development could form the subject of other provisions, so as not to give the impression of having been completely exhaustive.

55. Lastly, he hoped for some enlightenment from the Special Rapporteur as to the precise difference between general declarations of policy and informative declarations.

56. Mr. TOMKA said he was in favour of retaining draft guideline 1.2.5. If the Commission was drafting a legal text, it would certainly be preferable to avoid negative definitions, but the Guide to Practice would probably be used most frequently by civil servants employed in the treaty departments of foreign ministries, who were not necessarily familiar with legal niceties. It was common practice for States to make general declarations, especially at the time of ratification of or accession to a treaty. The Secretary-General was required to inform States of all such declarations and to publish them in the United Nations *Treaty Series*.

57. Perhaps the reference to "policy" in the title should be dropped. He suggested "Declarations of a general nature" as a possible alternative.

58. Mr. Sreenivasa RAO joined Mr. Brownlie in emphasizing that the Commission was not engaged in a normative exercise, but was producing guidelines for the benefit of States and newcomers to the field. He was against the deletion of a guideline solely on the grounds that it gave rise to differences of opinion. His objections to earlier guidelines had been motivated by the impression that they were inventing new categories of interpretative declarations that would merely confuse States. But the category addressed in draft guideline 1.2.5 certainly did exist, although the title was perhaps misleading. The unilateral statements described in chapter I, section C, of the third report were not necessarily declarations of policy; some concerned what might be described as a modality of implementation. He proposed deleting the phrase within square brackets, amending the title and referring the draft guideline to the Drafting Committee.

59. Mr. PAMBOU-TCHIVOUNDA said he thought that draft guideline 1.2.5 served a useful purpose in section 1.2, if only because it clarified the concept of an interpretative declaration by means of an *a contrario* approach.

60. The use of the plural form of the word "declarations" in the title was perhaps an intentional allusion by

the Special Rapporteur to the diversity of declarations of policy, as illustrated by the examples cited in chapter I, section C, of the third report. Paragraph 363 referred to China's position on the Comprehensive Test-Ban Treaty and the Holy See's position on the Convention on the Rights of the Child. He used the word "position" advisedly because he thought it might be used in place of the word "views" in the new version of the draft guideline, which was somewhat vague and abstract. A State or international organization could have any number of views on a particular treaty, depending on its perception of the treaty's political import for itself, for the States parties or for the international community as a whole. He suggested that the Special Rapporteur should reproduce the content of paragraphs 362 and 363 of chapter I, section C, of the third report in the commentary to the draft guideline.

61. The phrase "or on the subject area covered by the treaty", which added nothing to the substance of the draft guideline, should be deleted. Again, there was no reference to "policy" in the text. He suggested inserting one immediately after the word "treaty", for example a phrase such as "in order to emphasize its policy", so as to highlight the meaning and content of a State's views and to demonstrate their political import. An international treaty was always the expression of a power relationship, underlying which diverse political approaches were discernible.

62. At the beginning of the draft guideline, the words "of a general nature" could well be inserted after "unilateral statement".

63. Mr. GOCO said he appreciated the usefulness of draft guideline 1.2.5, but thought the Drafting Committee should decide on its placement and rubric. When a State made a unilateral statement that neither purported to exclude or modify the legal effect of a treaty nor sought to clarify its provisions, a problem of classification arose. In his view, States did not make innocuous statements. He proposed the descriptive appellation "unilateral declaration deemed not to be a reservation or an interpretative declaration".

64. Mr. PELLET (Special Rapporteur), responding to what he described as a very meaty and interesting discussion, said that the opinions of the Commission were clearly divided on the question of whether to include draft guideline 1.2.5 in the Guide to Practice. However, a majority seemed to be in favour of retaining it and nobody was categorically opposed to its inclusion. As noted by Messrs Brownlie, Kamto and Sreenivasa Rao, the nature of the exercise was the crucial factor. The Commission was not drafting a protocol, in which case it would be inadvisable to state a point first in the affirmative and then in the negative. The purpose of the Guide to Practice was to assist States in adopting a position. It might be important for a State to have a clear perception of whether it was dealing with a reservation, an interpretative declaration or something entirely different that was not subject to the law of treaties. Although, from an intellectual point of view, he was inclined to agree with members who wished to delete the draft guideline on the grounds that it repeated what had already been said in a different way, he strongly urged the Commission to retain it in order to help States decide on the legal nature of statements. He had been somewhat taken aback by the paradoxical arguments that saying nothing would clarify matters or that general declarations of policy were so common they should not be mentioned. It was precisely because they were so common that it might be useful to explain to States what exactly they were doing.

65. He had no strong views about the title, which could be omitted if the Commission so wished. The draft articles had been given titles only in the annex to the third report. He had an open mind on the question of whether to reflect the title in the text of the draft guideline. He was troubled, however, by the idea that a declaration of policy must, ipso facto, be devoid of legal effect. He agreed with Mr. Goco that States did not make innocuous statements but invariably had some ulterior motive. Whenever a State made a public statement, a legal effect was liable to ensue. Even if it had no effect on the application of a treaty, it might have other consequences such as estoppel. He was not hostile to including the idea of a "general declaration of policy" in the actual content of the guideline—perhaps along the lines proposed by Mr. Pambou-Tchivounda—referring to the State's political position vis-à-vis the treaty or its subject area.

66. A majority of members of the Commission seemed to be in favour of deleting the phrase within square brackets at the end of the draft guideline. He deferred to their opinion and suggested that the idea it contained might be reflected in the commentary.

67. In response to Mr. Dugard, he would point out that paragraph 374 of the third report referred to draft guideline 1.2.6. The statements covered by draft guideline 1.2.5 usually had an international rather than a national purpose, whereas the contrary was often true of the statements covered by draft guideline 1.2.6.

68. He thought that Mr. Economides' interpretation of draft guideline 1.2.5 had been syntactically erroneous. In the French text, it did not say *ses vues sur le sujet du traité* but *ses vues au sujet du traité*, which meant its views "in connection with" or "on the occasion of" the signing of the treaty. States might be using the treaty as a pretext for making a declaration. For example, the Holy See had taken the opportunity of its accession to the Convention on the Rights of the Child to express its concern for the well-being of children or families. That statement had a connection with the subject area of the treaty but did not address its content.

69. Lastly, he concurred with Mr. Lukashuk's comments and urged the Commission to refer the draft guideline to the Drafting Committee.

70. Mr. ROSENSTOCK said that eliminating the unnecessary was fundamental to the Commission's craft. Just as the accumulation of material could be confusing, so the deletion of what was superfluous could be clarifying.

71. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.2.5 to the Drafting Committee.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

# 2584th MEETING

*Wednesday, 9 June 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

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

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## Reservations to treaties[1] (*continued*) (A/CN.4/491 and Add.1-6,[2] A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,[3] A/CN.4/L.575)

[Agenda item 5]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

GUIDELINE 1.2.5 (*concluded*)

1. The CHAIRMAN said that, at its preceding meeting, the Commission had decided to refer draft guideline 1.2.5 (General declarations of policy) to the Drafting Committee. He would, however, give the floor to Mr. Hafner, who had been unable to take the floor on that occasion for lack of time.

2. Mr. HAFNER said that, in his opinion, neither the original text[4] nor the new version of draft guideline 1.2.5[5] was clear. He was not sure whether that provision referred only to certain declarations, for example those of a political nature, or whether it referred to all declarations that were neither reservations nor interpretative declarations. In the latter eventuality, the provision was tautological and had no raison d'être. If, however, it referred only to certain declarations, there was still a need to clarify the situation with regard to other declarations and the criteria to be used in distinguishing between the categories, bearing in mind that the political character of a declaration was a highly subjective matter. It would also be necessary to explain whether declarations not covered by the definition given in draft guideline 1.2.5 must therefore be considered as interpretative declarations or as reservations. In the absence of any explanations or clarifications, the draft guideline as submitted could only give rise to confusion.

3. For example, a situation might arise in which a professor at a university, which could be regarded as a State organ, gave a class expounding the Peace of Westphalia (Treaty of Peace between Sweden and the Empire and Treaty of Peace between France and the Empire). Would his declarations come within the scope of draft guideline 1.2.5? In another context, the declarations that Austrian officials occasionally made concerning the State Treaty for the Re-establishment of an Independent and Democratic Austria were doubtless covered by draft guideline 1.2.5. But it was not clear whether the political nature of the declaration resulted from the nature or from the political function of the organ making it or from the actual content of the declaration. Consequently, draft guideline 1.2.5 would create more problems than it solved and had no place in the Guide to Practice.

4. Mr. PELLET (Special Rapporteur) said that draft guideline 1.2.5 referred, not to all declarations made concerning a treaty that were neither reservations nor interpretative declarations, but only to certain of those declarations which were frequent and reflected customary practice. The declarations in question were those made by a State regarding a treaty, taking the treaty as a pretext, but without interpreting it or entering a reservation thereto. It often happened that such declarations were made at the time of the signature of the treaty or of expression of consent to be bound by it. He conceded that the text of the guideline was perhaps badly drafted and also that there was probably a problem with regard to the relationship between the title and the content.

5. That being said, the draft guideline was intended to remind States that, in making general declarations of policy, they were not operating within the context of the law of treaties and that, in that connection, neither the law concerning reservations nor the law concerning interpretative declarations was applicable. The example of a university professor interpreting the Peace of Westphalia was not well chosen; one might conceivably admit that his declaration constituted an interpretative declaration and fell within the scope of draft guideline 1.2 (Definition of interpretative declarations), but, in any event, it would not fall within the scope of draft guideline 1.2.5. The problem raised by Mr. Hafner perhaps related to draft guideline 1.2.

6. There were other categories of unilateral declarations made concerning a treaty that were neither interpretative declarations nor reservations. The question was whether all types of declaration that were neither interpretative declarations nor reservations were covered by the Guide to Practice. An attempt should be made to find a serious example of a declaration that came under none of the rubrics provided. If no example was found, it would probably be sensible to point out in the commentary that other types of declaration perhaps existed and that the Guide to Practice did not claim to be exhaustive. On the other hand, if an example was found, the Commission might take up the proposal, made at the preceding meeting, to introduce a new provision indicating that the enumeration of the various forms of unilateral declaration made with regard to a treaty did not necessarily cover every possible contingency. He noted, however, that most members of the Commission had found draft guideline 1.2.5 useful and that it had been referred to the Drafting Committee.

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[1] For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

[2] See *Yearbook ... 1998*, vol. II (Part One).

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

[4] See 2583rd meeting, footnote 7.

[5] Ibid., footnote 8.

GUIDELINE 1.2.6

7. Mr. PELLET (Special Rapporteur) said that he regarded draft guideline 1.2.6 (Informative declarations) as an excluding clause in the sense that, like draft guideline 1.2.5, it dealt with unilateral declarations that corresponded neither to the definition of reservations nor to that of interpretative declarations. Those declarations, however, were more closely linked with the treaty than general declarations of policy because they indicated the manner in which the State or international organization formulating them intended to discharge its obligations under the treaty.

8. The classic example of that type of declaration was the "Niagara reservation"[6]—which admittedly referred to a bilateral treaty—which was analysed in paragraphs 374 et seq. of the third report (A/CN.4/491 and Add.1-6). That declaration formulated by the United States of America had simply comprised an identification of what national authorities would be competent to implement the Treaty Relating to the Uses of the Waters of the Niagara River[7] it had concluded with Canada. Following an internal dispute, the District of Columbia Court of Appeal had ruled that that "reservation" did not constitute a true reservation within the meaning of international law, not because it referred to a bilateral treaty, but for reasons relating to its actual content;[8] nor could it be described as an "interpretative declaration" concerning the treaty, for its purpose had not been to clarify the meaning or scope of the treaty. Such declarations reflected considerations of domestic policy or national law, but did not purport to produce any effect at the international level, as States formulating them sometimes specified.

9. Of course, such declarations in no way modified the rights and obligations of the declarant vis-à-vis its partners. If a State wished to explain how it was going to discharge its obligations, it was free to do so, and its partners did not have to concern themselves with its declaration. On the other hand, they were entitled to require the declaring State to discharge its obligations towards them; unless the treaty expressly provided to the contrary, they were not entitled to require it to do so by implementing any given specific means.

10. Mr. BROWNLIE, referring to the structure of the Guide to Practice, said that he noted the Special Rapporteur had distinguished between two major rubrics: the definition of reservations (draft guideline 1.1) and the definition of interpretative declarations (draft guideline 1.2). He suggested that, in the interests of clarity, the Special Rapporteur should introduce a third rubric before draft guidelines 1.2.5 and 1.2.6, which might be entitled "Certain other types of declaration".

11. He also noted that, according to the draft guidelines that preceded draft guideline 1.2.6, declarations, including general declarations of policy, were formulated as it were simultaneously with reservations and interpretative declarations and in the specific context of expressing consent to be bound. That nexus was not spelled out in the case of informative declarations, where there was a looser connection between the juncture at which the declaration was made and that at which consent to be bound by the treaty was expressed. There was a narrow margin between informative declarations and what might simply be called conduct of States the consequence of which might be to modify the effect of the treaty. To illustrate the problem that might arise, he referred to the measures taken by certain States to extend the 12-mile limit of the contiguous zone while the Convention on the Territorial Sea and the Contiguous Zone had been in force. Those measures had been in some sense unilateral declarations indicating the manner in which States had intended to discharge their obligation at the internal level. Draft guideline 1.2.6 was acceptable, but perhaps some attention could be paid, in the commentary or possibly in the text itself, to the question of the relationship between the juncture at which the informative declaration was made and that at which consent to be bound by the treaty was expressed.

12. Mr. HAFNER said he thought that, like draft guideline 1.2.5, draft guideline 1.2.6 was a source of confusion and that it was very difficult to draw a distinction between the two provisions. The example given by the Special Rapporteur in paragraphs 370 and 371 of his third report was not convincing. In order for it to be so, it would have been necessary to quote the relevant provisions of the amendment procedure (art. XVIII) for the Statute of the International Atomic Energy Agency[9] in order to see whether, in making that declaration, the United States had in fact intended to make a reservation. If the amendment procedure provided for majority decisions, the United States declaration certainly went far beyond a mere declaration of domestic policy. Another example of an informative declaration was the fairly frequent case in which a State informed the other parties to a treaty that the government services competent to implement the treaty had changed. It would also be interesting to consider the situation that arose in the case of a succession of States. When other national authorities were competent to implement the treaty, the new States often informed the other States parties to the treaty of the change. The type of declaration used in that context was neither provided for in the 1978 Vienna Convention nor in the Guide to Practice. Nevertheless and despite the relative frequency of such informative declarations, he maintained that draft guideline 1.2.6 was not necessary. It would be useful to conduct a specific study on the other types of declarations made in conjunction with treaties that were neither interpretative declarations nor reservations. He also suggested discussing those declarations, not in a negative manner, as was done in the draft Guide to Practice, but in a positive manner, taking account of the various categories of declarations enumerated in the study he proposed.

13. He would also be interested to know why, at any rate in its English version, the Guide to Practice sometimes referred to a "statement" and sometimes to a "declaration". Moreover, he wondered why draft guideline 1.2.6 referred to the rights and obligations of the other contract-

[6] See L. Henkin, "The treaty makers and the law makers: the Niagara reservation", *Columbia Law Review* (New York), vol. LVI (1956), pp. 1151-1182, at p. 1156.

[7] Signed at Washington on 27 February 1950 (United Nations, *Treaty Series*, vol. 132, No. 1762, p. 223).

[8] See M. M. Whiteman, *Digest of International Law*, vol. 14, 1970, pp. 168-169.

[9] Done at the Headquarters of the United Nations, on 26 October 1956 (United Nations, *Treaty Series*, vol. 276, No. 3988, p. 3).

ing parties. Did that mean that some unilateral declarations could have an effect on the rights and obligations of the other contracting parties? If the Commission wished to retain draft guideline 1.2.6, perhaps it would be better to state explicitly that informative unilateral declarations must not have an effect on the rights and obligations of the other contracting parties.

14. Mr. KATEKA said he feared that the categories of declarations which were being created were hybrids which might complicate matters instead of clarifying them. Like other members, he thought that it would perhaps be clearer if all declarations which were neither reservations nor interpretative declarations were bracketed together under the single heading of "Other declarations". In any case, he failed to see what interest a unilateral declaration which had no effects at the international level could have for the international community. Draft guideline 1.2.6 should therefore be either deleted or incorporated in a broader category covering all other types of declaration.

15. Mr. KAMTO said that, like Mr. Brownlie, he was concerned by the absence of linkage between the time at which the informative declaration was made and the time when consent to be bound by the treaty was expressed. Even if a declaration had effects only at the internal level, it was desirable to indicate at what point in time it could be made; and the fact that a declaration was intended to have internal effects did not mean that it was of no interest to other subjects of international law and, in particular, the other parties to the treaty. Further, he would be in favour of combining all guidelines of the same type in the same rubric or, given the broad sense in which the word "policy" was being used, simply incorporating the draft guideline on informative declarations in the same provision as the guideline on general declarations of policy. Even the form in which the State proposed to apply the treaty at the internal level could be considered as belonging to general declarations of policy. In any case, there seemed to be no point in devoting a special provision to informative declarations.

16. Mr. ECONOMIDES said he thought that draft guideline 1.2.6 was very useful because it dealt with unilateral declarations, frequently met with in practice, which were neither reservations nor interpretative declarations. A complete guide to practice ought to cover all types of unilateral declarations. That being said, the text defined an informative declaration as a unilateral declaration by which a State or an international organization indicated the manner in which it intended to discharge its obligations at the internal level and said nothing about the rights that went with those obligations. By way of example, he noted that, when Greece had ratified the Convention on the Law of the Sea, it had attached to its instrument of ratification a declaration indicating the manner in which it intended to exercise a right conferred by the Convention.[10] The text of the draft guideline should therefore either be expanded to include a reference to rights or redrafted to read: "... indicates the manner in which it intends to implement the provisions of the treaty ...". Furthermore, the definition could be made more positive by adding the words "but an informative declaration" after the words "neither a reservation nor an interpretative declaration". Lastly, so far as the structure of the Guide to Practice was concerned, Mr. Brownlie's proposal to establish three major categories of unilateral declarations—reservations, interpretative declarations and other declarations—was of interest and should be taken into account by the Drafting Committee.

17. Mr. DUGARD said that he was in favour of maintaining draft guideline 1.2.6 because the purpose of the Guide to Practice was to list all types of unilateral declarations, specifying those which were neither reservations nor interpretative declarations. He wondered, however, whether the point of the exercise was not to discourage States from formulating declarations of that third kind. If such was the case, combining all declarations which were neither declarations nor interpretative declarations in a single category could have the opposite effect and could thus add to the confusion attached to treaty making.

18. Mr. ELARABY said that he was in favour of draft guideline 1.2.6, but agreed with Mr. Hafner that it differed from the other guidelines by its reference to effects on the rights and obligations of other parties, an aspect which called for further clarification. He also wondered whether the provision was not an example of overclassification and would not be of relatively little use in practice, especially since, as earlier speakers had pointed out, draft guidelines 1.2.5 and 1.2.6 could be combined in a single category of unilateral declarations which were neither reservations nor interpretative declarations. Lastly, the title of the provision was perhaps not the best possible, since all declarations were, in a sense, informative. All those points would have to be looked at by the Drafting Committee.

19. Mr. GOCO said that draft guideline 1.2.6 was useful because, even if no one could prevent a State from making a declaration when it acceded to a treaty, that State should know by what yardstick its declaration would be measured. The title of the provision did, however, raise a problem in that there could be informative declarations that did not correspond to the definition given in the text under consideration.

20. Mr. LUKASHUK said that the Commission was simply repeating the debate which had taken place in connection with draft guideline 1.2.5. Draft guideline 1.2.6 was a necessary addition to the general classification of unilateral declarations. It should be referred as quickly as possible to the Drafting Committee, which should take special note of the point raised by Mr. Economides concerning the need to include a reference to the rights which went with the obligations mentioned in the text.

21. Mr. PAMBOU-TCHIVOUNDA said he thought that draft guideline 1.2.6 was important and should appear in the Guide to Practice because, as draft guideline 1.2.5 did in respect of general policy declarations, it set out to define informative declarations in negative terms. There were, however, some difficulties. Thus, the Special Rapporteur had chosen not to settle the question of the moment when the informative declaration had to be made, a position that was understandable. In the first place, the law, procedures and organs of the State involved at the internal level were of no concern to the other parties;

[10] See *Multilateral Treaties ...* (2583rd meeting, footnote 6), p. 767.

secondly, they were subject to changes that could have effects in terms of the implementation of the treaty at the internal level. For that reason, the informative declaration could be made after the expression of consent to be bound by the treaty. Another reason why the draft guideline was important was that it illustrated the extent to which all aspects of the Commission's work were interlinked. It was not a matter of indifference that "the manner in which it intends to discharge its obligations..." could be understood as an obligation of conduct within the meaning of that concept adopted in connection with the topic of State responsibility. Summing up his remarks, he said that he considered it necessary to spell out the status of declarations that indicated the manner in which a State intended to discharge its obligations at the internal level, but which did not affect the rights and obligations of other contracting parties.

22. Mr. ROSENSTOCK said that it was perfectly possible to codify the subject of reservations to treaties without going into the question of interpretative declarations and without acknowledging the existence of unilateral declarations that were not interpretative declarations. He could understand the reasons for the classification in three categories proposed by Mr. Brownlie, namely, reservations, interpretative declarations and other declarations, but going into the details of the third category seemed to be devoid of interest other than of a doctrinal or philological nature and he failed to see how it could influence the conduct of decision makers in any of the world's capitals.

23. Mr. TOMKA said that draft guideline 1.2.6 was useful because it dealt with a phenomenon not unknown in State practice. The Drafting Committee could solve the problems that had been mentioned, taking into account in particular the classification proposed by Mr. Brownlie and the proposal by Mr. Economides that the words "intends to discharge its obligations" should be replaced by the words "intends to implement the treaty".

24. Mr. MELESCANU said that, while the study and clarification of State practice in the field of reservations and declarations as a whole were undoubtedly of theoretical interest, they also had practical value. Since the Commission was merely repeating the discussion that had already taken place in connection with draft guideline 1.2.5, it should refer draft guideline 1.2.6 to the Drafting Committee instructing it to incorporate all proposals made by members, including in particular the proposal for a better title.

25. Mr. KABATSI said that he wondered whether it was a good idea to discourage States from making declarations that were neither reservations nor interpretative declarations and were therefore outside the scope of the law of treaties. Such declarations could be useful, especially if made prior to the final commitment to be bound by the treaty in question, in that they helped the parties fully to understand each other's intentions. When used as a disguised means of making a reservation, such declarations offered the other parties an opportunity to react. Hence the third category of declarations was of interest in the sense that it obliged States to indicate clearly what they were doing.

26. Mr. HE said he shared the view that combining "other" declarations within a single category would improve the structure of the Guide to Practice as a whole. The Drafting Committee and the Special Rapporteur should consider that possibility. With reference to draft guideline 1.2.6 itself, he noted that it raised the problem of the difficulty of distinguishing, in certain cases, between an informative declaration and an interpretative declaration, as shown by the example of the declaration which Sweden had attached to its instrument of ratification of the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities, referred to by the Special Rapporteur in paragraph 372 of his third report, even though such a distinction could often be drawn without any difficulty.

27. Mr. ECONOMIDES said that he wished to add some further comments to his earlier statement on the words "but which does not affect the rights and obligations of the other contracting parties". First, the word "contracting" was superfluous and, secondly, even an informative declaration could affect the rights and obligations of the other parties, since the effect probably and often certainly derived not from the declaration itself, but from the treaty to which the declaration related. It would therefore be wiser to use wording such as that of draft guideline 1.2.5 and to say "but which does not modify the legal effect of the treaty".

28. Mr. BROWNLIE said that Mr. Economides' concern could be met by adding the words "as such" before the words "affect the rights and obligations". As some speakers had pointed out, what was involved was the conduct of a State party and, if that conduct was acquiesced in by the other contracting parties, an informative declaration, even an unofficial one, could potentially have important legal effects.

29. The CHAIRMAN noted that the Commission considered draft guideline 1.2.6 to be useful, but thought that the Special Rapporteur's exercise of classifying "declarations" was incomplete. He himself shared that view. Perhaps a third or even a fourth category of declarations should be added to "general policy declarations" and "informative declarations".

30. Mr. PELLET (Special Rapporteur), summing up the discussion, noted that, except perhaps for Mr. He, the members of the Commission had the same position on draft guideline 1.2.6 as on draft guideline 1.2.5, at least as far as its usefulness or lack of usefulness was concerned. He would not repeat the reasons which had led him to defend the need for draft guideline 1.2.6 and endorsed the arguments along those lines put forward by the members of the Commission.

31. In reply to Mr. Dugard, who had asked whether the exercise would not deter States from making a declaration, he said that what was involved was more an exercise in rationalization: the idea was to have States face up to their responsibilities by clearly specifying that declarations of that kind were neither reservations nor interpretative declarations and to make them aware of the consequences.

32. Turning to the main problems raised, he said that he appreciated the comments made on the title of the draft

guideline and admitted that, in one sense, any declaration other than a reservation was an informative declaration and that his proposed title should perhaps be changed. He counted on the Drafting Committee's assistance to find more precise wording.

33. As to Mr. Brownlie's suggestion for the inclusion of a third heading, which some of the members of the Commission had endorsed, he had no objection, provided it was specified that, in addition to reservations and interpretative declarations, which were subject to the law of treaties, there were other unilateral declarations, including general declarations of policy and informative declarations, and that the subject matter was carefully delimited. It would be virtually impossible to list all the types of declarations. However, he was willing to attempt to group declarations which were neither reservations nor interpretative declarations, such as reservations of non-recognition, under an additional heading.

34. He had listened with interest to Mr. Brownlie's proposal, which had been picked up by other members of the Commission and which was that draft guideline 1.2.6 should include the temporal factor that he had deleted in his revised text of draft guideline 1.2.5. Interpretative declarations could be made at any time. However, the reintroduction of the temporal factor might be justified because, after all, the risk of confusion between reservations and interpretative declarations was greater when a unilateral declaration was made at the same time as consent to be bound was given. If it was made later, it was clear that it was neither a reservation nor a conditional interpretative declaration. It was not apparent, however, that it was not an interpretative declaration, in the definition of which (sect. 1.2) the temporal factor did not come into play. He was not prepared a priori to reintroduce the temporal factor but the Drafting Committee might consider the question while bearing in mind the problems of principle to which it gave rise.

35. Replying to a comment by Mr. Hafner on the use in the English version of draft guideline 1.2.5 of the words "statement" and "declaration" to refer to one and the same thing, he pointed out that, in the French version, which was the original version, only one term was used: *déclaration*. As to the question whether a unilateral declaration could have an impact on the rights and obligations of other States parties, he said that it could, and in that case, it was a reservation.

36. With regard to the comment by Mr. Kateka, who was concerned about the creation of categories of hybrid declarations, he said that he had attempted to define categories that were as "pure" as possible. The fact of the matter was that there were all sorts of declarations which depended on positions taken by States.

37. In reply to Mr. Kamto, he said that the term *déclaration de politique générale* (general declaration of policy) in the French version was exactly what he had in mind. He was not certain that the use in the English translation of the word "policy" was appropriate.

38. He was fully convinced by the proposal by Mr. Economides that the words "the manner in which it intends to discharge its obligations" should be replaced by the words "the manner in which it intends to implement the provisions of the treaty". He was not hostile to the inclusion of the words "informative declaration" at the end of the draft guideline and the Drafting Committee should proceed as it had for draft guideline 1.2.5.

39. Referring to Mr. Pambou-Tchivounda's comment on the words "which does not affect the rights and obligations of the other contracting parties", he thought that they should be seen in relation to the point he had made on obligations of conduct: if a declaration which was informative in its content and by means of which a State indicated the manner in which it intended to discharge a particular obligation related to a provision of the treaty imposing an obligation of conduct on States, it was no longer an informative declaration; it was a reservation if it aimed to modify the obligation of conduct or an interpretative declaration if it aimed to clarify how the State intended to discharge a treaty obligation. However, declarations falling under the heading of draft guideline 1.2.6 were precisely those which did not have that kind of impact, and they were rather frequent. In that connection, Mr. Brownlie's proposal that the words "as such" should be included could probably be adopted.

40. He pointed out that the purpose of the exercise the Commission had undertaken was to catalogue State practice. It was thus clear that, regardless of the care which the Commission took in putting the finishing touches on the definitions, titles and texts, problems would arise in certain cases. No codification text had ever made it possible to do away with problems: it could only simplify their solution. However, it was useful to try to clarify situations.

41. In closing, he proposed that the Commission should refer draft guideline 1.2.6 to the Drafting Committee.

42. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to that proposal.

*It was so agreed.*

43. Mr. PELLET (Special Rapporteur) said that he would introduce draft guidelines 1.2.7 (Interpretative declarations in respect of bilateral treaties) and 1.2.8 (Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party) together with chapter II of his third report. He reminded members that draft guideline 1.1.9 ("Reservations" to bilateral treaties) had been put aside for the time being.

44. The CHAIRMAN invited the Special Rapporteur to introduce section 1.3 (Distinction between reservations and interpretative declarations), grouping together, if possible, the guidelines of which it was composed.

45. Mr. PELLET (Special Rapporteur) said that he would introduce draft guidelines 1.3.0 (Criterion of reservations), 1.3.0 bis (Criterion of interpretative declarations) and 1.3.0 ter (Criterion of conditional interpretative declarations) together; draft guideline 1.3.1 (Method of distinguishing between reservations and interpretative declarations) must be introduced separately because its subject matter was different. The title of section 1.3 was

provisional. As he had indicated in paragraph 391 of his third report, he had not been convinced at the outset of the need for the guidelines which made up that section—or, in any case, the first three—and that was why he had given them that strange numbering, which would need to be deleted if they were retained. The discussion which had taken place in the Commission had nevertheless dispelled any doubts he might have had on the subject: the Commission was duty-bound to draft provisions on ways of proceeding with the distinctions established in the two sections devoted, respectively, to defining reservations and to defining interpretative declarations. The point was not to determine what reservations and interpretative declarations were, but how, in practice, to distinguish between reservations and interpretative declarations and between interpretative declarations which were conditional and those which were not. Actually, the Commission had already referred two draft guidelines to the Drafting Committee which met that concern: draft guidelines 1.2.2 (Phrasing and name) and 1.2.3 (Formulation of an interpretative declaration when a reservation is prohibited), which he had initially included in section 1.2 on the definition of interpretative declarations. He pointed out once again that he did not consider that to be a good idea: the two draft guidelines in question did not relate specifically to reservations or interpretative declarations, but to how to tell them apart. Logically, they belonged in section 1.3. He did not wish to reopen the discussion on that point and counted on the Drafting Committee to make proposals on where to include those draft guidelines.

### Guidelines 1.3.0, 1.3.0 bis and 1.3.0 ter

46. Concerning draft guidelines 1.3.0, 1.3.0 bis and 1.3.0 ter, he said that the Commission must above all decide whether it wanted to retain them and, if so, should perhaps give the Drafting Committee instructions on the changes it wanted made. Actually, all three draft guidelines were obvious and did not appear to require lengthy comments. The three texts, which were placed in square brackets and introduced a much more important guideline, namely, draft guideline 1.3.1, were confined to explaining what seemed to flow clearly from the definitions contained in draft guidelines 1.1 (Definition of reservations), 1.2 and 1.2.4 (Conditional interpretative declarations).

47. Draft guideline 1.3.0[11] was another way of saying that a reservation was a unilateral statement by which a State aimed to exclude or modify the legal effect of the provisions of a treaty in their application to that State or, with regard to "across-the-board" reservations, all the provisions of a treaty from a particular point of view. It did not say anything other than had draft guidelines 1.1 and 1.1.1 (Object of reservations), which had already been adopted on first reading by the Commission at the fiftieth session, subject to possible changes by the Drafting Committee of draft guideline 1.1.1 in the light of the definition of interpretative declarations, apart from specifying that there was only one criterion for reservations: the objective of the State or international organization making the declaration. As he had noted in paragraph 390 of his third report, if the declarant intended, by means of that declaration, to modify the legal effect of certain provisions of the treaty, then the problem did not arise: it was a reservation which then was subject to the legal regime of reservations. If that was not the declarant's intention and if, after applying the criterion, it was established that it was not a reservation, then the unilateral declaration in question might be, but did not necessarily have to be, an interpretative declaration. It was at that point that draft guideline 1.3.0 bis[12] *c*ame into play, a provision which was conceived in the same way and in the same spirit as draft guideline 1.3.0.

48. Just as draft guideline 1.3.0 had stemmed from draft guideline 1.1, which defined reservations, draft guideline 1.3.0 bis was merely the logical extension of draft guideline 1.2, which defined interpretative declarations. Unlike a general declaration of policy or an informative declaration, the one and only purpose of an interpretative declaration was "to clarify the meaning or the scope that the declarant attributes to the treaty or to certain of its provisions". If the said declaration determined the consent of the declarant to be bound by the treaty, it was a special case, that of a "conditional interpretative declaration", which was the subject of draft guideline 1.3.0 ter.[13]

49. As, in the final analysis, draft guidelines 1.3.0, 1.3.0 bis and 1.3.0 ter merely aimed to pinpoint a number of criteria on the basis of the general definition of reservations and interpretative declarations which the Commission had already discussed, they might perhaps seem superfluous to some. However, if it was decided to refer them to the Drafting Committee, it would of course be necessary to bring the wording into line with that of draft guidelines 1.1, 1.2 and 1.2.4 because they stemmed directly from the definitions in question.

50. Mr. BROWNLIE said that he really failed to see what purpose was served by those provisions, which, in his view, duplicated the definitions provided in draft guidelines 1.1, 1.2 and 1.2.4.

51. Mr. HAFNER, referring to the criteria used to differentiate between reservations and simple or conditional interpretative declarations, as analysed by the Special Rapporteur in paragraphs 378 to 391 of his third report, said that, in the Special Rapporteur's view, if the practical result of a declaration was to exclude or modify the legal effect of the provisions of a treaty (objective criterion), it really constituted a reservation. Otherwise, it was an interpretative declaration. Where the latter merely pur-

[11] The draft guideline read:

"[1.3.0 *Criterion of reservations*

"The classification of a unilateral declaration as a reservation depends solely on the determination as to whether it purports to exclude or to modify the legal effect of the provisions of the treaty in their application to the State or international organization that formulated it.]"

[12] The draft guideline read:

"[1.3.0 bis *Criterion of interpretative declarations*

"The classification of a unilateral declaration as an interpretative declaration depends solely on the determination as to whether it purports to clarify the meaning or the scope that the declarant attributes to the treaty or to certain of its provisions.]"

[13] The draft guideline read:

"[1.3.0 ter *Criterion of conditional interpretative declarations*

"The classification of an interpretative declaration as a conditional interpretative declaration depends solely on the determination as to whether the declarant intended to subordinate its consent to be bound by the treaty to the interpretation that is the subject of the declaration.]"

ported to clarify the meaning or scope of the treaty, it was a simple interpretative declaration. Where it constituted a condition for the declarant's participation in the treaty (subjective criterion), it was a conditional interpretative declaration. However, according to the Special Rapporteur's reasoning, the subjective criterion, i.e. the purpose of the declaring State, was left until the second stage. That did not seem to be entirely consistent with the spirit of the 1986 Vienna Convention, which, in the provisions on the definition of reservations, gave considerable prominence to the intention of the parties. He wondered whether the objective and subjective aspects should not be considered jointly from the outset in the interests of consistency with the Convention.

52. Mr. Sreenivasa RAO said that he also had doubts about the value of the three draft guidelines under consideration. They covered problems of definition that the Commission had already discussed and referred to the Drafting Committee. He found the wording of draft guideline 1.3.0 ter, in particular, somewhat questionable. In English at least, the phrase "subordinate its consent" was fraught with consequences: where a State intended to "subordinate its consent" to be bound by the provisions of a treaty to the application of certain modalities and its legal obligations were modified as a result, as was conceivable, its declaration was a reservation and not a conditional interpretative declaration. In that connection, he drew the attention of the members of the Commission to the example given by the Special Rapporteur in paragraphs 372 and 373 of his third report. It remained to be seen, of course, what position was taken by the other parties involved. The key issue of the legal effects produced had not really been resolved, so that the draft guideline was of little value. It would be preferable for the Commission to refrain from commenting.

53. Mr. LUKASHUK said he also thought that the draft guidelines under consideration were superfluous and encumbered the text unnecessarily.

54. Mr. GAJA said that he shared that view; the draft guidelines under consideration added nothing to the new text of draft guideline 1.2.2 approved by the Drafting Committee, which read: "The [legal] character of a unilateral statement [as a reservation or an interpretative declaration] is determined by the legal effect it purports to produce." He would revert to the essential question of the criteria to be used for the purpose of interpretation when draft guideline 1.3.1 was discussed.

55. With regard to the definition of a conditional interpretative declaration, he said that the Special Rapporteur's argument in paragraphs 380 and 381 of his third report showed how difficult it was to find a sound criterion that could be used to differentiate between a reservation and a conditional interpretative declaration. Indeed, the declaration made by the Swedish Government concerning the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities, mentioned in the third report as probably being a reservation, was analogous to the declaration made by the Government of Japan that was considered an example of a conditional interpretative declaration.[14]

56. Mr. ECONOMIDES said he thought that the three provisions under consideration added nothing to what had been said in the definitions. They were at best clarifications that could be included in the commentary.

57. Mr. ELARABY said that, while he shared the opinion of the previous speakers, as a rule, he found that clarifications served a useful purpose: it should be remembered that it was basically the need to establish a clear-cut distinction between reservations and interpretative declarations that had given rise to the draft guidelines under consideration. But the closer one looked at draft guidelines 1.3.0, 1.3.0 bis and 1.3.0 ter, the more one was struck by the repetitive elements and the lack of anything new. Their sole value was as a means of shedding light on the definitions set out earlier in the text. He therefore agreed with Mr. Economides that their proper place was in the commentary.

58. Mr. PELLET (Special Rapporteur) said he was pleased that Mr. Elaraby had drawn attention to the importance of the distinction between reservations and interpretative declarations; that point should certainly be emphasized in a commentary, perhaps the commentary to draft guideline 1.3.1. Furthermore, he wished to make it clear that conditional interpretative declarations were only a subdivision of interpretative declarations—which could assume a great variety of forms—and did not constitute a distinct third category, a "separate species", of declarations, as Mr. Gaja seemed to think. He drew attention to the definition in draft guideline 1.2.4, which had been referred to the Drafting Committee.

59. With regard to Mr. Hafner's observation about the place to be accorded to the double test—the "objective criterion" and the "subjective criterion"—constituted by the purpose of the declaring State, he said that article 31 of the 1969 Vienna Convention concerning the general rule of interpretation of treaties made no mention of "interpretative declarations" and should therefore not serve as a frame of reference for the Commission. While the intention of the parties (subjective criterion) featured prominently in the section of the Convention dealing with reservations, it was still necessary for the declaration to be formulated in such a way as to ensure that the intention was materialized for a reservation to exist. Nevertheless, if Mr. Hafner was willing to work with him on a specific proposal, he was prepared to place more emphasis on the dual objective and subjective criterion in the Guide to Practice.

60. The question of the distinction between reservations and interpretative declarations could be further explored during the discussion of draft guideline 1.3.1.

61. The CHAIRMAN said that, in the light of the discussion, he took it that the Commission agreed not to refer draft guidelines 1.3.0, 1.3.0 bis and 1.3.0 ter to the Drafting Committee, on the understanding, however, that their content would be reflected in the commentary.

*It was so agreed.*

*The meeting rose at 1 p.m.*

[14] See 2582nd meeting, footnote 7.

## 2585th MEETING

*Thursday, 10 June 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

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### Cooperation with other bodies (*continued*)*

[Agenda item 11]

VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRMAN, welcoming the President of the International Court of Justice, Judge Stephen Schwebel, on behalf of the Commission, said that Judge Schwebel was also a distinguished former member of the Commission, who had served as Special Rapporteur on the topic of the law of the non-navigational uses of international watercourses. His presence carried on the tradition of cordial and productive personal relations between the two bodies.

2. Mr. SCHWEBEL (President of the International Court of Justice) said it was a great pleasure to renew contact with the Commission, a body whose important work and distinguished history made it one of the most productive institutions in the history of the United Nations, international law and international relations. The International Court of Justice could happily be described in similarly positive terms today. Its productivity was far greater than at any time since the establishment of its predecessor, the Permanent Court of International Justice, over 75 years previously. A docket of 19 cases was an extraordinary number for a court that could entertain only inter-State disputes and could not be compared with jurisdictions in which the potential number of litigants ran into millions. The diversity of those cases in geographical and cultural terms gave a sense of the breadth of the Court's concerns and on the docket of its constituency.

3. The first case concerned *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*. It was somewhat unusual in that both parties were Gulf States. There had been an intense struggle over jurisdiction and a difference of views between the parties over the authenticity of 72 documents on which one of them had relied and which had eventually been withdrawn. On the merits, it was a complex case of very great importance to each of the States concerned. The hearings stage would begin in the not too distant future.

4. Next came two cases concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* brought by the Libyan Arab Jamahiriya against the United Kingdom of Great Britain and Northern Ireland and the United States of America respectively. The Court had declined to issue the order indicating provisional measures sought by the Libyan Arab Jamahiriya in order to forestall the adoption of Security Council resolutions imposing sanctions against the country. It had upheld its jurisdiction to consider the merits and pleadings had recently been filed preparatory thereto. At the same time, the two men accused of carrying out the Lockerbie bombing had been surrendered for trial to a Scottish court sitting in the Netherlands. The interplay between that case and the cases pending on the Court's docket was unclear. The Vice-President of the Court, who was Acting President for those cases, would be meeting the parties shortly to clarify the situation.

5. Another highly charged case was that concerning *Oil Platforms*, which turned on claims that oil platforms belonging to the national Iranian oil company had been destroyed by United States naval forces during the Gulf War. The United States alleged that they were being used to mount terrorist attacks on shipping. The Court had upheld its jurisdiction in the face of a challenge. The United States had sought to bring counterclaims, some of which had been admitted by the Court. The case, which involved important and delicate issues such as neutrality and the use of force in international relations, was also moving towards hearings on the merits of the claims and counterclaims.

6. Next on the list was the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. The Court had issued two orders indicating provisional measures that had essentially been ignored in the same way as the Security Council resolutions on the same matter. The Court having upheld its jurisdiction, Yugoslavia had brought counterclaims [see page 258, paragraph 35] which the Court had deemed admissible. The hearings on the merits were expected to begin no later than February 2000 and to prove exceptionally difficult and protracted.

7. In the case concerning the *Gabčíkovo-Nagymaros Project*, the Court had rendered a judgment pursuant to a special agreement. It remained on the docket because of the provision in the special agreement to the effect that either party could return to the Court within six months if the judgment was not being implemented to its satisfaction. Slovakia had acted on that provision and the parties had resumed intensive negotiations. It was uncertain whether the Court would be called upon to play a further part.

8. The case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* had originated with a dispute concerning sovereignty over the Bakassi Peninsula. It had subsequently been extended to include the maritime boundary in the seas off the peninsula and the boundary running from Lake Chad to the sea between

* Resumed from the 2576th meeting.

Cameroon and Nigeria. The Court had issued an order indicating provisional measures (in recent years more and more applicants had tended to seek such measures and respondents had sometimes reacted by seeking counter-provisional measures). The Security Council had also been seized of the dispute[1]—an example of the two bodies acting concurrently and cooperatively. The Court had upheld its jurisdiction in the face of a challenge and Nigeria's request for an interpretation of that judgment had been turned down. The pleadings were proceeding and the merits of the case would eventually be discussed.

9. The case concerning *Kasikili/Sedudu Island* was under active consideration. It had been brought by special agreement and concerned an island marking the boundary between the two States. As there had been no jurisdictional problem or other incidental proceedings, the case had moved fairly swiftly to the hearings stage earlier in 1999. The Court was currently engaged in the process of producing a judgment.

10. Digressing for a moment to outline that process, he said that, on completion of the oral hearings, which had been preceded by three rounds of exchanges of written proceedings and three weeks of hearings on the merits, the Court had begun writing its notes. Each judge prepared a preliminary opinion, addressing a list of questions prepared by the Registry and reviewed by the President. The opinions usually ran to between 50 and 100 pages and, following translation from French into English or vice versa, were read by the judges who met for two to three days to discuss them. Each judge, beginning with the most junior in order of precedence, summarized his or her views, taking into account those expressed in the notes prepared by his or her colleagues. Lastly, the President stated his views, by which time it was usually clear in which direction the majority view lay. A secret ballot was then held to select two judges, usually one English-speaking and one French-speaking, to form a drafting committee chaired by the President or by another senior judge if the President's view was not that of the majority. The committee's draft judgment was circulated and written amendments were requested by a given date. A second version, incorporating proposed amendments, was produced and laid before the Court for a first reading. Every word of the proposed judgment was carefully weighed, a process that usually took two to four days, depending on how divided opinions were and on the determination of those holding the minority view to fight every line of the way. After the first reading, the President invited the members of the Court to state whether they contemplated preparing a separate or dissenting opinion. Those who so signified were asked to submit their opinions by a specific date so that they could be taken into account in preparing the draft for the second reading. The decision-making process thus involved the whole of the Court in the sense that the majority view was confronted with the dissenting and separate opinions in the drafting committee, which might adjust the judgment if it saw some merit in the dissenting approach or rewrite it in such a way as to counter the arguments presented. The Court worked as a universal body that sought to take account of the views of judges representing the principal legal systems and civilizations of the world. On second reading, the operational part of the judgment was put to the vote. Judges were required to vote for or against; abstentions were ruled out. If the Court was evenly divided, which was a rare occurrence, the President or other presiding officer had a casting vote. If the Court's judgment had been modified, for instance to reflect the position of the author of a separate or dissenting opinion, that person could issue a new last-minute version of his or her opinion. Finally, the parties were notified and the judgment was read out in open session.

11. The case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan* had as yet gone no further than the filing stage.

12. In the *Ahmadou Sadio Diallo* case, Guinea was exercising its rights of diplomatic protection on behalf of an individual. It alleged that a Guinean national who had been a long-term resident of the Democratic Republic of the Congo, with large-scale business interests in the country, had been treated in a manner inconsistent with Congolese international obligations, particularly with respect to the expropriation of his property interests. It was hoped that the procedure for the case would be established by the end of June 1999.

13. In the *LaGrand* case, Germany was acting on behalf of a German national who had been raised in the United States and executed for murder in one of its constituent States. On the day before Mr. LaGrand was due to be executed, Germany had petitioned the Court to order provisional measures to stay his execution, alleging that its rights under the Vienna Convention on Consular Relations had been violated by the failure of the local authorities concerned to notify the German consular authorities when Mr. LaGrand and his brother had been arrested and tried. There was no dispute about the fact that Germany's consular authorities had not been so notified. Germany had sought an order indicating provisional measures. The previous year Paraguay had sought a similar order, which the Court had unanimously issued in the case concerning the *Vienna Convention on Consular Relations*. It had also done so in the *LaGrand* case, but the singular aspect of that case was that when moving for the issuance of an order indicating provisional measures, Germany had claimed that the Court could issue such an order *proprio motu* on the basis of a particular provision of the rules of Court. No State had ever made such a claim before. A very substantial majority of the Court had taken the view, in the few minutes it had had to consider the matter, that that provision could properly be employed to issue an order. He himself had taken the view that the provision was not meant to provide authority for the Court to issue an order *proprio motu*—meaning "on its own motion", rather than the motion of one of the two parties—and that where one of the two parties moved for provisional measures the rules required a hearing of both parties. In his view, to issue an order indicating provisional measures on the basis of the views of one party violated that most fundamental principle of judicial procedure, the right of both parties to a hearing. Nevertheless, he had voted for the order, because he had not objected to its substance.[2] The order had reached the United States just a few hours before the scheduled execution time, in spite of which the

[1] See S/1996/150.

[2] For the separate opinion of President Schwebel, see *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999,* pp. 21-22.

execution had gone ahead. Germany, however, had indicated that it was disposed to pursue the case through to judgment, unlike Paraguay, which some time after the execution of its national had withdrawn its case. There, the *proprio motu* issue had not arisen because Paraguay had applied to the Court five or six days before the scheduled execution date and there had been time for a hearing of both parties before the order was issued.

14. Earlier in 1999 a request for an advisory opinion had been made by the Economic and Social Council on the question of the immunities of a Special Rapporteur of the Commission on Human Rights on the independence of the judiciary, who had given a press interview to a British publication which had resulted in the bringing of four suits against him for defamation by private parties in Malaysia, the country of which the Special Rapporteur was a national. The Secretary-General had from the outset taken the position that the Special Rapporteur had spoken in his official capacity and that therefore he should be immune from suit[3]—a position not accepted by the Government of Malaysia. There had also been a difference of view as to who was entitled to make the determination of immunity. In response to the request by the Economic and Social Council, the Court had ruled, in its advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, by a very substantial majority, that Mr. Cumaraswamy, the Special Rapporteur, had immunity from suit and that costs levied against him should be repaid.

15. Such had been the state of the docket until a few weeks previously, when Yugoslavia had brought 10 cases against 10 members of NATO in regard to NATO bombing of its territory. The Court had entitled those cases collectively *Legality of Use of Force*, thereafter designating each case by the parties thereto. Yugoslavia had urgently sought provisional measures—in short, an order to stop the bombing. Hearings had been held within a matter of days of Yugoslavia's filing its application, which itself had followed by a day its filing of a notice of adherence to the optional clause. That adherence had had various singular features, one of which was to confine jurisdiction to disputes arising after the date of the adherence, namely, 25 April 1999. At the hearings the 10 respondents had uniformly maintained that the Court lacked jurisdiction to issue orders indicating provisional measures. In most of the cases Yugoslavia had cited three grounds, and in two—those against Belgium and the Netherlands—a fourth ground. It had cited *forum prorogatum*, inviting the respondents to accept jurisdiction; the respondents had uniformly refused. It had then relied on its adherence to the optional clause—at any rate as against those States that had themselves adhered; and it had also invoked the Convention on the Prevention and Punishment of the Crime of Genocide, under article IX of which the Court had jurisdiction over disputes relating to the interpretation, application and fulfilment of the Convention.

16. The respondents had argued that there was no jurisdiction under the optional clause—in some cases, because of particular reasons, but in most cases on the grounds that the dispute had arisen not after 25 April, but on 24 March, the date on which the bombing had begun and on which the Security Council had debated the matter, including the legality of the use of force. The Court had accepted that argument and had therefore found an absence of jurisdiction on that ground. On the ground of the Convention on the Prevention and Punishment of the Crime of Genocide, it had held that a use of force by one State against another could not be equated with genocidal acts, which required intent to destroy a national, ethnic, racial or religious group. It had held that such basis was absent, and that therefore prime facie jurisdiction under the Convention could not be justified. Two of the cases, in which there had been no adherence to the optional clause or in which the jurisdiction of the Court under the Convention had been excluded in the absence of special agreement, had been dismissed—those against Spain and the United States. The other eight remained on the docket.

17. Mr. LUKASHUK said it sometimes happened that rules adopted by the Commission in the belief that they were, or should be, part of international law were subsequently recognized by ICJ as norms of positive international law. In that connection, he wished to put two questions. First, did the President of the Court consider that that development constituted a new phenomenon in the formation of customary international law? Secondly, did the President believe that holdings of the Court in such cases constituted *opinio juris* of the international community as a whole?

18. Mr. SCHWEBEL (President of the International Court of Justice) said Mr. Lukashuk had raised two very interesting questions, neither of which he felt able to answer with complete confidence. There were indeed instances in which the Commission had produced draft conventions later adopted by a diplomatic conference—or even draft conventions not yet so adopted—on which the Court had thereafter repeatedly relied in its judgments. The most notable example was the draft articles on State responsibility. The articles of that draft had for some two decades been cited before the Court in various cases as expressing rules of customary international law. On more than one occasion the Court had recognized those draft articles as an authoritative statement of the law, sometimes even citing the commentaries thereto. It had done so on more than one occasion in respect of the 1969 Vienna Convention, stating, even in respect of States not parties to the Convention, that provisions thereof such as article 31 reflected a customary international law.

19. Whether that was a new phenomenon was a moot point. Insofar as the Court had been adopting that approach for some time, it was not so very new. On the other hand, it was new inasmuch as it had become a recurrent practice of the Court, important in that it accelerated the incorporation of the work product of the Commission into the body of customary international law, sometimes before the convention came into force or even before it was considered at a diplomatic conference. Of course, the Court did not adopt that approach lightly, but would consider carefully whether a draft article formulated by the Commission was in fact a reflection of customary international law, or whether it was a development in that law. To date, it had relied on articles it had found to be a reflection of customary international law—notably in the *Gabčíkovo-Nagymaros Project* case in respect of countermeasures and state of necessity. It had also done so more

[3] See E/1998/94 and Add.1.

than once with conventions already in force, as in the case of the somewhat controversial article in the 1969 Vienna Convention referring to methods of interpretation, holding that article 31 did reflect customary international law—a view which would have been widely contested in 1969 but had become less controversial with the passing of time.

20. The question whether those instances of the Court's reliance on the product of the Commission's work constituted *opinio juris* of the international community as a whole was hard to answer. It was generally agreed that the Court's holdings on matters of customary international law carried great authority. He would not himself equate them with *opinio juris*, or claim that they were necessarily and invariably binding on all States. Some of its holdings had certainly been the object of vigorous dissent in the Court and rejected by some States, either expressly or in their practice. The status in international law of such holdings was open to debate. It was clear that the judgment of the Court in its *dispositif* was binding on the parties to the case, but that was not to say that holdings of the Court bound the international community as a whole.

21. Mr. Sreenivasa RAO asked whether other cases had arisen in which a country did not see fit to comply with an order indicating provisional measures, and whether the Court had ever responded by holding it in contempt.

22. Mr. SCHWEBEL (President of the International Court of Justice) said that controversy reigned as to whether provisional measures were binding. The conclusion to be drawn from the Statute of ICJ was that they were not. Provisional measures were measures that ought to be taken to preserve the rights of the parties. The Security Council was to be notified and could consider making recommendations or taking measures to give effect to a judgment. However, it was not bound to give effect even to judgments of the Court, still less to its orders indicating provisional measures. Nonetheless, many judges of the Court and scholars maintained that provisional measures ought to be binding, because otherwise the ultimate judgment of the Court and the integrity of the judicial process might be subverted. Thus, "the jury was still out" on that question.

23. In the history of the Court, there had perhaps been more cases in which a State had not complied with orders indicating provisional measures than cases in which it had. To the best of his recollection, the Court had never pursued the matter either at the instance of a party or *proprio motu*. Nor was there any provision for contempt citations.

24. However, that was not necessarily the end of the matter. It was possible that when the Court came to consider the merits of a case, or possibly even the jurisdiction, the outlook of some of its members might be influenced by a party's failure to comply with provisional measures. But if that was so, it was just one of the many subliminal factors that might colour the outlook of individual members of the Court. There might at times be reference to such failures, in Court deliberations or among judges outside deliberations, but he could not recall any case in which the Court, in a subsequent judgment, had referred to the matter. One possible exception might be the judgment in the case concerning *United States Diplomatic and Consular Staff in Tehran*. He could not offhand recall the Court having taken account of the fact that the hostages had not been released in spite of its order, but his memory might be at fault on that point.

25. Mr. BROWNLIE asked whether the President would care to comment on the effect on the Court's work, as the principal judicial organ of the United Nations, of the financial stringencies imposed within the system as a whole.

26. Mr. SCHWEBEL (President of the International Court of Justice) said that the acute financial difficulties of the United Nations had indeed had an impact on the Court's operations. In 1981 the Court had had just one case on its docket; it currently had 19. After some years of sparse activity in which the Registry had been relatively untested, since 1984 the business of the Court had been mounting, and resources were greatly strained. There had been some expansion of staff and financial resources over the past 15 years, but it had by no means kept pace with the increase in the work. The recent submission of 10 cases by Yugoslavia had stretched the Registry's staff almost to breaking point.

27. The Court had only four permanent translators and brought in temporary translators, at great cost, for particular cases. It had for many years tried to persuade the Secretariat that it would be more economical to expand the number of permanent translators. The Registrar of the Court would soon be taking up that matter with ACABQ, which he hoped would give it favourable consideration for inclusion in the budget of the next biennium.

28. The Court's legal staff was very small; six lawyers handled all matters it required; judges did not have clerks or research assistants and those six lawyers were not in a position to act as such. If the Court required a memorandum on how it had applied a particular rule, the Registry would produce it competently and rapidly, but it was not available to advise on the merits of cases. Judges did all their own work, which he felt was essentially positive: they had not been elected in order to be heavily reliant on young, unelected clerks, which was the case in some national systems. There was, however, room for a middle way. The judges and staff of the International Tribunal for the Former Yugoslavia all had clerks, as did those of the Court of First Instance of the European Communities and the Iran-United States Claims Tribunal, as well as many national jurisdictions. A pool of short-term research assistants chosen by the Registry in accordance with its international standards of recruitment, would speed up the Court's processes, provide valuable training in international law for young lawyers from around the world and contribute modestly to building up an informed constituency for the Court. That idea had been suggested to the United Nations, but the funding had not actually been requested in view of more urgent needs, such as translators. Indeed, the Court came to a halt if translations were not completed, and it had repeatedly come perilously close to that point in recent years. The situation was better than it had been three or four years ago, but there was much room for improvement.

29. Mr. HAFNER asked first, in connection with the point raised by Mr. Brownlie, whether the Court's long docket—19 cases—would have an influence on the duration of cases. Many complaints had been made, unjustifiably he was certain, about the Court's lengthy procedure in dealing with cases. He wondered about the Court's present capacity to handle cases and whether it had considered using other structures, such as the chambers, to alleviate that situation.

30. Secondly, as the principal judicial organ of the United Nations, ICJ was also regarded as the principal judicial organ of the world community, reflecting a universal system of international law. Did the existence of new tribunals and dispute settlement mechanisms, such as the International Tribunal for the Law of the Sea and the Court of Conciliation and Arbitration of OSCE, threaten the unity of international law? Would contacts between ICJ and those new tribunals be desirable in preserving that unity?

31. Thirdly, although the Court's docket essentially concerned boundary issues, in a few cases it was entering the field of what might be called matters of high policy, such as the use of force. He wondered whether the treatment of such cases would have an impact on the willingness of States to accept the Court's jurisdiction, for example by acceding to Article 36, paragraph 6, of the Statute of ICJ.

32. Mr. SCHWEBEL (President of the International Court of Justice) said that the extent of the docket would certainly affect the duration of the procedure. Cases were handled in the order in which they were filed, but the determining factor was whether a case was ready for hearing. The Court had heard the *Kasikili/Sedudu Island* case relatively rapidly, but because the case had been brought pursuant to special agreements, there had been no intervening incidental stages, such as a jurisdictional dispute, and no provisional measures. Also, the pleadings had been ready, the translations fairly advanced and a time slot had been available.

33. There was certainly a limit to the number of cases with which the Court could deal under its current methods. He agreed with Mr. Hafner that the criticism of the Court's slowness was on the whole unjustified. It was nonetheless fair to say that the work methods had been designed for an era of "low intensity" usage, something that was reflected not only in the very small size of the Registry but in the latitude accorded to the parties, who were traditionally permitted to submit written or oral pleadings of any length they wished. That situation could not continue if the work was to be done with reasonable dispatch. Steps had been taken to accelerate the procedure by impressing on the parties that pleadings should be as succinct as possible and exhibits, which required translation, attached only insofar as they were necessary. Thus the Court's ability to move more rapidly would turn substantially on the cooperation of the parties.

34. The essential solution did not lie with chambers. In the four instances where that solution had been chosen, in which five judges of the Court had been working on a particular case, it had not been easy for the whole court to function effectively. The case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* had been in the midst of oral argument when the case concerning the *Military and Paramilitary Activities in and against Nicaragua* had been brought; argument had been suspended and a large number of counsel had waited in The Hague, at considerable expense to the parties, while the Court had dealt with provisional measures in the latter case. The chambers solution had some potential, but it also raised the problems of coordination with the work schedule of the Court as a whole and of ensuring an adequate measure of distribution in the composition of a chamber, which was a delicate issue that had wider reverberations in the Court. Some believed that, with the increase in the Court's business and its attainment of universality in its clientele, it should be bigger in size. In his view, that would be a grave mistake. The Court was already a very ponderous institution and expansion would make it even more so, unless it regularly broke into chambers as did the European Court of Human Rights. That was not desirable for a universal court and he wondered whether the Court's authority would be maintained if work were regularly done by chambers rather than the full court.

35. As to Mr. Hafner's second question, the proliferation of tribunals should not necessarily threaten the unity of international law. It was in some respects quite desirable because it showed that the international community was willing to back its international obligations with authoritative means for settling disputes arising in the course of the performance of those obligations. In addition, various types of cases, for example trade disputes, could not be handled by a court of general jurisdiction and competence such as ICJ. The wisdom of establishing the International Tribunal for the Law of the Sea might be debated, but the Tribunal existed and should therefore be developed into a vigorous and productive court. The number of international disputes arising was sufficient to keep more than one court busy. He hoped there would be frequent resort to the Tribunal.

36. It was not infrequent for the decisions of various international courts and arbitral tribunals to reflect those of other courts. That was the essential way forward, as the practical possibilities of introducing a uniform hierarchical system of international courts were virtually nil. Theoretically ICJ should be the supreme arbiter, but as there was no sign of that happening, the world must be dealt with as it was. It would be juvenile for one court to try to "trump" the decisions of another; that was sometimes seen, but he hoped it would not become characteristic on the international scene.

37. Again, he did not know whether "high policy" cases were likely to have an adverse impact on the Court's jurisdiction, which had not fared well even in the decades when it had not heard such cases. A markedly higher proportion of States had adhered to the jurisdiction of PCIJ than adhered to ICJ at the current time or at any point in its history. Only one of the five permanent members of the Security Council adhered to the Court's compulsory jurisdiction under the optional clause; two had withdrawn. It might be said the two had withdrawn because high policy disputes had been brought before the Court, which had responded in ways not pleasing to them, and that the more

that happened, the less jurisdiction the Court would have. On the other hand, the involvement of the Court in such cases might enhance its attraction, if not to those States, then to others. Since those cases had been brought in the 1970s and 1980s the Court's docket had grown rather than shrunk. In any event, it was not the Court's role to speculate about its caseload; it had simply to get on with its work.

38. The CHAIRMAN thanked Judge Schwebel for an extremely interesting statement and for his very useful information about the Court's complex work. The fact that the Commission and Court both worked in the field of international law, provided a point of departure for fruitful relations between them. The importance of the Court's jurisprudence for the Commission's work could not be overestimated, and he hoped the Commission's work was also useful to the Court.

## Reservations to treaties[4] (*continued*) (A/CN.4/491 and Add.1-6,[5] A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,[6] A/CN.4/L.575)

[Agenda item 5]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

39. Mr. PELLET (Special Rapporteur), referring to Judge Schwebel's visit, said that it was gratifying to see that the excellent tradition inaugurated in 1997 was continuing and that the links between the Court, as the principal judicial organ of the United Nations, and the General Assembly, as the principal subsidiary organ in charge of the progressive development and codification of international law, would be reinforced.

GUIDELINE 1.1.9[7]

40. Draft guideline 1.1.9 ("Reservations" to bilateral treaties), was largely an American one in the sense that reservations to bilateral treaties were something of a specialty of the United States. To his knowledge, that country had been the first to make or claim to have made a reservation to a bilateral treaty, perhaps as early as 1778, but certainly in 1795, when a "reservation" had been made to the Jay Treaty.[8] Since then, the United States had been the main source of examples of reservations to bilateral treaties. According to credible statistics, it had formulated a good hundred in the past two centuries. The United States was not alone in so doing, but curiously most of the other examples that could be cited came from contracting parties in their relations with the United States.

41. One explanation for the practice was the American political system and the role of the Senate in ratifying treaties: American "reservations" were always imposed by the Senate, which made it a condition for its consent to ratification. It was not an entirely convincing explanation, at any rate from the legal point of view. To take another example, since 1875 the French Parliament had also had to authorize the ratification of most treaties and agreements, yet he had only found one example of an attempt by the French Parliament to try and force the Executive to set certain conditions for France's conclusion of a bilateral treaty. It was the Washington Agreement[9] concluded with the United States on the reimbursement of the debt contracted by France during the First World War. The attempt to introduce conditions had failed,[10] for the United States had refused the reservation,[11] and the Agreement had therefore entered into force in its initial version. It was an interesting situation: France had wanted to make a reservation, the United States had been opposed to it, and ultimately the Agreement went on to bind the two countries without the reservation. Two other outcomes could have been possible. The Agreement might not have entered into force because France could have refused to ratify it, assuming that it had had the political capacity to do so, which he doubted. That had been the fate of the Convention between Great Britain and the United States of America, in 1900,[12] Great Britain having rejected the reservation made by the American Senate.[13] Alternatively, the United States could have accepted the French reservation, and then the modified treaty would have entered into force. What those three situations showed was that the treaty did not enter into force, whether with or without reservation, unless the two parties were in agreement on the totality of the text. That was in contradiction with the very idea of a reservation. By its very nature, a reservation constituted a unilateral excep-

[4] For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

[5] See *Yearbook ... 1998*, vol. II (Part One).

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

[7] The draft guideline read:

"A unilateral statement formulated by a State or an international organization after signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty in respect of which it is subordinating the expression of its final consent to be bound, does not constitute a reservation, however phrased or named.

"The express acceptance of the content of that statement by the other party takes the form of an amendment to the treaty, and both parties are bound by the new text once they have expressed their final consent to be bound."

[8] Treaty of Amity, Commerce and Navigation between the United States of America and Great Britain (London, 19 November 1794), *Treaties and Other International Acts of the United States of America* (Washington, D.C., U.S. Government Printing Office, 1931), vol. 2, document No. 16, p. 245. For the reservation, see page 271.

[9] Agreement regarding the Consolidation of the Debt of France to the United States (Washington, 29 April 1926), League of Nations, *Treaty Series*, vol. C, p. 27.

[10] See A.C. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, C.N.R.S., 1962), vol. I, pp. 284-285.

[11] See C. Rousseau, *Droit international public*, vol. I, *Introduction et sources* (Paris, Sirey, 1970), p. 120.

[12] Convention between Great Britain and the United States of America, supplementary to the Convention of April 19, 1850, relative to the Establishment of a Communication by Ship-Canal between the Atlantic and Pacific Oceans (Washington, 5 February 1900), *British and Foreign State Papers, 1900-1901*, vol. XCIV (London, H.M. Stationery Office, 1904), p. 468.

[13] Ibid., pp. 473 et seq. The convention was not ratified and was replaced by the Treaty between Great Britain and the United States, relative to the Establishment of a Communication by Ship Canal between the Atlantic and Pacific Oceans (Washington, 18 November 1901), ibid., p. 46.

tion to a treaty whose text was not modified. A reservation was not an amendment to a treaty, but an exception to an existing treaty. As clearly stated in the definition of reservations in the 1969 Vienna Convention, which had been reproduced in draft guideline 1.1 (Definition of reservations), a reservation was above all a unilateral statement. That statement did not modify the treaty, and did not even purport to do so: it merely modified the legal effects of some of the provisions of the treaty for the State that made the reservation. But the treaty itself remained unchanged.

42. In other words, reservations to multilateral treaties had a "subjective" effect: they were at the origin of a modification of the legal effect of the provisions to which they referred, and therefore with regard to the party formulating them, whereas reservations to bilateral treaties had an objective effect. If they were accepted, they could and must enter into force and they modified the treaty itself.

43. It emerged clearly from those essential differences that "reservations" to bilateral treaties were not reservations within the usual meaning of the term in international law as defined in draft guideline 1.1. That conclusion, which could be deduced very simply from practice, was contrary neither to the text of the Vienna Conventions nor to their *travaux préparatoires*.

44. The 1969 Vienna Convention had taken little interest in bilateral treaties as such. The word appeared only once, in article 60, paragraph 1, on the consequences of a material breach of a bilateral treaty. As for the provisions on reservations (arts. 19-23) of the 1969 and 1986 Vienna Conventions, they evoked treaties during whose negotiation a limited number of States had participated, but it would be very risky and artificial to include bilateral treaties therein, especially as the special rapporteurs on the law of treaties had at first contemplated the specific problem of reservations to bilateral treaties, but eventually decided against asking the Commission to include the question in its draft, because, as stated in the reports of the Commission to the General Assembly on the work of its fourteenth session (1962) and the second part of its seventeenth session and of its eighteenth session (1966), "a reservation to a bilateral treaty presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement—either adopting or rejecting the reservation—the treaty will be concluded; if not, it will fall to the ground".[14]

45. As a result, the Commission had entitled the section of its draft on reservations "Reservations to multilateral treaties". That reference to multilateral treaties had disappeared at the United Nations Conference on the Law of Treaties following a Hungarian proposal[15] which had given rise to a rather curious and interesting exchange of views between the President of the Conference, Roberto Ago, and the Chairman of the Drafting Committee, Kamil Yasseen,[16] which was reproduced in paragraph 428 of the third report (A/CN.4/491 and Add.1-6) and from which it was very difficult to draw firm conclusions. Both of those jurists had considered that bilateral treaties could not be the subject of reservations in the strict sense. However, that had not been the unanimous opinion of the participants in the Conference. The *travaux préparatoires* of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations[17] had not dispelled the ambiguity. Initially, the Commission had contemplated the possibility of reservations to bilateral treaties between two international organizations. That possibility had later been abandoned after a rather confused discussion in 1981. To some extent, it was perhaps the 1978 Vienna Convention which had given the clearest indication, because the sole provision it contained on reservations, namely article 20, was applicable only to multilateral treaties. But, once again, that did not necessarily mean reservations to bilateral treaties could not exist.

46. Nevertheless, he firmly believed that there could be no reservations to bilateral treaties because, logically, the very institution of reservations was incompatible with bilateralism in spirit, functioning and legal regime. For a State or international organization to be able to make a reservation to a treaty, the treaty must exist and must be in force or be in a position to enter into force independently of the State making the reservation. That was possible once three States involved were, but not if there were only two—something that was mathematically nonsensical. Such was the position of virtually all States which had replied to the questionnaires on reservations to treaties sent through the Secretariat to States and international organizations at the forty-seventh session of the Commission, in 1995.[18] Some States had simply reported that they did not make reservations to bilateral treaties, while others explained why. For example, Germany, Italy and the United Kingdom had indicated in similar language that, in actual fact, a reservation to a bilateral treaty constituted an offer to renegotiate. That was consistent with the opinion of the Commission in 1962 and 1966, the position of Ago and Yasseen in 1969, and also the view of the vast majority of legal experts who had addressed the question, of which he had given a number of examples in paragraphs 468 et seq. of his third report. Those experts included a number of eminent American internationalists. It was revealing that the United States itself, although the champion in making reservations to bilateral treaties, had never pressed for the concept to be enshrined at international level, notably during the negotiations of the Vienna Conventions. In his opinion, it was a sign that the United States itself considered that, in the final analysis, such

[14] *Yearbook ... 1962*, vol. II, pp. 176-177, document A/5209, and *Yearbook ... 1966*, vol. II, p. 203, document A/6309/Rev.1 (part II).

[15] See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April-22 May 1969*, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), 10th plenary meeting, p. 28, para. 23.

[16] Ibid., 11th plenary meeting, p. 37, paras. 19-24.

[17] See *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February-21 March 1986*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.5); and vol. II, *Documents of the Conference* (ibid.).

[18] The questionnaires are reproduced as annexes II and III to the second report of the Special Rapporteur (*Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1 and A/CN.4/478).

"reservations" were actually based on a logic different from that of real reservations to treaties, a contractual logic, whereas reservations were an element of unilateralism which burst into the law of treaties.

47. The practice of the United States and the small number of other States which had made use of the same technique in their relations with the United States was not free of a certain terminological ambiguity. The conditions set by the United States Senate for the ratification of both multilateral and bilateral treaties had various names, including "reservations", "amendments", "declarations", "understandings" and "conditions", but the distinction between those terms was not very clear. While "amendments" and "reservations" were more pertinent to the present subject matter, "declarations" and "understandings" were more a matter for interpretative declarations.

48. Perhaps members had comments to make at the current time on his introductory remarks and on draft guideline 1.1.9.

49. Mr. KATEKA said that he had in the past expressed doubts about the advisability of dealing with reservations to bilateral treaties. He continued to believe that bilateral treaties could not and should not be subject to unilateral modification, regardless of the terminology used to describe the change. The Special Rapporteur was right to conclude that the Vienna regime was not applicable to reservations to bilateral treaties.

50. If it was true, as noted in paragraph 437 of the third report, that the practice of unilateral statements which some States called "reservations" in respect of bilateral treaties was geographically circumscribed, then why universalize the practice? Paragraph 432 said that the practice would provide useful safeguards with respect to undertakings signed too hastily. Was that really the case? Should uncertainty be introduced in treaty relations just because some official had negotiated a less than satisfactory bilateral treaty? The implication of reservations to bilateral treaties was that they could introduce bad faith in bilateral relations. For example, a provision of the Constitution of the United Republic of Tanzania empowered Parliament to ratify all treaties and agreements to which the United Republic of Tanzania was party and the provisions of which required such ratification. If the Tanzanian Parliament were to ratify a bilateral treaty which the Government had signed with State X and State X were then to submit an amendment under the guise of a reservation, was the Tanzanian Government expected to return to Parliament to say that State X had forgotten to include a provision in the treaty and that the treaty had to be renegotiated and resubmitted for ratification? That might give the impression of lack of seriousness in the treatment of one sovereign State by another. It would be better if State X sorted out its internal mechanisms and presented Tanzania with a clear-cut position prior to the ratification process. The impression might be created that one was dealing with two competing arms of the Government of State X. In that connection, he would point out that the forms of government, whether presidential or parliamentary, were irrelevant in the treaty-making process. Otherwise, article 27 of the 1969 Vienna Convention would be rendered meaningless.

51. In paragraph 461 of the third report, the Special Rapporteur expressed doubt as to whether a newly independent State could formulate a reservation to a bilateral treaty because of the principle of rupture. Personally, although opposed to the idea of reservations to bilateral treaties, he was of the view that, if a predecessor State could formulate a reservation upon notification of succession, a newly independent State could do the same. That would be in keeping with equality of treatment. In fact, it was because of such pitfalls that some newly independent countries had adopted innovative and radical doctrines of State succession in the 1960s.

52. Paragraph 480 of the third report referred to the practice of only one State. He would have preferred a more general discussion of State practice.

53. If it would help to lay the ghost of bilateral treaties to rest, he was prepared to endorse draft guideline 1.1.9, despite his misgivings about reservations to bilateral treaties.

54. Mr. BROWNLIE said that the difficulty he had with Mr. Kateka's warnings was the sort of problem he had with those who wanted to delete references to general declarations of policy. At issue was a guide to State practice, and it was useful to know what was the wrong side of the line, so to speak. Hence, although reservations to bilateral treaties were a contradiction in terms, for present purposes he preferred a useful inclusion of problems rather than exclusion of guidelines which actually indicated what existed.

55. He did not object to the general conclusion that such reservations were counterproposals or amendments and that they had to be treated legally as such. The problem was with polarity. He sought assurance from the Special Rapporteur that the appropriate polarity was not between bilateral treaties and multilateral treaties, but between bilateral and plurilateral treaties on the one hand and multilateral treaties on the other. The particular characteristic of multilateral treaties was not the number of parties, but the treaties' nature: they were nearly always standard-setting instruments, whereas many plurilateral agreements were essentially the same as bilateral treaties.

56. Mr. ROSENSTOCK said that the Special Rapporteur's analysis of reservations to bilateral treaties was perceptive and accurate. Perhaps Governments which had a parliamentary system capable of disagreeing with the Executive would eventually have to deal with such issues. In the event of a disagreement, there would be some response by the parliamentary body which would lead to a situation in which the bilateral treaty had to some extent to be renegotiated. That was a legitimate problem, and he saw no difficulty if someone wanted to use the term "reservation" in that context. It just was not a reservation as the term was used in the Commission's present exercise. Hence, it would be necessary to specify that "reservation" was used within the meaning of that term as found in the 1969 Vienna Convention. That would solve the problem and recognize that the term was employed in a different sense in a different context and not in a completely absurd manner. As for plurilateral circumstances, it seemed to him that there were differences between a reservation to a plurilateral treaty and a multilateral treaty, which was

found in the Convention but which did not necessarily affect the question as to whether or not it was meaningful to speak of reservation in a bilateral context. There might be different rules as to what the consequences of the reservation were, but its character as a reservation was the same, whether in a plurilateral or a multilateral treaty. That was not true in the case of a bilateral treaty, and it therefore had to be said either that the term had been wrongly used by, for example, the United States and others, or more appropriately, that it was used differently from the way it was employed in the draft guideline 1.1.9 or in the Vienna Conventions. It was a simple approach to finding the right answer and was consistent with the position of Ago and Yasseen and with the previous activities of the Commission.

*The meeting rose at 12.55 p.m.*

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## 2586th MEETING

*Friday, 11 June 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

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### Reservations to treaties[1] (*continued*) (A/CN.4/491 and Add.1-6,[2] A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,[3] A/CN.4/L.575)

[Agenda item 5]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (*concluded*)

GUIDELINE 1.1.9 (*concluded*)

1. Mr. PELLET (Special Rapporteur) said that, although he had read out only the first paragraph of draft guideline 1.1.9 ("Reservations" to bilateral treaties) at the preceding meeting, the Commission was being asked to consider both paragraphs of the provision.

2. Mr. HAFNER said that he shared the Special Rapporteur's opinion on the two paragraphs of draft guideline 1.1.9. He did not, however, interpret Mr. Brownlie's observations (2585th meeting) in the same way as Mr. Rosenstock. In his view, what Mr. Brownlie had meant was that the problem lay not in "reservations" to bilateral treaties, but in the definition of a bilateral treaty. It could happen that certain multilateral treaties were in reality bilateral inasmuch as they established bilateral relations. Jurists had attempted to draw a distinction in legal literature by using the terms "bipartite" and "multipartite" instead of the terms "bilateral" and "multilateral" to reflect such distinctions.

3. For example, the peace treaties concluded at the end of the First World War (the treaties of Versailles, Trianon, Sèvres and Saint-Germain-en-Laye) were clearly multilateral treaties, but they established bilateral relations. He submitted that the idea of Germany being authorized to enter a reservation to the Treaty of Versailles or Austria to the Peace Treaty of Saint-Germain-en-Laye was inconceivable. It could, of course, be argued that such a step would be incompatible with the object and purpose of the treaty and that a reservation would be inadmissible on that ground, but the question was in fact whether the treaties in question were not, in reality, bilateral treaties, in which case reservations would be excluded. The same applied to the State Treaty for the Re-establishment of an Independent and Democratic Austria, which also established a certain category of bilateral relations. Another significant example was the bilateral treaty concluded between Austria and Germany on economic problems and transboundary water management. The European Economic Community had seen fit to associate itself with the treaty, at which point it had ceased to be bilateral and had become trilateral or multilateral.[4] He wished to know whether a treaty of that kind, although it involved more than two parties, could still be viewed as multilateral for the purpose of reservations.

4. Mr. LUKASHUK said that he broadly endorsed draft guideline 1.1.9 and appreciated the Special Rapporteur's analysis of State practice in the area of reservations to bilateral treaties. He stressed the importance of the issue of "reservations" to bilateral treaties which had not been addressed either by the Commission or by the 1969 Vienna Convention. Strictly speaking, of course, there was no such thing as a "reservation" to a bilateral treaty, but such reservations nevertheless existed, a fact that had thus far been observed only in the writings of jurists. In practice, new situations might develop, particularly in the light of the growing trend towards parliamentary control over the foreign policy of Governments. The entering of reservations to treaties was an instrument of parliamentary control. He referred in that connection to the fact that the Russian Parliament had attempted to enter reservations to bilateral treaties. It had been necessary to explain to the deputies that reservations were inadmissible in such cases, but the Russian deputies had objected that the United States Senate had made reservations. It had then

[1] For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

[2] See *Yearbook ... 1998*, vol. II (Part One).

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

[4] Agreement between the Federal Republic of Germany and the European Economic Community, on the one hand, and the Republic of Austria, on the other, on cooperation on management of water resources in the Danube Basin (Regensburg, 1 December 1987), *Official Journal of the European Communities*, No. L 90, vol. 33 (5 April 1990), p. 20.

been necessary to point out that, although reservations to bilateral treaties were basically inadmissible, they had nonetheless been entered in some cases. Given that such reservations were not real reservations, a special regime was needed to deal with them and the Special Rapporteur's proposal in that regard was therefore fully justified. He nevertheless drew the Special Rapporteur's attention to the fact that reservations to bilateral treaties closely resembled conditional interpretative declarations. He did not entirely agree with the Special Rapporteur when he said in paragraph 473 of his third report (A/CN.4/491 and Add.1-6) that a "reservation" to a bilateral treaty was actually a request to renegotiate the treaty.

5. With regard to the wording of draft guideline 1.1.9, the first paragraph stated that "a unilateral statement formulated by a State or an international organization ... does not constitute a reservation" but it failed to say what exactly it was. He suggested amalgamating the two paragraphs of the draft guideline, for example by starting the second paragraph with a phrase such as "If the reservation entered by one party requires the acceptance of the other party ...". He further noted that the words "the new text" in the second paragraph could be taken to mean that the reservation could be viewed as having been accepted only if the original text had been amended, but that eventuality was rarely encountered. The usual practice in such circumstances was to append an additional document. Lastly, he said that there were serious mistakes in the Russian version of the draft guideline which should be corrected when the final version of the draft guideline was translated.

6. Mr. ROSENSTOCK suggested that draft guideline 1.1.9 should be referred without further delay to the Drafting Committee.

7. Mr. PAMBOU-TCHIVOUNDA endorsed the Special Rapporteur's conclusion set forth in paragraph 481 of the third report. He began by suggesting that, for the sake of consistency, the word "formulated" in the first paragraph of the draft guideline should be replaced by the word "made". In line with the positive approach advocated by Mr. Economides in connection with another draft guideline and following on from Mr. Lukashuk's comment, he also proposed that a phrase should be inserted at the end of the first paragraph of the draft guideline stating what a unilateral statement concerning a bilateral treaty was, since it was not a reservation. It could perhaps be described as an offer of renegotiation, a term used by the Special Rapporteur in his presentation. With regard to the second paragraph, he proposed that the words "The express acceptance of the content of that statement" should be replaced by the words "The express acceptance of that statement" because the word "content" served no purpose and the text would benefit from being pruned down. Lastly, he would be inclined to include the draft guideline under the heading "Other statements", which had been proposed by Mr. Brownlie and would group together all statements that were neither reservations nor interpretative declarations, but he would defer to the Drafting Committee in that regard.

8. Mr. Sreenivasa RAO said that he shared Mr. Kateka's view and had no objection to the draft guideline being referred to the Drafting Committee. The problem under consideration would never arise in India because any problems relating to the text of an agreement were resolved before the signing and ratification stage was reached.

9. Mr. KUSUMA-ATMADJA said that he had found Mr. Brownlie's statement about plurilateral treaties interesting. After referring to a number of agreements that Indonesia had concluded with other countries, particularly in the context of WTO, he congratulated the Special Rapporteur on his analysis and said he agreed that draft guideline 1.1.9 should be referred to the Drafting Committee.

10. Mr. HE stressed the need to clarify the issue of reservations to bilateral treaties. He was pleased that the third report of the Special Rapporteur provided detailed information about State practice. The term "reservations" to bilateral treaties had been frequently used in practice, giving the impression that such reservations existed. The Special Rapporteur's conclusion in paragraph 481 of his third report was satisfactory. A question that had not yet been resolved was that of conditional interpretative declarations, which stood on the borderline between reservations and interpretative declarations and had occasionally been termed "para-reservations", "quasi-reservations" or "assimilating reservations". The question was to what extent a conditional interpretative declaration was subject to the legal regime applicable to reservations or interpretative declarations. Perhaps the Special Rapporteur could shed some light on the matter.

11. Mr. YAMADA said that he had no objection to the referral of draft guideline 1.1.9 to the Drafting Committee. He wished to present a clarification concerning the reference in paragraph 449 of the third report to the Treaty between Japan and the United States of America.[5] That example had not been given by Japan in response to the Special Rapporteur's questionnaire, but had probably been taken from the *Digest of International Law.* In the aforementioned example, the United States Senate, in giving its consent to the Treaty, had entered a reservation to one of the articles. The reservation had been communicated to the Japanese Government, which had taken it as a proposal for the renegotiation of the article. Japan had accepted the amendment proposed by the United States Senate on the basis of reciprocity. The article in question had not been rewritten, but an exchange of notes between the Governments of the two countries[6] had had the effect of amending it. The term "reservation" had been used in the exchange of notes out of respect for the United States Senate. In the view of the Japanese Government, however, it could not on any account be viewed as a reservation to the bilateral treaty. That was why the Japanese Government had not mentioned it as an example in reply to the Special Rapporteur's questionnaire.

12. Mr. ECONOMIDES said that he endorsed draft guideline 1.1.9, which was useful and suitable for solving a problem that had, in any event, arisen only in legal writings. It raised the technical question of how to determine which moment marked the end of negotiations and when a State could make a new proposal to modify a treaty that

[5] Treaty of Friendship, Commerce and Navigation (with Protocol and exchange of notes) (Tokyo, 2 April 1953) (United Nations, *Treaty Series*, vol. 206, No. 2788, p. 143).

[6] Ibid., pp. 230 and 235.

had already been concluded. In principle, it was the moment when the "authentic and definitive" version was adopted, to use the terminology of the Vienna Conventions, in other words, most often, the moment of signature, or sometimes that of provisional agreement by initialling the text. Reference to the latter moment, which marked the end of negotiations, should be made in the draft guideline, to which a positive element could also be added specifying not only what a unilateral statement was not, but also what it was, i.e. a new proposal for the modification of the provisions of the treaty which could be either accepted or rejected. The Drafting Committee could likewise include a reference to the case where the new proposal was refused, as well as that where it was accepted.

13. Mr. GOCO pointed out that, after a treaty had been drafted, as described by Mr. Economides, a body such as the Senate of the United States or of the Philippines might have something to say about it and wish to add something that had not been thought of by the negotiators. If that addition was not accepted by the other party, then there was, strictly speaking, no longer a treaty. It might also happen that, after the signature of the treaty, an event took place which caused one of the States to formulate a reservation. Must it necessarily be assumed that a new treaty was involved?

14. Mr. PELLET (Special Rapporteur), summing up the discussion on draft guideline 1.1.9, said that the members of the Commission all agreed not only on the inclusion of the provision in the Guide to Practice, but also on its content, in general terms. "Reservations" to bilateral treaties were not necessarily a reflection of bad faith on the part of States. When a State was structured along presidential or parliamentary lines, that type of unilateral statement sometimes constituted a practical solution. The fact that the United States frequently resorted to the practice did not necessarily reveal greater maturity on its part, however. Other equally "mature" States refrained from making such statements, which nonetheless created problems for the partner State. It had also been asked whether such "reservations" were not conditional interpretative declarations. They were, because they placed conditions on the ratification of the treaty, and they were not, because they aimed to modify, and not to interpret, the treaty's provisions. Many members of the Commission had suggested that a positive descriptive phrase should be added, such as "a proposal to renegotiate". That addition would be acceptable, as long as it was not interpreted to mean that "reservations" to bilateral treaties formed part of the topic other than at the stage of definitions. There was no question of dealing with their legal regime. Other specific drafting proposals had been made and the Drafting Committee would surely take them into account. A major problem was still what was meant by "bilateral treaty". It had been pointed out that the problem arose primarily for bilateral treaties that were actually plurilateral treaties. If plurilateral treaties were understood to mean treaties with a limited number of parties, then there was no doubt that reservations to such treaties were possible, subject to the usual conditions and restrictions of the law of treaties. If plurilateral treaties were understood to mean bilateral treaties with many parties, then the problem did indeed arise. The Treaty of Versailles and the Peace Treaty of Saint-Germain-en-Laye, for example, as well as the Agreement between NATO and the Federal Republic of Yugoslavia,[7] brought together a single party and a plural party. It would be difficult to allow reservations by the single party, but the same was not necessarily true for the plural party. Nevertheless, it was a problem that should be covered in the commentary. The same was true of bilateral treaties whose nature changed, although it was not necessary to explain everything in the part of the draft dealing with definitions.

15. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.1.9 to the Drafting Committee.

*It was so agreed.*

GUIDELINES 1.2.7 AND 1.2.8

16. Mr. PELLET (Special Rapporteur) said that interpretative declarations gave rise to fewer problems than reservations in respect of bilateral treaties, even though the Vienna Conventions were silent on the matter, as they were on interpretative declarations in general. The practice was nevertheless of very long standing, and not only in the United States, but, most importantly, neither States in their responses to questionnaires nor the literature disputed the principle. Accordingly, it was "a general practice accepted as law", but to say that it was a well-established practice did not necessarily mean that there were no problems involved. First, it might be difficult to distinguish such interpretative declarations from the "reservations" that were the subject of draft guideline 1.1.9, namely, proposals that were actually aimed at amending a treaty. Therein lay the problem of "disguised reservations" or "false interpretative declarations" that had already been encountered in respect of multilateral treaties. Secondly, all unilateral declarations made in respect of bilateral treaties were not interpretative declarations. Many such declarations—for example, the "Niagara" reservation[8]—fell into the category of what could be called, for the time being, "informative" declarations and were covered in draft guideline 1.2.6 (Informative declarations), which the Commission had already considered. Thirdly, it might be asked whether the indisputable distinction between simple interpretative declarations and conditional interpretative declarations could be applied in the present context. As a general rule, in respect of bilateral treaties, the latter were more common and he had found virtually no examples in practice of simple interpretative declarations. There was, however, nothing to prevent a State from making such a declaration when ratifying a treaty, and without seeking to oblige the other party to do the same. In such a situation, the treaty could enter into force and, if the other contracting State did not agree with the proposed interpretation and a problem arose, the two States would settle the dispute by peaceful means in conformity with the general rules of international law. If, on the other hand, the other State accepted the proposed interpretation, it would then become the authentic interpretation of the treaty and be binding on both parties, whose agreement on the matter would con-

[7] Kosovo Verification Mission Agreement between the North Atlantic Treaty Organization and the Federal Republic of Yugoslavia (Belgrade, 15 October 1998) (S/1998/991, annex).

[8] See 2584th meeting, para. 8.

stitute an additional agreement within the meaning of article 31, paragraphs 2 (*a)* and 3 (*a*), of the 1969 and 1986 Vienna Conventions.

17. It would therefore seem, on the one hand, that there was no problem in acknowledging that a bilateral treaty could be the subject of an interpretative declaration and that such a declaration was covered by the definition given in draft guideline 1.2 (Definition of interpretative declarations), without requiring the formulation of a separate draft guideline, and, on the other hand, that since the overall problem was the same, the "application" guidelines were equally relevant in the case of interpretative declarations made in respect of bilateral treaties, with two exceptions. First, draft guideline 1.2.1 (Joint formulation of interpretative declarations) was irrelevant in the context of bilateral treaties, where joint interpretation was, ipso facto, an additional agreement. Secondly, draft guideline 1.2.3 (Formulation of an interpretative declaration when a reservation is prohibited) was not applicable. Since bilateral treaties could not be the subject of reservations, the problem did not have to be considered. In addition to draft guideline 1.2, that left only draft guidelines 1.2.2 (Phrasing and name), 1.2.4 (Conditional interpretative declarations), 1.2.5 (General declarations of policy) and 1.2.6, it being understood that the place ultimately found for those provisions in the draft as a whole was not being prejudged. That was what was stated in draft guideline 1.2.7 (Interpretative declarations in respect of bilateral treaties), which should nevertheless be supplemented by draft guideline 1.2.8 (Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party) indicating that the interpretation resulting from an interpretative declaration by a State and accepted by the other party constituted the authentic interpretation of that treaty. It would seem difficult to dispute those two provisions, but that relatively neutral wording had to be retained and no position, at the present stage in any event, should be taken on whether and in what circumstances an interpretative declaration made in respect of a bilateral treaty had to be accepted by the other party. That went back to the overall problem of the conditional interpretative declarations which were the subject of draft guideline 1.2.4 and on which the Commission had agreed to draw conclusions in another part of the Guide to Practice. If he had spent a bit too much time on the subject, which did not seem to give rise to insurmountable difficulties, it was because it was quite fascinating and was badly served by disputable terminology.

18. Mr. ECONOMIDES pointed out that, among the guidelines to which draft guideline 1.2.7 referred, guidelines 1.2, 1.2.2 and 1.2.4 apparently applied to unilateral declarations formulated in respect of treaties in general, in other words, to both multilateral and bilateral treaties. Draft guideline 1.2.7 could be deleted and it could be indicated that section 1.1 (Definition of reservations) applied to multilateral treaties, while section 1.2 (Definition of interpretative declarations) applied to bilateral treaties, or that the guidelines in the future Guide to Practice applied to the two categories of treaties, since reservations, by definition, could be made only in respect of multilateral treaties.

19. If draft guideline 1.2.7 was retained, he wondered whether it was appropriate for it to refer to certain guidelines only, to the exclusion of others that clearly did not apply. He would prefer more flexible wording indicating that all the guidelines could also apply to bilateral treaties where that was truly feasible.

20. Draft guideline 1.2.8 was self-evident and useful. He agreed with the Special Rapporteur that it did not require more detailed consideration.

21. Mr. PELLET (Special Rapporteur) said that he, too, wondered whether the fact that the guidelines to which draft guideline 1.2.7 referred did not refer expressly to multilateral treaties constituted a problem. He invited the Drafting Committee to consider that point. Nevertheless, he believed that it could be helpful to States to list the applicable guidelines. Again, the Drafting Committee would be called upon to decide the matter.

22. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guidelines 1.2.7 and 1.2.8 to the Drafting Committee.

*It was so agreed.*

GUIDELINE 1.3.1

23. Mr. PELLET (Special Rapporteur) said that he was particularly attached to draft guideline 1.3.1 (Method of distinguishing between reservations and interpretative declarations), which, unlike draft guidelines 1.3.0 (Criterion of reservations), 1.3.0 bis (Criterion of interpretative declarations) and 1.3.0 ter (Criterion of conditional interpretative declarations), added an important element to the definitions contained in sections 1.1 and 1.2 of the draft. Definitions alone were not enough; it was essential to know how to proceed in order to determine the legal nature of a specific unilateral declaration. That was the purpose of draft guideline 1.3.1. He emphasized that the method was also applicable to drawing a distinction made in draft guideline 1.2.4 between a simple interpretative declaration and a conditional interpretative declaration. There was only one method of doing so, just as article 31 of the 1969 Vienna Convention provided only one method of interpretation of treaties.

24. On the surface, draft guideline 1.3.1 was also a statement of the obvious. Authors and practitioners were unanimous in recognizing that the general rule of interpretation of treaties embodied in article 31 of the 1969 Vienna Convention and reproduced in the 1986 Vienna Convention was a success and the harmonious balance achieved between that general rule and the supplementary means of interpretation covered by article 32 was welcomed with satisfaction. The fact remained that those rules applied only to treaties and that reservations did not form an integral part of the treaty to which they related; they constituted unilateral legal instruments separate from the treaty. That distinction was quite fundamental. Furthermore, the aim in the case in point was not, properly speaking, to interpret the unilateral declaration as such, but to determine whether or not it constituted a reservation, a simple interpretative declaration or a conditional interpretative declaration.

25. He would leave it to the Special Rapporteur on unilateral acts of States to say whether the general rule of interpretation of treaties was generally transposable to unilateral acts. He personally had no doubt that it was; and unilateral declarations formulated in respect of treaties, whether they were reservations, interpretative declarations or other types of declaration, were transposable. Only a limited effort was required for the transposition; the treaty irradiated the declarations made in respect of it and to neglect the rules of interpretation of treaties when dealing with the interpretation of such declarations would be a little odd. That had been the natural reflex of the Inter-American Court of Human Rights in its famous advisory opinion on *Restrictions to the Death Penalty*, which was referred to in paragraph 399 of the third report; in substance, the Court had said that a reservation must be interpreted by examining its text in accordance with the ordinary meaning which must be attributed to the terms in which it had been formulated within the general context of the treaty.

26. The problem, for the time being, was not how to interpret reservations, but to determine what method to use to define a unilateral declaration as a reservation, an interpretative declaration or otherwise. In his view, the same approach should be followed; after all, a definition was also an interpretation, as many members of the Commission had pointed out in connection with other draft guidelines. What mattered in determining the nature of a unilateral declaration made in respect of a treaty was the content of the declaration.

27. That was confirmed by international jurisprudence, which was invariable and examples of which were given in paragraph 400 of the third report. So far as he was aware, international judges and arbitrators had, in all cases, sought to establish whether they were dealing with a reservation or with an interpretative declaration by proceeding on the basis, first of all and as a matter of priority, of the actual text or content of the unilateral declaration, in accordance with the method recommended in article 31, paragraph 1, of the 1969 Vienna Convention. It could be asked whether matters should not be left there and whether it was necessary to have recourse to the "supplementary means" provided for in article 32 of the Convention. The question arose especially because, in the case of unilateral declarations in respect of treaties, the preparatory work (*travaux préparatoires*), which was the main supplementary means, was often difficult to obtain or did not exist. On balance, he took the view that article 32 should be mentioned, first, because precedents were to be found in the jurisprudence, at any rate that of the European Court of Human Rights (para. 403 of the third report), and, secondly, because articles 31 and 32 of the Convention made a well-balanced pair. The dominant element was the text, the content, the ordinary meaning of the terms; as clearly indicated in article 32, recourse could be had to supplementary means of interpretation and, in particular, to the *travaux préparatoires* only when the interpretation according to article 31 left the meaning ambiguous or obscure or led to a result which was manifestly absurd or unreasonable.

28. The rule contained in draft guideline 1.3.1 was generally accepted as an indisputable rule of law. He therefore proposed that the draft guideline should be referred to the Drafting Committee.

29. Mr. GAJA noted that, according to the definitions contained in the draft guidelines proposed by the Special Rapporteur, "reservations" and "interpretative declarations" were unilateral acts. As such, they were not governed by the law of treaties. Both reservations and interpretative declarations could, of course, produce certain effects from the viewpoint of the law of treaties. He therefore agreed that it was possible to draw on the provisions of the 1969 Vienna Convention in order to settle, by analogy, problems connected with the validity and the interpretation of those unilateral acts. That was also true where the issue to be determined was whether the declaring State had intended to make a reservation or an interpretative declaration. In the latter case, however, it was not possible to proceed by analogy only, as the Special Rapporteur was suggesting in draft guideline 1.3.1. In its judgment in the *Fisheries Jurisdiction* case, ICJ, which had been requested to interpret a reservation formulated by the Canadian Government to its declaration of acceptance of the compulsory jurisdiction of the Court under the optional clause, had said that it

> will thus interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served [paragraph 49 of the judgment].

It had also referred to

> the principle of interpretation whereby a reservation to a declaration of acceptance of the compulsory jurisdiction of the Court is to be interpreted in a natural and reasonable way, with appropriate regard for the intentions of the reserving State and the purpose of the reservation [paragraph 54 of the judgment].

30. While he realized that those criteria were not readily applicable, especially where the *travaux préparatoires* were not easily accessible, he nevertheless recommended that draft guideline 1.3.1 should be reviewed in the light of the position adopted by the Court.

31. Mr. HAFNER said that the thorny problems raised by draft guideline 1.3.1 were made still more complicated by the different rulings adopted by different courts.

32. It was difficult, in practice, to distinguish a reservation from an interpretative declaration, those two unilateral acts being interchangeable. In that connection, he noted that, at the time of ratifying the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), the Austrian Government had submitted some interpretative declarations and some reservations to that instrument to Parliament for its approval. The Austrian Parliament had changed the reservations into interpretative declarations and vice versa[9] and thereupon the Protocol was ratified.

[9] See United Nations, *Treaty Series,* vol. 1289, No. 17512, pp. 303-304.

33. The interpretation which had to be carried out in order to make the distinction was twofold: the first step was to determine whether the unilateral declaration was a reservation or an interpretative declaration, and the second step was to interpret its content. In view of the definitions given of reservations and interpretative declarations, respectively, a subjective test had to be applied to the first of those operations by determining the intention of the declaring party. In that connection, he thanked Mr. Gaja for his reference to the judgment of ICJ in the *Fisheries Jurisdiction* case. The European Court of Human Rights, too, tried in the first instance to establish the intention of the parties rather than the meaning of the text itself.

34. In determining the intention, it was possible to have recourse to the designation given by the declaring party or to other means without reference to materials other than the text of the declaration and the *travaux préparatoires*, although access to the latter might be difficult to obtain. In that case, recourse could be had to methods similar to those envisaged by articles 31 and 32 of the 1969 Vienna Convention, on the understanding that the text would be used only to identify the intention of the declaring party. The application of article 31 was justified insofar as the declaration had to be interpreted in accordance with the ordinary meaning and, to use the terms of the judgment of ICJ (see paragraph 29 above), the interpretation should be reasonable and should be made in good faith and in the light of the object and purpose of the treaty. In order to guarantee fairness, it would be necessary to specify whether the object and purpose were those of the treaty or of the declaration. The criterion of object and purpose could lead to a restrictive interpretation of the declarer's intention in that it might operate in favour of defining the declaration as an interpretative declaration rather than as a reservation.

35. For similar reasons, he did not think that the decision of the Inter-American Court of Human Rights (see paragraph 25 above) could be used in support of the Special Rapporteur's proposal, since it seemed to deal not with the intention of the declaring party, but with the interpretation of the content of the unilateral declaration, which was undoubtedly subject to the Vienna regime.

36. For those reasons, he took the view that draft guideline 1.3.1 should be modified to make it clear, first, that what was being identified was the intention of the declaring party and, secondly, that that intention derived first of all from the text of the unilateral declaration as interpreted in accordance with article 31 of the 1969 Vienna Convention; if that method of interpretation did not yield the desired result, only then should reference be made to the *travaux préparatoires*.

37. Mr. GOCO said that draft guideline 1.3.1 was useful and certainly had its place in the future Guide to Practice, but he was not clear about the title: the method in question was not for distinguishing between reservations and interpretative declarations, but for determining whether a unilateral declaration was a reservation or an interpretative declaration.

38. Mr. LUKASHUK said that he had two points to raise about draft guideline 1.3.1. The first had to do with its title, which was not entirely in keeping with the text itself, and he suggested changing it along the following lines: "Method of determining the legal nature of a unilateral declaration". The second point had to do with the purpose of interpretation: that could not be the treaty itself, which was subject to the Vienna regime, but it could not be unilateral declarations either because that regime did not apply to all cases. Hence the need to give further consideration to the draft guideline, which should perhaps be deleted.

39. Mr. ECONOMIDES said that draft guideline 1.3.1 gave rise to a real conceptual problem. Article 31 of the 1969 Vienna Convention, to which it referred, had to do with the interpretation of treaties, i.e. all provisions agreed between two or more contracting parties. Yet by their very nature, reservations and interpretative declarations were unilateral and rules of interpretation applicable to bilateral or multilateral instruments could not be transposed to them. At most, articles 31 and 32 of the Convention might provide several basic elements which might serve as a starting-point for drawing up new rules.

40. Moreover, the title of the draft guideline was not consistent with its content because it spoke of interpretative declarations, whereas, in the body of the text, the words "unilateral declaration" were used, and they could designate very different kinds of declarations, and not only interpretative declarations. The criterion which was ideal for determining that a unilateral declaration was an interpretative declaration was the intention expressed by the declaring State. It was worth noting, however, that such a declaration could have been made at an earlier period in circumstances which had since changed. Hence the presence of a very specific problem which obviously also needed to be solved.

41. Mr. BROWNLIE said he also thought that the title of draft guideline 1.3.1 was poorly chosen, because it gave the impression of providing a method for distinguishing between reservations and interpretative declarations; in reality, that distinction was made throughout all the guidelines and the guideline under consideration only proposed an additional element of assessment. That did not detract in any way from the value of draft guideline 1.3.1, however, and, in order to dispel the concerns of members who were disturbed by references to articles 31 and 32 of the 1969 Vienna Convention which were too direct, perhaps they could be preceded by the words mutatis mutandis.

42. Mr. MELESCANU said the argument that article 31 of the 1969 Vienna Convention on the rule of interpretation of treaties was applicable only to provisions agreed at the bilateral or multilateral levels was only partly valid. Once a reservation had been accepted by the other parties concerned, it became part and parcel of the bilateral or multilateral agreement which it sought to modify and therefore concerned all contracting parties and lost its unilateral nature.

43. The reference to articles 31 and 32 of the 1969 Vienna Convention had the advantage of providing a simple solution to the problem raised, whereas the drawing up of specific and entirely new rules might well be much more difficult and complex. However, he admitted that matters would be clearer if draft guideline 1.3.1 again

mentioned the respective characteristics of reservations and interpretative declarations already defined in other parts of the Guide to Practice or referred to the relevant guidelines. The inclusion of the words mutatis mutandis proposed by Mr. Brownlie seemed to be a good idea.

44. Mr. ROSENSTOCK said that the introduction of the words mutatis mutandis in the text might seem attractive because it had the advantage of simplicity. However, if that proposal was retained, it would be necessary to make it clear in the commentary that there was an important nuance or difference of approach between article 31 of the 1969 Vienna Convention and draft guideline 1.3.1. In article 31, the question asked was what the contracting parties understood, whereas, in the draft guideline, it was what the declaring State had meant, and that made the latter's intention more important. However, it was not always so simple because, once a reservation had been formulated without the other parties concerned objecting to it, it could be considered that, in a sense, they had "understood" or "meant" the same thing as the declaring State. Consequently, the insertion of the words mutatis mutandis did not offer an acceptable solution unless an effort was made to explain those nuances.

45. Mr. Sreenivasa RAO said that, in his view, Mr. Rosenstock had stated the problem perfectly. His statement had reminded him of a very lively debate which had taken place between two members of the American Society of International Law on the relative values of text and context as elements of interpretation. In the draft guideline under consideration, it was clearly the context which must be given greater importance.

46. Mr. GOCO noted that the problem raised by Mr. Rosenstock was often a source of misunderstanding between States parties. When one State party made a unilateral declaration, it might very well have wanted to formulate a reservation, i.e. avoid the effects of a particular provision, without provoking a reaction on the part of the other States parties, which thought that a simple interpretative declaration was involved. It was only in the case of a later dispute that they became aware of the misunderstanding; hence the need to remove the ambiguity.

47. Mr. PELLET (Special Rapporteur) said that the members of the Commission seemed to agree that draft guideline 1.3.1 should emphasize the intention of the declaring State. That might be done by replacing, in the first line, the words "the legal nature" by the word "intention". As underscored by Mr. Goco, it was important to help States determine whether a unilateral declaration was an interpretative declaration or a reservation so that they knew exactly what they were dealing with and what rules were applicable. Practice showed that the issue was somewhat blurred, for reasons which might be purely diplomatic. After all, it was simplest to refer to article 31 of the 1969 Vienna Convention. He thanked Mr. Gaja for citing the ICJ interpretation of the Canadian reservation in its judgment in the *Fisheries Jurisdiction* case, the relevant paragraphs of which [49-54] had simply been transposed from the provisions of article 31 of the Convention, or more exactly of article 31, paragraph 1. The intention of the contracting parties was present just below the surface in article 31, which spoke of the treaty's "object" and "purpose", i.e. what the contracting parties had wanted to do.

48. Mr. Lukashuk's criticism of the title did not seem founded because the text began with the words "To determine", which clearly showed that it had to do with a method.

49. Mr. Brownlie's proposal for the addition of the words mutatis mutandis would in fact be a possible solution, but he would prefer it if the Drafting Committee considered new wording based on Mr. Rosenstock's suggestion.

50. Mr. ECONOMIDES said that, if the text emphasized the difference between a declaration and the terms of a treaty as a way of determining the underlying intention of the declaring State, the reference to articles 31 and 32 of the 1969 Vienna Convention on the interpretation of treaties would become perfectly natural.

51. The CHAIRMAN noted that the discussion had not revealed any fundamental opposition to draft guideline 1.3.1 and he therefore said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.3.1 to the Drafting Committee.

*It was so agreed.*

GUIDELINE 1.1.7

52. Mr. PELLET (Special Rapporteur) said that, for the sake of honesty, he felt compelled to point out to the members of the Commission that he had changed the text of draft guideline 1.1.7 (Reservations relating to non-recognition) as a result of the criticism the members had expressed during the consideration of the text at the fiftieth session. In paragraphs 44 to 54 of his fourth report (A/CN.4/499 and A/CN.4/478/Rev.1), he explained the reasons and in particular the practical arguments which had led him to make those changes.

53. The new text of draft guideline 1.1.7 read:

"Statements of non-recognition

"A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize as a State does not constitute either a reservation or an interpretative declaration, even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity."

54. Although the text was new, it could be considered that it had already been referred to the Drafting Committee because the discussion had already taken place and the changes had been made in keeping with the opinion of most of the members of the Commission.

*The meeting rose at 1.05 p.m.*

# 2587th MEETING

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

*Chairman*: Mr. Zdzislaw GALICKI

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

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

[Agenda item 3]

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

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

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

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

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

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

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

* Resumed from the 2578th meeting.

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

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

[3] Ibid.

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

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

[6] See 2567th meeting, footnote 5.

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

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

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

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

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

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

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

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

[7] Ibid.

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

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

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

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

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

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

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

[9] See 2567th meeting, footnote 7.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[14] See 2570th meeting, footnote 4.

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

[16] See footnote 4 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*

ARTICLE 29

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*The meeting rose at 1 p.m.*

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## 2588th MEETING

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

*Chairman*: Mr. Zdzislaw GALICKI

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

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

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 29 (*concluded*)

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

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

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

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

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

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

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

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

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

[3] Ibid.

[4] See 2567th meeting, footnote 5.

[5] See 2587th meeting, footnote 8.

benefiting from the obligation consented not to the general suspension of the rule or its abrogation, but to the non-application of the obligation provided for by the rule in a specific instance. That was the whole point. It was essential to distinguish clearly between the case in which the consent given in a particular situation precluded wrongfulness, or accepted in advance a conduct which, without that consent, would have been contrary to the obligation and consequently wrongful, and cases of the suspension of a treaty under articles 57 and 65 of the 1969 Vienna Convention or derogation from a rule of general international law (customary law) by agreement.

8. The Special Rapporteur had referred on several occasions to the work of the Special Rapporteur on the law of treaties, Sir Gerald Fitzmaurice, and, in particular, to the limits of treaty obligations and circumstances justifying non-performance.[6] However, the law of treaties and the law of State responsibility were two very different things and, under the influence of the former Special Rapporteur on State responsibility, Mr. Roberto Ago, the Commission had decided not to use Fitzmaurice's work in its consideration of State responsibility. In his view, it was preferable for the Commission not to return to it or, if it did, to do so with the greatest caution. In particular, he had doubts about the practical value of distinguishing between "intrinsic" and "extrinsic" justifications or excuses.

9. On the other hand, just as article 62 of the 1969 Vienna Convention elaborated on the *rebus sic stantibus* principle, so the draft articles on State responsibility should elaborate on the principle of consent as a circumstance precluding wrongfulness. Previous speakers had stressed issues relating to the formulation of that principle, such as the definition of consent validly given or the status of persons authorized to give consent, but those issues might either be taken care of by the Drafting Committee or explained in the commentary. With regard to the issue of persons authorized to give consent, he did not see the relevance of the example given in paragraph 240 (*c*) of his second report on State responsibility (A/CN.4/498 and Add.1-4) on the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which had nothing to do with the subject matter of article 29. That Convention related to consent to arbitration to settle disputes arising between a State party and private corporations or persons of the other State party. At no time did such consent constitute a circumstance precluding wrongfulness within the meaning of article 29 or a waiver of a claim of responsibility.

10. The members of the Commission who had spoken against retaining article 29 (2587th meeting) had also expressed concern about its possible abuse. He was, however, not convinced that its deletion would provide States, and in particular smaller and weaker ones, with better protection. Deleting it would simply shift the problem by requiring States to consider whether consent was implied and to undertake a process of interpretation for want of clearly stated limits such as those in article 29, paragraph 2. In reality, that article made it possible to settle many problems and, for that reason, he fully endorsed its being retained.

[6] Ibid, para. 3.

11. Mr. SIMMA said that the report under consideration showed the progress made in thinking on the subject of State responsibility and demonstrated that *lex posterior* was always better than *lex prior*.

12. Concerning article 29, he said that his view was radically opposed to that of Mr. Tomka. To answer the question whether consent was really a circumstance precluding wrongfulness, it was necessary to refer to the premises of both the Special Rapporteur and his predecessors, which seemed to be the following: in cases of circumstances which precluded wrongfulness, the primary obligation remained in force, but the Commission was in the presence of certain cases which had the effect of precluding wrongfulness as long as the circumstances existed. That premise had never been contested by Governments or academic observers and, as the Special Rapporteur had pointed out in his second report, it had been corroborated by jurisprudence. According to that premise, the Special Rapporteur's conclusion that consent had no place in circumstances precluding wrongfulness was unassailable. Consent given in advance removed or suspended the operation of the primary obligation. Whether or not the *volenti non fit injuria* principle belonged in the draft articles on State responsibility was not the issue. The fact of the matter was that it was not a circumstance precluding wrongfulness as defined by Mr. Ago.

13. If, despite those considerations, the Commission decided to retain consent as a circumstance precluding wrongfulness, paragraph 240 of his second report gave it a foretaste of the difficulties which it would face. Even the question whether consent had been validly given gave rise to a whole set of problems, as did the competence of persons authorized to give such consent. With regard to the relationship between consent and peremptory norms, the Special Rapporteur rightly argued that some peremptory norms contained an intrinsic consent element. A comparison of paragraph 2 of article 29 as adopted on first reading with Article 2, paragraph 4, of the Charter of the United Nations showed that that problem had never even been touched on. Paragraph 2 said that paragraph 1 (the fact that consent could be a circumstance precluding wrongfulness) did not apply if the obligation arose out of a peremptory norm of general international law. Article 2, paragraph 4, of the Charter was certainly a peremptory norm. And yet everyone recognized that, if a State consented to the military forces of another State marching into its territory, such "authorization" would constitute a derogation from the provisions of paragraph 4.

14. If the Commission decided to retain article 29, then paragraph 2 of the version adopted on first reading was obviously very insufficient. Nor did the arguments put forward in the second report militate in favour of retaining it. The issues which the Commission would have to face if it decided to retain it would be too numerous and difficult to be referred to a Drafting Committee.

15. The only valid argument in favour of retaining article 29 was that it had not been challenged by Governments, but was that valid and sufficient? The arguments in favour of its deletion were more convincing, the first being that consent was not a circumstance precluding wrongfulness because it did not fit the Commission's definition of such circumstances. As pointed out by

Mr. Kateka (2587th meeting), article 29 also ran the risk of abuse, which was yet another reason to abandon it. Consequently, he was in favour of its deletion.

16. Mr. ELARABY said that the Special Rapporteur's analysis of the problems raised by article 29 had been very persuasive, but he did not think that the problems were such as to warrant deleting the article. The various points mentioned in paragraph 240 of the second report clearly called for in-depth reflection and careful drafting, but the question of consent could not, in his view, be omitted from the draft articles because a number of issues raised by Governments had to be settled.

17. For example, it was clear from paragraph (20) of the commentary to article 29 adopted on first reading that consent given by a State was only one element of an agreement between two parties: the subject having the obligation and the subject having the corresponding subjective right, who waived it. Such an agreement produced an effect only between the parties concerned and the obligation continued to exist with respect to all other parties. That point needed to be emphasized. Notwithstanding the drafting difficulties, it was also important to state in the draft articles that consent had to be validly given; in particular, it should have been explicitly expressed and not obtained through coercion. As Mr. Kateka had said (ibid.), States could coerce other parties into giving their consent and it should be mentioned somewhere that such conduct was not authorized.

18. Moreover, paragraph (17) of the commentary to article 29 adopted on first reading stressed the limited scope and duration of consent. Those limitations should also be spelled out in the draft articles. The Commission must offer guidance to States.

19. If only for those practical reasons, he thought that article 29 should be retained, although he agreed with Mr. Hafner that the title should be amended to read "Prior consent".

20. Mr. ECONOMIDES said that he would comment on both article 29 and article 29 bis (Compliance with a peremptory norm (*jus cogens*)) proposed by the Special Rapporteur in his second report because, in his view, they were closely linked.

21. With regard to article 29, he broadly shared the Special Rapporteur's conclusions because he had always felt that the article, or rather paragraph 1 thereof, was unorthodox: the idea that a State could consent to the perpetration of wrongful acts at its expense was somewhat troubling. Such a provision had no place in the draft articles on State responsibility. In the case of minor limitations on sovereignty, it was superfluous, while, in the case of major limitations, it raised problems and was quite simply undesirable. He had therefore no objection to the deletion of paragraph 1.

22. Paragraph 2, on the other hand, if skilfully reworded, could add a useful new element to article 29 bis proposed by the Special Rapporteur. One could say, for example, at the end of article 29 bis, that a State "cannot, by its consent, render lawful with respect to itself an act by another State that is not in conformity with an international obligation deriving from a peremptory norm of international law". That would have the dual advantage of stressing the legal authority of a peremptory norm and, *a contrario*, laying down the limits of consent.

23. Article 29 bis was absolutely essential because chapter V would be incomplete without it. If there was a conflict between a peremptory international obligation and an ordinary international obligation when it came to determining whether an act by a State was lawful or wrongful, the peremptory norm must clearly take precedence in all cases. However, the wording of article 29 bis called for two comments: the word "required" seemed inappropriate and the phrase "in the circumstances" made for obscurity rather than clarity. He suggested the following wording: "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the same act is in conformity with a peremptory norm of general international law."

24. Alternatively, laying more emphasis on the conflict of obligations, it might be said that "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the obligation conflicts with a peremptory norm of general international law". That wording was based on article 53 of the 1969 Vienna Convention.

25. Mr. CRAWFORD (Special Rapporteur) said that article 29 bis was not being discussed for the time being. Article 29 should be considered fully on its merits before Mr. Economides' proposal concerning article 29, paragraph 2, was considered.

26. Mr. SIMMA said that the concept of consent was implicit in article 29 bis and raised the same problem of logic as had been mentioned by some members. To say in article 29 bis, in a new paragraph 2, that consent did not preclude wrongfulness in respect of *jus cogens* could imply, *a contrario*, that consent was valid as a matter of course in other circumstances. If the condition of consent was not explicitly expressed, it could not be subjected to restrictions ("validly given", "freely expressed") in a new paragraph 2 of article 29 bis because it would be nonsensical to say that consent, even where validly given, was null and void if the act breached *jus cogens* norms.

27. Mr. ECONOMIDES said that he had opposed the inclusion of article 29, paragraph 1, in the draft articles, but was in favour of including paragraph 2 after the provision of article 29 bis. It was true that consent could not render lawful an act by a State that was in breach of a *jus cogens* obligation and it could be assumed, *a contrario*, that in all other cases consent could render such an act lawful. In practice, all other cases would depend on the interpretation of the primary rule.

28. Mr. KAMTO said he was inclined to support the deletion of article 29. Two situations could arise out of the giving of consent prior to the occurrence of an act. Either such consent was not contrary to a peremptory norm or an objective *erga omnes* obligation, in which case there was no difficulty because the act formed part of the normal relations between two States. Or else the consent was contrary to *jus cogens*, in which case a situation would arise in which two States were shirking multilateral obligations. If the article was not deleted, it should at least be reworded. He did not think that Mr. Economides' pro-

posal resolved the problem fully, however, because his wording simply purported to make explicit article 53 of the 1969 Vienna Convention and not really to create a system of exoneration from wrongfulness. To say that wrongfulness would be precluded by the fact that the wrongful act was in conformity with a *jus cogens* obligation was nothing new. If the act was not wrongful because it was in conformity with a *jus cogens* obligation, the obligation should never have existed because it was in any case a breach of *jus cogens*. So it was not just practical arguments (confusion between the law of treaties and the law of responsibility), but legal arguments too that could be cited in support of the deletion of the article.

29. Mr. HE said it was clear from the second report that, in many cases, the consent given by a State before the occurrence of an act amounted to a legalization of the act in international law, while consent given after the commission of the act was tantamount to a waiver of responsibility, but would not prevent responsibility from arising when the act occurred. Thus, neither case constituted a circumstance precluding wrongfulness. However, one could still raise a third possibility that there might be cases where consent might be validly given in advance, but where it was not part of the definition of the obligation. In such a case, consent in article 29 as adopted on first reading could still be applied. He asked whether such a possibility could be excluded. The example cited in the first footnote to paragraph 238 of his second report, approximating Fitzmaurice's idea of "acceptance of non-performance", could come within the scope of former article 29 inasmuch as it could relieve State A of responsibility. In that regard, article 29 could still be useful after being reworded to reflect the views expressed during the discussion.

30. Mr. LUKASHUK said that the discussion of article 29 was purely theoretical. It was not a matter of the progressive development of the law, but of the codification of existing provisions in the light of the 1969 Vienna Convention. Consent represented an agreement in the context of which other parts of the agreement could be terminated. Whether article 29 was retained or not, the situation would remain unchanged because the article was a concrete expression of a general provision applicable to the articles on responsibility. A number of questions had been raised, particularly about the relationship with peremptory *jus cogens* norms, for example, on coercion, but such issues had been settled by the Convention and each individual article could not be linked to those general provisions. If the article was deleted, the situation would not change, but the intrinsic logic of the draft articles would be adversely affected. It was therefore in order to preserve the systemic character and overall logic of the draft articles that article 29 should, in his view, be retained.

31. Mr. BROWNLIE said he thought that it would be disastrous to delete article 29. To begin with, its deletion would fly in the face of experience. Secondly, it would be completely ineffectual because consent would continue to be a justification in international law and the Commission's assertion to the contrary would change nothing. Thirdly, it would be viewed as eccentric and tarnish the Commission's reputation. And, fourthly, it would be illogical: consent could create a situation in which the primary rule ceased to be binding and the question of consent as a justification would lose all consistency. That analysis did not apply, however, in the context of legal discussions before an international court of arbitration. In that kind of setting, the argument that consent encroached on primary obligations was possible, but it could conversely be argued, where such was not the case, that the circumstances had generated consent entailing a specific risk of damage even if the primary obligation remained in force. There were thus two situations which might be closely interconnected, as was the case with many factual situations, but which were nevertheless dissimilar. It was therefore illogical to talk about the validity or non-validity of a primary obligation. He was furthermore unconvinced by the argument that the Commission was faced with difficult drafting problems and that a reference to *jus cogens* was necessary. The Commission ran up against drafting difficulties pertaining to *jus cogens* in most of its work.

32. Mr. ADDO said that, in international law, many of the violations of the rights of a State could be legitimated by its consent, but that consent had to be given before or at the same time as the violation. Retrospective assent would constitute a waiver of the right to claim reparations, but would not repair the breach of international law that had taken place. Consent would be vitiated, of course, by error, coercion or fraud, by analogy with the rules applying to treaties. Whether or not consent had been freely given in advance was a crucial question of fact that was fraught with difficulties, for it had often been invoked by States to attempt to justify what were blatant acts of intervention. The entry of foreign troops into the territory of a State, which was normally unlawful, usually became lawful if it took place with the consent of that State. The Security Council and the General Assembly had considered many cases of that kind. The basic principle of consent as a legitimating factor had not been challenged in those forums. Differences of opinion always arose, however, on whether consent had been validly given, whether the rights of other States had been violated and whether peremptory norms had been infringed. According to paragraph (11) of the commentary to article 29 adopted on first reading, consent, to be valid, must be "really expressed", but the expression could be in the form of conduct as well as of words. Was there consent if there were elements of coercion? Would implicit threats of invasion or threats of economic retaliation invalidate consent? Did consent, to be valid, require the support of the people in a State? Was domestic law of relevance and was it decisive or were standards of international law relevant for determining the "will" of the State? Those questions arose in several cases involving military intervention. Consent precluded the wrongfulness of an act only in relation to the State that gave its consent, but an act consented to by one State could constitute a breach for another. For example, injury to nationals of a consenting State in violation of an international convention could also constitute a breach in respect of other parties to the convention. It had to be noted that the Commission's draft considered that even consent freely given would not absolve a State from responsibility where the obligation was one of *jus cogens*. Did that mean that the principle of *jus cogens* was being extended beyond what was laid down in articles 53 and 64 of the 1969 Vienna Convention? Mr. Ago, and the

Commission had based their views on "logical principles" rather than on practice. Would a Government then be free to consent to give up sovereignty and become a protectorate or province of another State? Could self-determination be asserted as a principle of *jus cogens* and a referendum demanded as a condition of a State's consent to give up sovereign rights in favour of another? Those were large questions on which members of the Commission should exercise their minds before committing themselves to retaining article 29. He personally was in favour of the deletion of the article because it would create more problems than it would solve. Experience was preferable to logic.

33. Mr. PELLET warned the Commission about the danger of rashly challenging provisions that had been adopted on first reading and had been generally well received. Certainly, nothing prevented the Commission from going back to an article or even deleting it or adding others, especially since some provisions had been under consideration for 20 or 30 years. He did not blame the Special Rapporteur for wishing to delete a particular provision if he believed there were pressing reasons to do so, but that was not the current case. Like Mr. Brownlie, he thought that the Commission would look ridiculous if it deleted article 29. Mr. Addo had said that experience should prevail over logic. The relevant experience and practice, however, were precisely that consent validly given constituted a circumstance precluding wrongfulness. He had great difficulty in understanding the tortuous reasoning of certain members of the Commission who seemed to have doubts about what appeared to be obvious and in conformity with consistent practice that had been firmly established. When a State gave its consent to an act, it was valid, even if a contrary rule had existed at the outset. It was also very difficult to understand the assertion that, when consent operated as a circumstance precluding wrongfulness, it was included in the primary rule. That did not reflect the real situation in law. There were, on the one hand, primary rules which either excluded or did not exclude the possibility of giving consent and, on the other hand, a general rule that, when a State expressed its consent not to apply a rule of positive law, its responsibility did not come into play because the wrongfulness itself was expunged. The rule provided for in article 29, paragraph 1, adopted on first reading, to some extent played the role of the *rebus sic stantibus* principle in the law of treaties. Some authors did, of course, claim that the principle was a clause implicitly included in treaties, but that was an artificial analysis, for it was in fact a general rule of international law. The idea that it was possible to give consent to the infringement of what was essentially a general rule also seemed to be a rule of international law. Primary rules had nothing to do with the matter. They could include or exclude the possibility of consent, but that was an entirely different issue. It would be unfortunate if the Commission suggested the deletion of a provision that seemed to be patently obvious.

34. He agreed with the members of the Commission who had said that consent constituted a circumstance precluding wrongfulness only if it had been given in advance. Consent given ex post facto came under the determination of responsibility and, thus, of part two of the draft articles. If consent was retained among the circumstances precluding wrongfulness, as he hoped it would be, the words "validly given" did not give rise to any particular problems, since it was quite true that not all consent was valid and the examples referred to by Mr. Addo were relevant and convincing. He did not think that now was the right time to raise the question when consent was given validly or not. If some members of the Commission thought that the validity of consent was a crucial issue, it should be included in the agenda, but he did not think that all of international law could be rewritten in connection with each provision of a draft.

35. Those observations made him very sceptical about whether article 29, paragraph 2, as adopted on first reading, was well founded. While he was fully aware that *jus cogens* was an essential safeguard for the expression of consent and that consent that was contrary to *jus cogens* could not produce effects, he believed that that was just one more example of "consent validly given" and just one of the very explicit and detailed warnings that the Special Rapporteur should sound to explain the words "validly given". That was why he believed that article 29, paragraph 1, should be retained, paragraph 2 should be deleted and further explanations should be given in the commentary.

36. Mr. Sreenivasa RAO said he fully endorsed the views expressed by Mr. Pellet and, like him, felt that, since the draft articles were being considered on second reading and some of their provisions had already been applied, it would be better to avoid deleting an article when it was under consideration unless there were fundamental reasons for doing so.

37. He agreed with the concerns expressed by Mr. Kamto and Mr. Kateka (2587th meeting) and by Mr. Addo, but he also thought that the cases referred to could be seen only as examples of consent validly given for a specific purpose and should not be extended to serve as a basis for the breach of other rules. He was therefore in favour of retaining article 29 with all the examples and explanations that might be necessary, especially as its deletion would in no way help to solve the problems involved.

38. Mr. MELESCANU said that he would like the Special Rapporteur to give an example of the application of the rule embodied in article 29, paragraph 1, or the possibility of such application. Since, in his opinion, the law was based primarily on experience, it was necessary to see whether experience did indeed provide the basis for retaining article 29, paragraph 1. The examples given by other members were not convincing, particularly the example of the right of overflight. While overflight of the territory of a country without prior authorization was prohibited under international law, once agreement had been given in advance, the rule applied and a wrongful act could no longer be involved.

39. Mr. CRAWFORD (Special Rapporteur) said that the current discussion went to the very heart of the issue of circumstances precluding wrongfulness and that the members of the Commission who did not believe in the distinction between primary rules and secondary rules sometimes became a bit impatient with those who did. His concern had been to situate the idea of consent within the framework of that distinction, which had been made in

chapter V. That approach did not give rise to problems with regard to many of the other circumstances covered by the chapter. If the problems raised by the idea of consent could be solved by the Drafting Committee, that was what should be done.

40. Mr. Brownlie and Mr. Gaja, together with Mr. Sreenivasa Rao, did not include the idea of consent in the context of consent given in advance in a treaty, which they saw not as a circumstance precluding wrongfulness within the meaning of chapter V, but as part of *lex specialis*. In their view, there could be some cases which came within the framework of a system accepted by all, but to which there were major exceptions, even if a great deal of room was made for consent within that system. The principle of *volenti non fit injuria* might well be a general principle as far as the rights of a consenting State were concerned. That was an important point which should clearly flow from the rule and be explained in the commentary. There could, however, be some situations in which the only excuse or justification for a conduct had been consent that had remained in force at the time of the act. That was especially true in the case of the use of force. If a State consented in advance to the use of force in its territory and then withdrew its consent, recourse to force became wrongful, even if the State had withdrawn its consent ill-advisedly. He did not think, however, that a State was entitled to waive its right to withdraw its consent to the use of force in its territory by another State. That was an intermediate case that he had not foreseen in his report. In reply to Mr. Melescanu, he said that, to his knowledge, article 29, paragraph 1, had not been expressly invoked in case law, but that everyone accepted the principle of effective consent as an important operational element. Account might nevertheless be taken of intermediate cases where consent had not been withdrawn after, but before the act.

41. Mr. GOCO drew Mr. Melescanu's attention to the case of *Savarkar*, an Indian revolutionary who had escaped during a call in a French port from the ship on which the British Government had been transporting him for repatriation to and trial in India. He had ultimately been arrested on French territory with the consent of a French policeman. The question had been whether there had been consent in that case, since the French Government had subsequently disavowed the policeman and that raised the issue of how to determine which authority was entitled to give consent.

42. Mr. Addo's question touched on very delicate issues, since it had to be determined whether consent had in fact been given and then whether it was limited by other factors. In his opinion, too much time should not be spent on those aspects and there was a certain logic in the conclusions that the Special Rapporteur had drawn. Consent validly given in advance entailed lawfulness, but to seek to determine whether such consent had been given in valid circumstances would be to start down a road full of traps. Whether the law was a matter of logic or of experience, it was the reflection of the times and should evolve accordingly.

43. Mr. TOMKA said he did not think that it was essential to determine whether article 29 had been expressly invoked or not. Referring to Mr. Melescanu's question, he said that a person considered to be dangerous might be arrested by the forces of a State in the territory of another State, the latter State having given its consent in advance to that arrest. By giving its consent, that State accepted the suspension of the other State's obligation, but wrongfulness was excluded only in that particular case and there was no general suspension of the rule establishing the obligation.

44. Mr. PELLET pointed out that, in the *Savarkar* case, it could be argued that the consent had not been given in a lawful manner and had thus not been validly expressed, but that, if it had been, the rule established in article 29 would have applied, a consideration that also militated in favour of retaining article 29, paragraph 1.

45. Mr. ROSENSTOCK said he was in favour of the deletion of article 29, but there appeared to be no majority in favour of retention or deletion. The Drafting Committee might therefore be asked to make minor amendments to the text that would be acceptable to the advocates of deletion. The Special Rapporteur himself seemed to be backtracking and further time should not be spent on the discussion.

46. Mr. CRAWFORD (Special Rapporteur) said that he endorsed Mr. Rosentock's proposal. Summing up the debate, he said it was true that Governments had not criticized the inclusion of article 29 as such, but had expressed concerns about its wording, even if that wording appeared to raise issues that went far beyond what some of the comments suggested. Intermediate cases could be imagined, as indicated in the footnote at the end of paragraph 238 of the second report. He was receptive to the argument that deletion of the article could give the impression that there were far greater implications than the concerns raised by distinctions, which were, in many respects, very much open to manipulation. The question was where exactly the boundary between primary rules and secondary rules lay. If it was ultimately decided, as seemed likely, that the idea of consent should be maintained in the draft articles, satisfactory wording must be found to meet the concerns expressed by several members of the Commission.

47. Mr. DUGARD said that the second report of the Special Rapporteur was distinguished by its clarity at the level of jurisprudence and its insistence on the distinction between primary and secondary rules. Leaving aside the question whether law was essentially a matter of experience or of logic, the only possible justification for maintaining article 29 seemed to him to be that the principle it set forth formed part of experience, in terms both of domestic law and of the draft articles on State responsibility.

48. Very little mention had been made in the current debate of the analogy with domestic law, although the principle *volenti non fit injuria* came from that source. The principle was a general one found in many legal systems and was, in particular, widely accepted in criminal law. The Commission was not obliged, of course, to be guided too rigidly by the precepts of domestic law, which were not founded upon a clear-cut distinction between primary and secondary rules, if only because domestic law systems considerably predated that distinction. For

example, the rule against assault was often defined in domestic law as violation of the bodily integrity of a person without that person's consent; there, the idea of consent formed part of the primary rule. On the other hand, it was accepted in most domestic law systems that consent precluded wrongfulness. Such lack of clarity in the thinking on those matters could be explained by the way in which domestic law had evolved. The Commission would have to decide whether it wished to preserve the muddiness of domestic waters or preferred the logic advocated by the Special Rapporteur in his second report.

49. Another reason in support of the deletion of article 29 was the difficulty of deciding by what authority consent could be given. In the case of domestic law, that was an easy matter, but, in international law, it was often a most difficult exercise; Ago, in his time, had been well aware of the problem by stipulating that consent had to be "validly given". A recent case, the arrest of Mr. Öcalan in Kenya, provided a good illustration of the difficulty, since it was not yet clearly established whether consent to his arrest in Kenyan territory had been given by a person empowered to do so. If the answer was in the negative, the arrest would have been unlawful.

50. He therefore thought it preferable to opt for the clarity of jurisprudence and to consider that absence of consent was an intrinsic condition of wrongfulness and the giving of consent did not preclude wrongfulness. His decision to oppose the retention of article 29 was confirmed by the impossibility of producing a good example of a case where consent would have precluded wrongfulness. Mr. Tomka had mentioned the hypothesis of kidnapping, but the primary rule in that case was and remained that there should be no intrusion in the territory of the State by an agent of another State. In the case of Eichmann,[7] for example, the abduction had been carried out by Israeli agents in Argentine territory without the previous consent of the Argentine Government; thus, the act had been wrongful even if the Argentine State had subsequently waived its right to demand reparation from the Israeli State. Likewise, in the case of overflight of a territory, a State which gave its consent after the event waived the right to demand reparation.

51. All those considerations led him to oppose the retention of article 29 and to wonder why some members wanted to keep it. It had been argued that logic required the maintenance of article 29, but, in his own view, it was, in fact, experience—long years of acceptance of article 29—that was inducing the members in question to want to keep it. That, however, raised the question of the object of the present debate. Was it simply to endorse previously approved articles or was it to submit them to careful scrutiny? Of course, it would be difficult to modify provisions already endorsed by, for example, ICJ, such as article 33 (State of necessity), but, where there had been no such confirmation by jurisprudence, as was the case with article 29, and where State practice in the area concerned was negligible, a fresh look at the question seemed to be called for. In the case in point, logic required the deletion of article 29.

[7] See Security Council resolution 138 (1960) of 23 June 1960.

52. Mr. PAMBOU-TCHIVOUNDA said that he was in favour of retaining article 29. The greatest circumspection should be exercised in considering the deletion of a provision from what was already a long-standing draft. Some of the draft provisions had already received what amounted to legal confirmation; that was, for instance, the case with article 33. The Commission could not be sure that a situation would not arise in future where a judge might endorse a principle set forth in an article that had been deleted. It would be wrong to prejudge the future fate of the draft articles, some parts of which, adopted on first reading, could already be regarded as forming part of the law.

53. However, article 29 called for three comments. First, its wording was a little awkward because, as it stood, it gave the impression that the responsibility relationship between the State committing the wrongful act and the injured State had to be seen as part of an exclusively treaty-based system of obligations, without, incidentally, making it clear whether bilateral or multilateral treaties were meant. Thus, the concept of "consent" and that of "peremptory norms of international law" harked back to the 1969 Vienna Convention, which was entirely devoted to the primary rules of the law of treaties. That gave a distorted picture of the topic.

54. Secondly, obligations whose violation constituted an internationally wrongful act could be obligations in customary international law, general international law, imperative law, objective law, etc., all of which had to be borne in mind when analysing article 29.

55. Thirdly, the great shortcoming of article 29 was that it singled out the role of the injured State's conduct in the occurrence of the wrongful act by reducing it to the consent which that State was supposed to give under certain conditions, which, incidentally, were both too specific and not specific enough. If the Commission was to be rigorous in relation to the importance of the conduct of the injured State in the occurrence of the wrongful act as a circumstance precluding wrongfulness, it had to adopt the same approach and be just as demanding in the case of all other circumstances precluding wrongfulness (distress, force majeure, etc.).

56. An answer also had to be found to the question of the form (written, declarative or other) that consent could take. Article 29 was silent on that point. Furthermore, all States could find themselves in the situation dealt with by the provision and it could be asked whether they should provide for such an eventuality in their constitution or some other code. He would not mention silence, that paradoxical form which could reflect implicit consent; after a certain time, the absence of reaction on the part of the injured State could be taken as consent. For political reasons, States did not necessarily care to publicize their intentions when organizing their legal relationships. Only in the presence of a dispute did the question arise as to what precisely had been agreed between them. Realism dictated recognition of the fact that there were forms of tacit consent to a wrongful act and that such tacit consent was a circumstance precluding wrongfulness.

57. His position in favour of maintaining article 29 was thus subject to two conditions. In paragraph 1, any terms

that could prove confusing and were only of theoretical importance, such as the word "validly", should be deleted. Since it was hard to see what purpose it served to reproduce article 53 of the 1969 Vienna Convention word for word in paragraph 2—in a reference that was full of possibilities for misunderstanding—only the first sentence should be retained, with the addition of a reference to obligations of an objective nature (obligations *erga omnes*). Jurisprudence existed in that regard and that type of obligation could not be ignored. Thus, if article 29 referred to "a rule of *just cogens* or a rule *erga omnes*", article 29 bis could be deleted.

58. Mr. CRAWFORD (Special Rapporteur) noted that the problem arising in connection with article 29 was partly the result of the fact that the situation it referred to was the least likely of all circumstances that could preclude the wrongfulness of an international act. Furthermore, as had just been recalled, the article implied a complete displacement of the obligation. Fitzmaurice's analysis, although 40 years old, remained entirely accurate in that regard.

59. Two other things were also clear. First, while no Government which had submitted comments on the article had expressly accepted it, none had proposed that it should be deleted. Secondly, the majority of members of the Commission seemed to be in favour of maintaining it.

60. It should, however, be pointed out that the situation dealt with in the article was not one in which wrongfulness had been ruled out in advance by prior agreement between two States in the form of a treaty or some other analogous instrument, but a situation where consent was given at the very moment of the occurrence of the wrongful act. Such a middle case did exist and, for that reason, the general principle according to which a State was free to dispose of its own rights had to be expressly stated in chapter V. Article 29 was precisely a reflection of such a middle case.

61. He had no objection to article 29 being referred to the Drafting Committee, on the assumption that the Drafting Committee would produce a modified version of the article.

62. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer article 29 to the Drafting Committee.

*It was so agreed.*

ARTICLE 29 bis

63. Mr. GAJA recalled that articles 53 and 64 of the 1969 Vienna Convention provided that any treaty which conflicted with a peremptory norm of general international law was void. Article 65 of the Convention described the procedure to be followed with regard to the invalidity or termination of a treaty conflicting with *jus cogens*. That implied that a treaty remained in force, so far as the obligation in question was concerned, for as long as that procedure had not been carried out. It was therefore possible to imagine a case where an obligation provided for by the treaty remained and coexisted with another obligation imposed by a peremptory norm. Yet the very term "peremptory norm" meant that an act incompatible with such a norm was considered unlawful. That was the case, for example, with the use of force in the territory of another State, which remained wrongful even if there was a treaty providing for it. As Mr. Economides had pointed out, the obligation under the peremptory rule prevailed over that imposed by the treaty rule. It was equally obvious that the treaty obligation was one which the State parties were free not to respect. That followed, however, not from treaty law, but from the law of State responsibility.

64. Article 29 bis was perhaps not absolutely necessary, but it could do no harm. However, a problem arose as to which provisions of the Charter of the United Nations took precedence over obligations established by treaty between Member States. Did all Charter provisions do so or only those which corresponded to a peremptory norm of international law?

65. Mr. PELLET said that the explanation provided in article 29 bis not only did no harm, but was very useful. As the Special Rapporteur pointed out, it was best not to water it down too much by explaining that conduct contrary to a norm of *jus cogens* was not lawful. That was a rule of general international law which was not specific to the law of State responsibility. It would be best to leave article 29 bis as it stood.

66. The Special Rapporteur also stated that it was not necessary to repeat the definition of a "peremptory norm". Yet that had already been done in article 29, paragraph 2, adopted on first reading. Contrary to what the Special Rapporteur said, perhaps a little categorically, that definition, which continued to be disputed, had to appear somewhere in the draft, but not necessarily in the place where it was located at the current time. It also did not necessarily have to reproduce the definition given in article 53 of the 1969 Vienna Convention, whose scope was exclusively functional, since it was suited to the purposes of treaty law. By moving outside that context, there could be a broader definition.

67. Mr. TOMKA said that it was difficult to imagine a situation in which the rule provided for in article 29 bis would be applicable. In customary international law, it would mean that there was a customary rule which required a certain conduct on the part of a State, while, at the same time, there was a peremptory rule prohibiting that conduct. Article 29 bis would thus serve a practical purpose only if a conflict existed between obligations of general international law.

68. In the law of treaties, if a treaty was not in conformity with a norm of a peremptory nature, it was invalidated *ab initio* and no obligation stemmed from it. In the event of the supervening emergence of a new peremptory norm which the treaty in force contravened and if a State invoked that conflict in order to denounce the treaty, the treaty was void as soon as the State invoked that conflict. As soon as it did so, the State had no obligation to perform the treaty and he failed to see what conflict could arise in such a case.

69. Therefore, while not opposing the principle embodied in article 29 bis, he did not see how a State could be required by a peremptory norm to adopt a certain conduct while at the same time being prohibited from doing so by another.

70. Mr. CRAWFORD (Special Rapporteur) said he agreed with Mr. Pellet that the concept of *jus cogens* was too influenced by the conditions in which the first formal definition had been provided in the context of the law of treaties. The idea of reconsidering the definition from the point of view of State responsibility was attractive, provided that it was not done solely in the context of article 29 bis; the term *jus cogens* was also used elsewhere in the draft. The Commission had not yet decided that the draft should contain a definitions clause, but, if it chose to include one, it would have to consider where in the text it should appear.

71. As Mr. Gaja had said, at the general level, where there was a conflict between the requirements of a peremptory norm and those of a non-peremptory one, the former requirements prevailed. That rule, however, existed outside the field of the law of responsibility, which merely reflected its consequences. That being said, the Commission was called upon to consider conflicts of substance rather than conflicts *litteris verbis* which related to the actual language of treaties. It had to envisage, first, conflicts with rules which were not treaty rules and, secondly, conflicts which did not arise from the treaty as such, but from particular circumstances.

72. By not adopting a slightly more relaxed attitude on the subject of what constituted circumstances precluding the wrongfulness of an act of a State, the Commission would be endorsing a far too narrow concept of *jus cogens*, especially in view of the position it had already taken in connection with consent, which had effect only in terms of express obligations and their invalidation after a rather anomalous procedure, whereas the real effect of *jus cogens* was much more fundamental.

73. From a more pragmatic point of view, it should be borne in mind that, according to the 1969 Vienna Convention, a conflict between a treaty and *jus cogens* invalidated the treaty *in toto*, including provisions that might be beneficial. It was not in the interest of international law to invalidate a treaty on the grounds that it was incidentally in conflict with certain peremptory norms. Clearly, if a treaty provided, say, for the enslavement of the population of a State by another State, that treaty was null and void, but that was a purely academic hypothesis. In most real situations, a conflict between the treaty and *jus cogens* would arise in an incidental manner. There was therefore some advantage in broadening the application of the concept of *jus cogens*.

*The meeting rose at 1.05 p.m.*

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# 2589th MEETING

*Thursday, 17 June 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

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

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

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 29 bis (*concluded*)

1. Mr. HAFNER said that the question raised by the proposed new article 29 bis (Compliance with a peremptory norm (*jus cogens*)) was rooted in a certain concept of the meaning of obligation and breach of obligation. As indicated previously, he was in favour of viewing the obligation separately from the rule because the eventual scope of the obligation depended on several different rules, including secondary rules. Such an approach would make it possible to answer the question asked by the Special Rapporteur in paragraph 312 of the second report on State responsibility (A/CN.4/498 and Add.1-4) without the risk of dissolving part one of the draft articles altogether. Any case of an incidental breach of *jus cogens* through the implementation of a treaty obligation would be precluded because the scope of the obligation would already be limited by existing *jus cogens*. Reading article 31 of the 1969 Vienna Convention in the same way would produce the same result insofar as the interpretation of a treaty, which necessarily preceded its application, had to take account of the legal context, in other words, of other applicable rules of international law. The same would apply to rules of customary law, so that in the final analysis the new provision would not be needed. It could, of course, be argued that the same would apply to the question of consent, but the absence of a definition of the effects of consent in other rules would seem to justify the inclusion of consent, if not of *jus cogens*, among circumstances precluding

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

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

[3] Ibid.

wrongfulness. He did not, however, propose to reopen the discussion on that point.

2. As Mr. Gaja had suggested, a reference to obligations under Article 103 of the Charter of the United Nations should be included in proposed new article 29 bis. But that Article 103 did not apply to customary law, and the question whether obligations under the Charter also prevailed over obligations resulting from customary law or general principles of law remained open. While recognizing that the issue could not be dealt with in the present context, he nevertheless wished to signal his doubts in that respect. Another issue that might arise from the inclusion of a reference to Article 103 was whether other treaties which declared their precedence over other commitments ought not to be mentioned as well. That, however, would undoubtedly be going too far.

3. Reverting to the issue of *jus cogens*, and referring to the example involving the right of transit or passage contained in note 1 on proposed article 29 bis, in the conclusions as to chapter V (Circumstances precluding wrongfulness) of the draft, contained in chapter I, section C, of his second report, he asked whether a neutral State which prohibited an aggressor State, but not the victim State, from making use of the 24-hour rule in one of its ports would be exonerated from its obligation under the law of the sea. The issue was, perhaps, already addressed by the article on aid or assistance and could be settled in accordance with that article, thus rendering article 29 bis superfluous. If maintained, the proposed provision was likely to give rise to problems of a new nature and could be said to impart a new shade of colour to *jus cogens*. He was inclined to agree with Mr. Pellet's remarks calling for a redefinition of *jus cogens*.

4. Noting that paragraph 312 of the second report failed to answer any of the questions it raised, he would reiterate that an answer would largely depend on the interpretation of the concept of obligation within the meaning of the draft. An exclusive interpretation would not be desirable so long as the article did not distort the concept as a whole. Since that was not the case, he saw no objection to referring it to the Drafting Committee for further study.

5. Mr. SIMMA said that the examples adduced by the Special Rapporteur in paragraph 306 of the second report brought out the practical relevance of proposed new article 29 bis. To take Mr. Hafner's image of "new colour" a step further, he would say that the possibility of conflict with *jus cogens* seemed to hover like a black cloud over international treaties which in themselves presented no problem with regard to State responsibility. The need to establish a circumstance precluding wrongfulness in order to exonerate States which lived up to their obligations arising from *jus cogens* was undeniable.

6. It had been argued that much of the ground covered by article 29 bis was already covered by article 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act). The difference was that, while article 27 envisaged the situation in terms of a State's collaboration with the perpetrator, article 29 bis made it clear that a State's failure to collaborate with the perpetrator of an act prohibited under *jus cogens* would not be considered wrongful.

7. As to Mr. Gaja's suggestion to include a reference to Article 103 of the Charter of the United Nations, he thought that the priority nature of Charter obligations should indeed be spelled out somewhere in the draft. Unlike Mr. Hafner, he believed that Article 103 did apply to customary law. Lastly, supporting the call for a redefinition of *jus cogens* made by Mr. Pellet (2588th meeting) and supported by Mr. Hafner, he explained that, in his view, the aim should be not to redefine *jus cogens* but to make the existing definition more complete.

8. Mr. HE said that article 29 bis was undeniably one of the strongest among the new candidates for inclusion in chapter V. Peremptory norms of general international law were defined by article 53 of the 1969 Vienna Convention and it was universally accepted that there could be no going back on that clear endorsement of the concept of *jus cogens*. Thus, theoretically as well as logically, there were solid grounds for including it in chapter V.

9. On the other hand, the strong doubts expressed by a number of Governments, in the comments and observations received from Governments (A/CN.4/492),[4] and referred to in paragraph 234 of the second report could not be overlooked. It was to be noted that the doubts related not so much to the substantive values embodied in *jus cogens* norms, such as those prohibiting genocide, slavery, war crimes, crimes against humanity and others, but rather to the uncertainty surrounding peremptory norms and to the risk of destabilizing treaty relations. It should also be noted that ICJ had up to now declined to use the term *jus cogens*, while endorsing the concept of intransgressible principles in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* [see page 257, paragraph 79]. For all those reasons, the Commission should exercise the utmost caution in deciding whether compliance with peremptory norms should be included in chapter V.

10. Mr. ROSENSTOCK said that he largely agreed with the comments made by Mr. Hafner and Mr. He. There was certainly no question of going back on the 1969 Vienna Convention, but neither should it be forgotten that the inclusion of *jus cogens* in the Convention had taken place in a very particular context and in the framework of a carefully constructed regime. In the case of article 29 (Consent), the Commission had decided, notwithstanding the doubts expressed by many members, to accept the provision because it was already in the draft articles and because there had been no overwhelming objection by Governments. Article 29 bis, on the other hand, was not in the text of the draft and there was no overwhelming demand on the part of Governments to include it. For the reasons given by Mr. Hafner, and in view of the risk of galloping instability, he wondered if the Commission would be wise to include article 29 bis in the draft.

11. Mr. LUKASHUK said that he had not expected article 29 bis to give rise to so much discussion. The article merely reproduced a universally recognized rule of international law enshrined in the 1969 Vienna Convention and reflected in the practice of ICJ. He entirely agreed with Mr. Simma's comments except on one point: in his view, to involve the Commission in the task of elaborating

[4] See 2567th meeting, footnote 5.

a new definition of *jus cogens* would be unrealistic and inappropriate. Referring to Mr. Rosenstock's remarks, he recalled that, in adopting a similar position at the United Nations Conference on the Law of Treaties, the United States delegation had not challenged the concept of *jus cogens* as such but had emphasized the need to define the procedure for determining what did and what did not constitute a peremptory norm.[5] In his opinion, article 29 bis was indispensable to the draft as a whole and had to be included.

12. Mr. DUGARD noted that, while the need for a reference to peremptory norms and *jus cogens* in the draft articles had been a recurrent theme in the debate, a number of members of the Commission had expressed concern about the particular provision under discussion. He wondered, therefore, whether the Special Rapporteur should not be invited to draft a more general provision on the subject of *jus cogens*, which might or might not reproduce the definition contained in article 53 of the 1969 Vienna Convention, for inclusion in chapter I (General principles). Such a provision establishing a general link between the doctrine of *jus cogens* and the subject of State responsibility could obviate the need for article 29 bis and other provisions dealing with peremptory norms.

13. Mr. CRAWFORD (Special Rapporteur) said that he would like to give that suggestion more thought. The proposed solution might indeed prove an elegant way of dealing with the issue raised by article 29 bis and by certain other draft articles. While reserving the possibility of adopting such a solution, the Commission should not, he thought, abandon the effort to arrive at a satisfactory formulation of article 29 bis.

14. Mr. KAMTO said that when the question of *jus cogens* had been debated in connection with the 1969 Vienna Convention, the main point at issue had not been the existence of peremptory norms of international law but their implementation. The difficulty with the example referred to in note 1 to the proposed text of article 29 bis was that it did not make clear who was to implement the peremptory norm. Any State could, with very serious consequences, arrogate to itself the right to act as an international policeman by invoking, say, human rights. If the principle set out in the draft article was maintained, the Commission must have the opportunity to discuss it again on the basis of the text that would eventually emerge from the Drafting Committee.

15. Mr. PELLET said that he did not share Mr. Kamto's view of the international order. In the case, for example, of a State selling arms to another State and discovering that the purchasing State intended to use those arms to commit genocide, the danger to the international order surely resided in the potential genocide rather than in the seller's decision to refuse to proceed with the sale.

16. Mr. KAMTO said that the example did not dispose of the difficulty. Who, in such a case, was to act as the guarantor of lawfulness? Was it individual States, was it the international community as represented by the United Nations or some other entity? How was international order to be preserved?

17. Mr. PAMBOU-TCHIVOUNDA said that he understood and shared Mr. Kamto's concerns and hoped that they would be duly taken into account by the Special Rapporteur, especially in connection with parts two and three of the draft articles.

18. Mr. CRAWFORD (Special Rapporteur) said that the debate on article 29 (2588th meeting) had not revealed any disagreement on the basic proposition that consent validly given could have the effect of precluding State responsibility. Rather, the point at issue had been whether that proposition should be dealt with in chapter V. Except for the suggestion made by Mr. Dugard, no equivalent conceptual concern had been expressed about the placing of article 29 bis. The doubts had been about the existence of any practical example, i.e. by reason of their operation, norms of *jus cogens* would have eliminated the obligation itself rather than simply its consequences. On balance, members appeared to think that there were situations in which that might not be so. Another difficulty that had been pointed out was the potentially destabilizing effect of *jus cogens* on a treaty in the event of inconsistency. The examples adduced had tended to relate to the use of force, which entailed the operation of Article 103 of the Charter of the United Nations. Yet situations were more likely to arise in consequence of other criminal activities, such as genocide, which all States were called upon to prevent. He saw no reason why, in the case of genocide, the obligation of prevention should not have the same status as the obligation not to commit genocide.

19. The debate had also been useful because it had revealed a strongly-held conviction that the law of State responsibility was affected by the notion of obligations to the international community at large, even if some members of the Commission had more difficulty than others in identifying those effects.

20. Bearing in mind the observations made by Mr. Dugard and Mr. Kamto, it seemed that article 29 bis could be referred to the Drafting Committee. It went without saying that the core issue of *jus cogens*, would come up again in connection with the resumption of the debate on article 19 (International crimes and international delicts) or some equivalent to it.

21. Mr. SIMMA, referring to the Special Rapporteur's assessment of Mr. Dugard's proposal for solving the problem that arose whenever the issue of *jus cogens* came up by simply including an article along the lines of "Without prejudice to any implications arising from obligations *erga omnes*, *jus cogens*, the international community, etc.", said that such a solution would be unacceptable. The progressive development and codification of State responsibility needed to address more fully the consequences of obligations owed to the international community as a whole.

22. The CHAIRMAN suggested referring article 29 bis to the Drafting Committee, pending consideration as to its

[5] See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968*, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), p. 295, 52nd meeting of the Committee of the Whole, paras. 15-17, and p. 330, 57th meeting of the Committee of the Whole, paras. 26-28; and ibid., *Second Session, Vienna, 9 April-22 May 1969*, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 102, 20th plenary meeting, paras. 20-23.

final place and content and taking into account the comments on article 29 itself.

23. Mr. PAMBOU-TCHIVOUNDA said he feared that such a course would be premature. It would be better to keep to article 29. He preferred postponing the discussion to give the members of the Commission time to consider article 29 bis more closely and express their opinions later in plenary. Such an important question, which posed substantive problems of principle, could not simply be left to the Drafting Committee.

24. Mr. LUKASHUK said that he shared Mr. Pambou-Tchivounda's concern, but saw no contradiction between the two proposals: the Commission could refer article 29 bis to the Drafting Committee and continue to reflect on it. He therefore endorsed Mr. Kamto's sensible suggestion to refer the article to the Drafting Committee while providing a later opportunity to discuss the outcome.

25. Mr. GOCO said that such a referral would place a heavy burden on the Drafting Committee, given the divergent views expressed in the Commission. He thought that article 29 bis could be referred to the Drafting Committee without prejudice to its being considered again in plenary.

26. Mr. PAMBOU-TCHIVOUNDA said that, in that case, the Commission should not be surprised if the Drafting Committee did not refer anything back to it at all because it had been unable to produce any formulation for article 29 bis.

27. The CHAIRMAN said it seemed clear that the discussion had not yet achieved satisfactory results and that article 29 bis called for further thought. As he saw it, discussion of the subject could usefully be suspended.

28. Mr. CRAWFORD (Special Rapporteur) said that, at the 2588th meeting, there had been enormous differences on another important issue, namely the proper place for consent, and yet members had been perfectly happy to refer article 29 to the Drafting Committee to see what it could produce. In the debate at the fiftieth session he had received a strong mandate from the Commission to reflect in the draft articles the notion of obligations to the international community as a whole. It had been one of the reasons for proposing article 29 bis. In the tradition of the Commission, the function of the Drafting Committee was to try to produce appropriate solutions to problems, including substantive problems. It was often easier to do that in an informal off-the-record discussion. He agreed entirely with Mr. Pambou-Tchivounda that, if the Drafting Committee could not produce a satisfactory formulation, then it should report back to the Commission and explain why. He also concurred with Mr. Kamto and Mr. Lukashuk that the question would have to be considered further. He wondered whether the Commission could not simply agree on the understandings reflected in the statements by Messrs Kamto, Lukashuk and Pambou-Tchivounda to refer article 29 bis to the Drafting Committee to see what it could do.

29. Mr. KATEKA said that the discussion raised the issue of the Commission's procedure. A debate had been held on article 29 bis and members had had an opportunity to express their views; some had spoken and some had not. Surely, the Commission did not have to force everyone to take the floor. It would be a different matter if the Commission had found that it was divided and wanted to take a vote. He saw no problem with referring the article to the Drafting Committee.

30. Mr. Sreenivasa RAO said that, in any case, the discussion would be unable to dispel the doubts or ambiguities associated with the issue, and he was therefore inclined to allow the Drafting Committee to consider the article, to see whether it was really necessary to have such a heavy *exceptio* and, if so, to take it into account in the final adoption. He did not think the substantive problems in article 29 bis could not be resolved.

31. Mr. BROWNLIE said that it was difficult for the Chairman to guess what everyone was thinking, but if all members had to give an opinion that they were in favour of referring article 29 bis to the Drafting Committee, then the question might as well be put to the vote, because not all members felt a need to speak in every debate. It seemed to him that the issues relating to *jus cogens* had been sufficiently discussed, and so he had remained silent. He endorsed the Special Rapporteur's remarks.

32. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer article 29 bis to the Drafting Committee.

*It was so agreed.*

ARTICLE 29 ter

33. Mr. KATEKA said that article 29 ter (Self-defence) should be confined to the provisions of the Charter of the United Nations. Any broader application, as suggested by France, in the comments and observations received from Governments, would create more controversy on an already complex issue of international law. Only the inherent right of individual or collective self-defence set out in Article 51 of the Charter should be envisaged. He was not sure about the distinction the Special Rapporteur had introduced between the obligation of total restraint and one of presumably lesser restraint. The Special Rapporteur had cited humanitarian law, human rights and the non-first use of nuclear weapons. The latter example was merely a tactical issue which was used in disarmament but was generally of little practical consequence. In fact, the question should have been that of no use of nuclear weapons at all. He was not certain how that fitted into the scheme of things in the current context. Given the lack of clarity, he proposed removing the distinction.

34. Mr. CRAWFORD (Special Rapporteur), noting that Mr. Kateka's first point related to the comments made by France on the notion of self-defence outside the framework of the Charter of the United Nations, said that the wording of paragraph 1 of article 29 ter, which was identical to that proposed in article 34 (Self-defence) adopted on first reading, did in fact refer to the notion of self-defence in Article 51 of the Charter. However, the problem with article 29 ter as it stood was that it apparently gave a State an excuse for violating international humanitarian law if it was acting in self-defence, and that could not possibly be right. The Court had expressly recognized that point in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. It was a clear

example of where a distinction had to be drawn. Naturally it would be more desirable for States to agree never to use nuclear weapons than only to agree not to use them first. But, in the case of a unilateral undertaking by one State made to another State or States never to use nuclear weapons first, the undertaking was plainly intended to apply even to action in self-defence. The State making the undertaking was not saying that it would not use nuclear weapons first if it engaged in aggression; it was committing itself not to do so under any circumstances. That was what the Court considered to be an obligation of total restraint.

35. Mr. HAFNER, noting that the Commission was already engaged in the second reading of the text, that States had already used it in practice and that international courts had cited its provisions, said he was not sure how far the Commission should deviate from the existing version. In his view, it should do so only as far as was necessary. Certainly States would be surprised to examine something totally new, and putting them in such a position could endanger all of the work on the draft. Again, when the draft statute for an international criminal court[6] had been drawn up, consideration had been given to whether lawful measures under international law should act as a legitimate defence against individual responsibility. As it currently stood, the article did not give clear guidance on that matter, which merely showed how complex it was.

36. Where should the limit of the applicability of paragraph 2 be drawn? He fully recognized the need to restrict the notion of self-defence, and he suspected that "lawful" already covered the content of paragraph 2. Would it not suffice to explain in the commentary that the word "lawful" in paragraph 1 was to be understood in the way in which it was now reflected in paragraph 2?

37. The CHAIRMAN, speaking as a member of the Commission, said that he fully agreed with Mr. Hafner's suggestion. Paragraph 2 was already covered by paragraph 1. The addition of paragraph 2 might actually create more confusion. Moreover, the words "in particular" led one to wonder what other obligations might also be involved.

38. Mr. CRAWFORD (Special Rapporteur) said that Mr. Kateka objected to paragraph 2 in principle, and that was a question which had to be resolved, whereas Mr. Hafner and the Chairman, speaking as a member of the Commission, had argued that paragraph 2 was already implicit in the word "lawful" in paragraph 1, although the commentary to article 34 as adopted on first reading did not make that point clearly.[7] Moreover, there had been a recent decision by ICJ expressly directed to that issue in the framework of environmental obligations, not humanitarian law, and the formulation of paragraph 2 reflected the language employed by the Court, which had been asked to find that environmental obligations overrode self-defence. The Court had ruled that they did so only when they were expressed in such a way as to apply as obligations of total restraint in armed conflict. Hence, there was good authority for paragraph 2. He thought the matter should either be spelled out in the commentary or preferably in the article itself, because, as rightly noted by Mr. Simma, the Commission was trying to codify the law and not simply to point to it. To the extent that it was possible to express the content of the law with clarity, the Commission should do so. He agreed with the Chairman that the words following "in particular" might be out of place, but that was a separate question and one which could certainly be taken up in the commentary. In fact, the language there had been taken from article 60 of the 1969 Vienna Convention, where, again, States had felt that the question of humanitarian law was so important that it should be spelled out. Of course, it was a classic example of a restraint on States, even acting in self-defence.

39. The word "validly" in article 29 had been greatly criticized and many members had said that it was necessary to be more explicit. The fundamental question raised by Mr. Kateka was whether paragraph 2 was right. It was right; it had recently been affirmed to be right, it was classically right, it was not a case of progressive development, but of current law, and the only question was how to enunciate it.

40. Mr. SIMMA said that there were two tendencies in the Commission which he regarded as disturbing. One was to say that a concept could not be changed because it had been referred to by international courts and was therefore written in stone. To his mind, it was always necessary to consider the context in which a concept had been used by an international court. It might well be that, even if the Commission decided to add something to the concept or to change it, it would not contradict the rulings of international courts. That comment related to the remark by Mr. Hafner on the concept of self-defence, which, of course, was constantly used by States seeking to justify all sorts of actions.

41. The other tendency was to try to solve a problem by overworking certain words. To conceal behind the word "lawful" the problem that the Special Rapporteur sought to address in paragraph 2 was a good example. One perfectly commonsensical reading was that paragraph 1 dealt with the issue of *jus ad bellum*. The right existed to use military force in self-defence, and from that point of view, the word "lawful" in the phrase "if the act constitutes a lawful measure of self-defence" would describe the circumstances—the preconditions—for acting in self-defence, in the event of an armed attack for example.

42. It was by no means obvious that the word "lawful" would cover all limitations applicable once a State acted in self-defence, limitations which, in doctrinal terms, were subsumed under the heading of *jus in bello* and should be spelled out. They were what the Special Rapporteur had in mind in paragraph 2, which he was in favour of retaining because paragraph 1 could convey the false impression that everything was permissible in self-defence. However, the phrase "which are expressed or intended to be obligations", drawn from the language used in the advisory opinion concerning the *Legality of the Threat or Use of Nuclear Weapons* [see page 242, paragraph 30], was, in his view, superfluous. It was sufficient to say "international obligations of total restraint". The words "in particular", on the other hand, would only cause a problem if the preceding clause was unclear. They served the legitimate purpose of drawing attention to the

[6] *Yearbook…1994*, vol. II (Part Two), p. 26, para. 91.

[7] See 2587th meeting, footnote 12.

special case of humanitarian obligations. Moreover, the text was modelled on that of article 60, paragraph 5, of the 1969 Vienna Convention.

43. Mr. PAMBOU-TCHIVOUNDA said that the Special Rapporteur had proposed a new inflated version of article 34 as adopted on first reading that sought to establish the notion of an obligation of total restraint in the context of self-defence. He preferred article 34 for the reasons stated by Mr. Hafner. There might be some justification for addressing the issue of a breach of the obligation of total restraint in a separate article on State responsibility, but it was unwise to include a passing reference to such a complex subject in the context of armed conflicts, thereby detracting from its importance as a separate category of obligations. He suspected that the Sixth Committee of the General Assembly would be somewhat surprised to have to consider an entirely new draft article on self-defence.

44. Mr. PELLET said he saw no reason why States should be surprised to be presented with a new text. Many years had passed since the drafting of article 34 and it was perfectly conceivable that new issues had come to light and needed to be addressed.

45. He agreed with Mr. Hafner that the word "lawful" in paragraph 1 of article 29 ter covered the subject matter of paragraph 2, which merely served to illustrate the point. Self-defence was lawful in cases of armed aggression and paragraph 1 stipulated that specific measures could be taken in that context. He was in favour of deleting paragraph 2, but if it was retained the word "lawful" should be deleted from paragraph 1. In addition, the phrase "even for States engaged in armed conflict or acting in self-defence" in paragraph 2 should be deleted because the entire article was concerned with self-defence. Overall, however, the paragraph struck him as an unnecessary attempt to rewrite the whole body of international law on responsibility.

46. He concurred with the comment by the French Government under article 34, in the comments and observations received from Governments, that the reference to self-defence "in conformity with the Charter of the United Nations" was too narrow. Everyone knew, especially since the judgment of ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua* in 1986, that the natural right of self-defence was not a right founded on the Charter of the United Nations. The restrictive renvoi to the Charter could also cause problems where a State was not a member of the United Nations. He proposed replacing "a lawful measure of self-defence taken in conformity with the Charter" by "a lawful measure of self-defence within the meaning of the Charter".

47. Mr. ROSENSTOCK said he thought the term "lawful" was a reference to *jus in bello* and deleting it would have no effect whatsoever on the statement regarding *jus ad bellum*. It thus covered the subject matter of paragraph 2. The fact that an article was different from the version drafted 25 years previously should not be an obstacle to change, but the sensitivity of the subject might well give pause. As nobody had taken issue with article 34, with the exception of the point mentioned by Mr. Pellet, and as the word "lawful" served no purpose apart from addressing *jus in bello*, it was preferable to leave it unchanged. At all events, there was little difference of substance among the members of the Commission and all outstanding issues could be examined in the Drafting Committee.

48. Mr. SIMMA said he was convinced by Mr. Pellet's argument that the word "lawful" only made sense independently if it was intended to cover humanitarian, environmental and other limitations. Otherwise, it would be labouring the point to refer to measures of self-defence that were lawful and in conformity with the Charter of the United Nations. The issue of whether the humanitarian and other concerns should be spelled out in greater detail was what had prompted the Special Rapporteur to draft paragraph 2.

49. With regard to the French Government's comment on article 34, he agreed with Mr. Pellet that where a State could not invoke Article 51 of the Charter of the United Nations, it could still rely on customary law to justify action in self-defence. But France had raised an entirely different issue when it proposed that the broader limits laid down by international law should be referred to instead. He did not agree with the French Government on that score. In his view, there was a right of self-defence that had the contours and limitations of the right recognized in Article 51 of the Charter and no other broader right.

50. Mr. ELARABY said that the records of the Security Council and General Assembly were replete with claims and counterclaims regarding the lawfulness or otherwise of acts of self-defence. The reference in article 29 ter, paragraph 1, to "in conformity with the Charter of the United Nations" was therefore more important than the word "lawful". Although the Charter of the United Nations might not actually confer a right of self-defence, it set forth regulations and limitations relating to the role of the Council and the circumstances necessitating armed action. The word "lawful" raised a number of problems and should perhaps be deleted.

51. Mr. GOCO said he found paragraph 1 to be a sufficiently comprehensive comment on the subject of self-defence. The key word "lawful" covered the point that paragraph 2 was intended to make. With regard to the comment by the French Government, he proposed inserting a reference to "the inherent right of self-defence recognized in the Charter of the United Nations".

52. Mr. YAMADA said he had no objection in principle to paragraph 2 which, in his view, stated a primary rule of self-defence. It was obvious that a State which resorted to force in self-defence must observe all rules of warfare, including humanitarian law. However, he foresaw major drafting difficulties in spelling out the principle and would therefore prefer to delete the paragraph.

53. Mr. CRAWFORD (Special Rapporteur) said that one of the functions of a Special Rapporteur on second reading was to take account of developments that had occurred since the first reading. In the case in point, an important judgment by ICJ had been of direct relevance. The commentary to article 34 had failed to interpret the word "lawful" in the sense that had emerged during the

present discussion, relating it exclusively to the requirements of proportionality, necessity or armed attack.

54. Self-defence in the context of chapter V was not taken as a circumstance precluding wrongfulness in relation to the use of force. The primary rule was perfectly clear: force could not be used in international relations except in self-defence. The position was that self-defence was a justification or an excuse, as ICJ had ruled in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in relation to breaches of other obligations, e.g. the obligation not to cause substantial harm to the environment. In response to the argument that such obligations prevented the use of nuclear weapons, the Court had stated that, where a State was acting in self-defence, they did not. But there was another category of obligations that had to be complied with even in self-defence. If the Commission wished to take the position that the word "lawful" covered not only *jus ad bellum* but also *jus in bello* and authorized him to produce a commentary in which the point was made crystal clear, he would be happy to do so.

55. He accepted Mr. Pellet's argument that alternative wording to "in conformity with the Charter of the United Nations" should be considered and would be content to have article 29 ter, paragraph 1, referred to the Drafting Committee. He agreed with the proposal to delete paragraph 2 on the understanding that the content would be fully reflected in the commentary.

56. Mr. KAMTO said that, in his view, the right of self-defence could be understood only in the context of the Charter of the United Nations. If there was a basis other than the Charter for such a right in international law, the question was whether, from the standpoint of international responsibility, the regime of self-defence should come under the Charter or remain outside it. He would have no hesitation in opting for the former alternative. To conceive of the use of self-defence outside the framework of the Charter would lay it open to a serious risk of slippage due to the lack of a treaty regime to control it and of guarantees of control by the Security Council under the Charter.

57. Mr. Sreenivasa RAO said the Special Rapporteur had made the point in article 29 ter, paragraph 2, that, when a person or a State acted lawfully in self-defence, it was still bound by principles such as those contained in humanitarian and human rights law. But although the applicability of humanitarian law to both parties to a conflict was a basic principle, there was no real agreement on such issues as proportionality, military necessity, legitimate targets, and the development of weapons for deterrence or strategic purposes. Civilian sites were commonly targeted in armed conflicts and environmental issues were overlooked. He was in favour of a wider public debate on the subject and the promotion of restraint through dissemination. The commentary should make the point that considerable ambiguity still existed in respect of the notion of total restraint and was exploited in practice.

58. Mr. BROWNLIE said he supported the Special Rapporteur's procedural proposal, and also wished to make two general points. The debate, particularly on article 29 ter, had revealed certain systemic problems relating to chapter V. The first was that, according to a purist and slightly esoteric view, chapter V consisted of a series of formulations of conditions for the legality of State conduct that could be represented—albeit in a rather academic way—as primary rules. In that case, chapter V would fall. It was his understanding that the members of the Commission were now estopped from taking that very unhelpful academic view of chapter V.

59. The second systemic problem was that the content of the articles in chapter V inevitably gave rise to problems with regard to their relationship to other parts of international law. The Commission could not reasonably expect the Special Rapporteur to produce, as it were, in passing—either in a second "without prejudice" paragraph or in the commentary—an economical codification of the whole of *jus cogens*, simply because it was in some way relevant. Thus, in the context of article 29 ter it would certainly be helpful if some of the relational points were made in the commentary. But if the Commission insisted that the Special Rapporteur—or the Drafting Committee, for that matter—should deal with those relational points in the actual text of the articles, it would be difficult to achieve that aim efficiently, and to avoid mistaken inferences being drawn subsequently from what was stated and what was not stated. He therefore hoped that the Commission would not devote too much time to relational problems and that it would instead concentrate on the important task of propounding the principles of excuse or justification.

60. Mr. HE said he endorsed the view that article 29 ter should apply to measures of self-defence taken in conformity with the provisions of the Charter of the United Nations. Paragraph 2 would raise some highly debatable issues, and he accordingly thought it should be deleted. The commentary should, however, comprehensively reflect the various views expressed on the issues raised by paragraph 2.

61. Mr. HAFNER said it was his understanding that only paragraph 1 of article 29 ter was to be submitted to the Drafting Committee and that the commentary should elaborate on the contents of paragraph 2. However, there was a difference between "lawful measures of self-defence" and "lawful self-defence" and, in his opinion, the former expression addressed the issues raised in paragraph 2. He therefore proposed that the Commission should decide that, unless paragraph 1 was amended, the substance of paragraph 2 was to be considered by the Drafting Committee for possible inclusion in the text of article 29 ter.

62. Mr. SIMMA said that, as the Special Rapporteur had pointed out, when the draft articles had been adopted on first reading, the then Commission had understood the word "lawful" to refer to concepts such as proportionality, rather than to *jus in bello* limitations.

63. Mr. PAMBOU-TCHIVOUNDA asked whether a decision to refer article 29 ter, paragraph 1, to the Drafting Committee would imply that the question of the placement of the provisions of that article had been settled.

64. Mr. CRAWFORD (Special Rapporteur) said that the Drafting Committee would have to consider, in the context of chapter V as a whole, the order in which individual

articles would appear within the chapter. It would be premature to take a decision as to their numbering at the present juncture.

65. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer article 29 ter, paragraph 1, to the Drafting Committee, and to consign the contents of its paragraph 2 to the commentary.

*It was so agreed.*

ARTICLE 30

66. Mr. CRAWFORD (Special Rapporteur) said that Mr. Rosenstock had already expressed concern at his proposal to postpone discussion of article 30 (Countermeasures in respect of an internationally wrongful act) until the following session, instead proposing that article 30 should be taken up at the current session, once the Commission had completed its consideration of the other articles of chapter V. At that time the Commission could also discuss the related issue of whether the detailed treatment of countermeasures in part two should be retained.

67. His own position was that the Commission could not discuss the exact formulation of article 30 until it had decided whether to retain the treatment of countermeasures in part two. If it was decided to retain that treatment, article 30 could simply take the form of a renvoi to part two. Thus, the only question the Commission needed to discuss at the current juncture was whether countermeasures could ever constitute circumstances precluding wrongfulness. If time permitted once the Commission had completed its consideration of chapter V, he would then welcome a discussion of the issue of principle in relation to the treatment of countermeasures, which would serve to provide him with guidance in preparing his next report. Following that discussion, he would be happy to consider the implications for article 30, and even to propose a text for that article if the Commission had taken a clear position on the general issue. In his opinion, however, it would not be fruitful to enter into a detailed discussion of the content of article 30 at the current time.

68. Mr. ROSENSTOCK said he did not insist on an immediate discussion of article 30 and would be happy for the Commission to discuss it once the other draft articles in chapter V had been considered. In his opinion, however, it would not be prudent to delay discussion of article 30 until the Commission came to consider part two. To do so might make it more difficult to reach agreement on either of those matters. Many of the articles were in some sense dependent on other articles: hence the somewhat provisional nature of many of the decisions taken with respect to them. He was thus reluctant to accept the view that the Commission should not attempt to deal with article 30 in the context of chapter V. Article 30 should be discussed either there and then, or else at the end of the discussion of chapter V.

69. Mr. SIMMA said he supported Mr. Rosenstock's view. Article 30 should be discussed as it currently stood, and at the current juncture rather than at the end of the debate on chapter V.

70. Mr. GOCO said that the Commission should tackle article 30 there and then, as the place of countermeasures in a scheme of circumstances precluding wrongfulness needed to be discussed, without prejudice to the question of the place of countermeasures in part two.

71. Mr. CRAWFORD (Special Rapporteur) reiterated his position, which was that if, after the current debate, the Commission decided that article 30 belonged in chapter V in some form—as he himself believed—then progress would have been made. The current debate could afford an opportunity to draw attention to problems of drafting, and to consider whether article 30 had a place in chapter V. If, subsequently, the Commission decided to delete the chapter dealing with countermeasures from part two, he would then propose a new version of article 30. A full-scale discussion of article 30 at the current meeting would not obviate the need for a later discussion of that article if the Commission decided to delete the treatment of countermeasures in part two. Consequently, he did not think it fruitful to discuss the content of article 30 in detail at the current juncture.

72. Mr. TOMKA said that his views on article 30 were, first, that countermeasures should be listed among circumstances precluding wrongfulness. In cases such as the *Air Services Agreement of 27 March 1946*, *Military and Paramilitary Activities in and against Nicaragua*, and, more recently, the *Gabčíkovo-Nagymaros Project*, countermeasures had been found to be an institution of international law precluding wrongfulness. It would thus be a retrograde step to delete article 30 from chapter V.

73. Secondly, he fully supported the need to define the conditions for resort to countermeasures in detail in part two. The detailed treatment by ICJ of that issue in the *Gabčíkovo-Nagymaros Project* case would doubtless be of value to the Special Rapporteur in his work. Lastly, when the Commission had adopted the draft articles on countermeasures, it had had in mind individual countermeasures, as opposed to "sanctions" as defined in paragraph (21) of the commentary to article 30.[8] He would be interested to hear from the Special Rapporteur whether the articles on circumstances precluding wrongfulness would also cover the situation of compliance with binding decisions of the Security Council imposing sanctions, a situation in which a State might be prevented from complying with other international obligations. One answer might be that, under Article 103 of the Charter of the United Nations, obligations arising from the Charter would prevail.

74. Mr. GOCO asked whether he was right in understanding that, if the Commission decided to retain article 30 as a circumstance precluding wrongfulness, the Special Rapporteur would then produce a new version of article 30.

75. Mr. CRAWFORD (Special Rapporteur) said he emphatically agreed with Mr. Tomka that article 30 covered a circumstance precluding wrongfulness and should be retained in chapter V, without prejudice to the question of its formulation. He also agreed that the Commission's intention when adopting article 30 had been to deal only

[8] Ibid., footnote 8.

with countermeasures proper, and not with sanctions. He conceded that article 30 was not very clearly formulated in that regard, a matter the Drafting Committee would need to address. Sanctions imposed under the Charter of the United Nations were expressly saved by article 39 (Relationship to the Charter of the United Nations) in part two, which would in due course apply to the articles as a whole. Sanctions imposed lawfully under other specific treaties would be covered by the *lex specialis* principle, but in any event they were not countermeasures. It should be made clear in the text and commentary that article 30 was not concerned with sanctions.

76. As to Mr. Goco's point, he supported the retention of an article 30, but the formulation would depend on the extent to which countermeasures were dealt with in detail in part two. If the treatment of countermeasures was retained in part two, article 30 could be very brief. Once the Commission had concluded its consideration of the remaining articles in chapter V, he would be happy to formulate a brief paper addressing the arguments for and against retaining a treatment of countermeasures in part two. Thereafter the Commission could return to article 30.

77. Mr. ROSENSTOCK said that chapter V would be woefully insufficient if it did not include an article 30. He personally found article 30 substantially acceptable as currently worded. That wording might or might not have to be radically recast in the light of the fate of chapter III (Countermeasures) of part two.

78. The CHAIRMAN said that a majority of members appeared to favour discussing the desirability of retaining article 30, but not its substance.

79. Mr. SIMMA said he fully agreed with the Special Rapporteur and Mr. Rosenstock with regard to the procedure to be adopted, the need to retain article 30, and the need to regulate countermeasures in part two. As to the drafting, he had two concrete proposals to make. First, it seemed not to be entirely clear to some States that article 30 excluded organized sanctions. That point should be clarified, since sanctions decreed by the Security Council to counter a threat to the peace might be directed against a State whose threat to the peace did not necessarily involve a breach of international law. Secondly, he strongly advocated replacing the word "legitimate", which carried a heavy ideological charge, by a word such as "legal" or "justified", as many activities that were "legitimate" were not entirely legal.

80. Mr. PAMBOU-TCHIVOUNDA asked whether it might be useful for the Commission to work on the basis of the redrafting of article 30 that the Special Rapporteur had just offered to prepare, rather than considering a text that had apparently now been superseded.

81. Mr. CRAWFORD (Special Rapporteur) said that, like the hapless Coleridge in Byron's *Don Juan*, he felt called upon to "explain his explanation". If he were to propose a new article 30 at the current juncture, he would have to propose two different texts, one based on the assumption that the treatment of countermeasures would be retained in part two, the other based on the opposite hypothesis.

82. Mr. ROSENSTOCK asked whether it could be placed on record that the Commission now accepted in principle that countermeasures had a place in chapter V; that the provision relating to countermeasures would broadly resemble article 30 as adopted on first reading; and that that provision might nonetheless require further consideration, depending on the ultimate fate of chapter III of part two.

*The meeting rose at 1.05 p.m.*

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## 2590th MEETING

*Friday, 18 June 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

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

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

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 30 (*concluded*)

1. Mr. KATEKA drew attention to the linkage between article 30 (Countermeasures in respect of an internationally wrongful act) of part one and chapter III (Countermeasures) of part two of the draft.

2. Countermeasures had a place in the draft only subject to certain conditions, which were set out in chapter III of part two, concerning the obligation to negotiate, the principle of proportionality and the settlement of disputes, and were designed to prevent abuses. Yet paragraph (17) of the commentary to article 30[4] implied the possibility, by way of reprisals, of bombarding a town or a port of an

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

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

[3] Ibid.

[4] See 2587th meeting, footnote 8.

aggressor State, something that was clearly unlawful. It was to be hoped that the Special Rapporteur would make the necessary corrections in the final text of the commentary. That being said, he accepted article 30 as adopted on first reading.

3. Mr. SIMMA said that it was necessary to achieve clarity with regard to the difference between "countermeasures" and "reprisals", terms that were used more or less synonymously. He was guided by General Assembly resolution 2625 (XXV) of 24 October 1970 containing in an annex the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, where it was stated in the principle dealing with the non-use of force that "States have a duty to refrain from acts of reprisal involving the use of force". It was true that the term "reprisals" had lately fallen out of grace, but the term "countermeasures" designated a more aggressive attitude and had less pacific connotations because it derived from American political theory as applied to nuclear deterrence.

4. Mr. CRAWFORD (Special Rapporteur) said he agreed that it was necessary to settle the question of terminology. He nevertheless believed that the more recent term "countermeasures" meant only pacific measures. "Reprisals" was a wider term which did not wholly coincide with the subject of article 30. Moreover, a distinction would also have to be drawn between those terms and "retortion" and, especially, "sanctions", the last-named being imposed by an international institution, in particular, by the Security Council under Chapter VII of the Charter of the United Nations.

5. Mr. ROSENSTOCK said he did not think that the word "sanctions", which often had a punitive connotation, was the most appropriate to designate measures taken under Chapter VII of the Charter of the United Nations.

6. Mr. LUKASHUK said that to claim that sanctions were not a prerogative of international organizations was contrary to practice and inconsistent with a recognized principle of international law. The Special Rapporteur himself had rightly said that States could not be given the right to impose sanctions, as that would be contrary to international law, and that only international institutions, and especially the United Nations, had that right when it involved the use of force.

7. Mr. ROSENSTOCK, clarifying his earlier comments, pointed out that the Charter of the United Nations never spoke of "sanctions", but only of "measures". Thus, even an international institution did not, perhaps, have the right to impose sanctions.

8. Mr. KAMTO said that the Commission was considering a very sensitive issue which gave rise to enormous problems. The history of the concept of "countermeasures" showed that the term had first come into use at a time when the international community had been forced to acknowledge the weakness of the Security Council and of the United Nations system in general; that weakness had led to the establishment of a kind of private justice.

9. At present, it could be asked whether such a concept was really consistent with the letter and spirit of the Charter of the United Nations. In other words, were there situations where a State was authorized to take measures on its own—whether or not those measures involved military force—in order to put an end to a violation of international law? In more narrowly legal terms, what was the primary rule relating to countermeasures? In the case of self-defence it was, clearly, natural law. However, in the case of countermeasures, even if the term was now accepted, the fundamental principle was not evident and it was hard to tell whether the practice being codified was not, perhaps, contrary to international law. A side issue that also arose was the question of the Commission's normative policy: should the practice of ICJ, whose decisions did not necessarily become accepted rules suitable for codification, be automatically endorsed?

10. Chapter VI of the Charter of the United Nations offered the possibility of settling a situation involving a breach of an international obligation by means other than countermeasures. The Charter did not provide only for military action, but also proposed other mechanisms. It was, in any case, indispensable to circumscribe countermeasures, as far as possible, by all sorts of conditions, such as the principle of proportionality, machinery for the settlement of disputes and the obligation to negotiate.

11. It was not possible to use the term "sanctions" for measures taken by an international organization and a different term for those taken by States. The law, as classically construed, provided that sanctions could be imposed only by a judicial body empowered to do so. However, in the international legal order, it did not matter who imposed the sanctions, it was the punitive intent that would indicate whether or not those measures constituted sanctions. They were actually sanctions only if the State against which they were taken perceived them as such.

12. In any event, countermeasures had become part of international practice. They were included in the Special Rapporteur's draft and it would not be wise to ignore that fact. Indeed, since countermeasures were a reality, it was important to establish a legal regime to govern them and that regime should be as restrictive as possible. The machinery already in place (principle of proportionality, etc.) could be expanded on the basis of the idea that countermeasures were essentially provisional and were authorized only pending an appeal to an international court or institution capable of settling the dispute that was the origin of the countermeasures. Thus, it might be possible, on the one hand, to add the obligation to discontinue the wrongful act and, on the other hand, to specify that the damage caused had to be real. A mere breach of an international obligation should not, in itself, give rise to countermeasures.

13. Mr. CRAWFORD (Special Rapporteur) reminded the members that the question under consideration was whether article 30 should be maintained in chapter V. More generally, the Commission would have to decide whether the question of countermeasures should be dealt with in greater depth in connection with chapter III of part two.

14. Mr. HE said he thought that article 30 should be maintained in chapter V, but should be kept in square brackets pending the outcome of the debate on chapter III of part two.

15. Mr. TOMKA said that the point was whether, as a matter of principle, countermeasures could be a circumstance precluding wrongfulness. The discussion on the substance of the question should be deferred until later.

16. Mr. GOCO said that the question of the regime that should govern countermeasures was irrelevant at the current time. For the moment, the Commission was concerned with the issue of wrongfulness.

17. Mr. LUKASHUK said that article 30 had to be included in chapter V because countermeasures were among the most important circumstances precluding wrongfulness, quite independently from the outcome of the debate on the regime for countermeasures and from the question of the location of the article. International law was unimaginable without implementation machinery or, in other words, without countermeasures. Positive law recognized that to be so: for example, the 1969 Vienna Convention provided that, if State A violated a treaty, State B had the right, by way of countermeasures, to demand the implementation of the treaty or not to implement the treaty for as long as the violation continued.

18. Mr. ADDO said he did not think that article 30 could be referred to the Drafting Committee until a decision had been taken on the status of countermeasures in international law.

19. Mr. GOCO said that, once the Commission had decided whether countermeasures were a circumstance precluding wrongfulness, it would be able to amend the wording of article 30.

20. Messrs ELARABY, KABATSI, KAMTO and KATEKA said they were of the view that the Commission could not take a decision on the future fate of article 30 before completing its consideration of chapter III of part two.

21. Mr. ROSENSTOCK noted that everyone agreed on the need to mention countermeasures in chapter V; however, a decision on the wording of article 30 could not be taken before the regime for countermeasures had been considered in the context of part two of the draft articles.

22. The CHAIRMAN confirmed that the Commission was being asked to decide whether article 30 should be maintained in the draft articles, not on the article's contents.

23. Mr. PELLET said that article 30 should be kept in chapter V, for the reasons outlined by the Special Rapporteur. Countermeasures were a fact and a reality of international life. He had two comments to make on paragraph 245 of the second report on State responsibility (A/CN.4/498 and Add.1-4); at the end of the third sentence, the words "be collectively sanctioned" (*sanction collective*) should be replaced by the words "give rise to a collective response" (*réaction collective*), since the reference to sanctions had a punitive connotation. In the French text of the last sentence, the words *l'État fautif* should be replaced by the words *l'État responsable*, which was, in his opinion, a better translation of the English words "wrongdoing State".

24. Mr. CRAWFORD (Special Rapporteur) said that paragraph 245 was merely a condensed version of the commentary to article 30. It was quite possible that it needed some improvements.

25. Mr. LUKASHUK said that, like Mr. Pellet, he did not agree with the idea of fault. He also thought it was incorrect to speak of countermeasures in respect of a wrongful act because they were obviously taken in respect of a State and not of an act.

26. Mr. KAMTO said that it was not because an act existed that it must be accepted as a reason for exoneration. Acts were one thing, while the rules of law were another.

27. Mr. SIMMA said that the Commission was supposed to be dealing not with acts but with legal rules and principles. The problem was whether countermeasures existed as an institution. The answer could be said to be yes and it was not because countermeasures were not mentioned in the draft articles that they would disappear as an established principle.

28. A certain logic had to be preserved in the draft articles. If article 30 was deleted from chapter V of part one, there would no longer be any reason to cover conditions relating to resort to countermeasures and proportionality in part two; and chapter III (arts. 48-50) should then be deleted from part two.

29. The approach advocated by the Special Rapporteur not only of retaining article 30, but possibly expanding on it by adding elements from articles 47 to 50 of part two would therefore be preferable. The Commission should indicate to readers that, among the circumstances precluding wrongfulness, it had not overlooked countermeasures, whatever wording was finally adopted for that article. Obviously, that solution would not satisfy members of the Commission who thought that countermeasures were wrongful.

30. Mr. PELLET said that, while the word "countermeasure" was relatively recent, the practice itself, whatever the name given to it in the past, had always been the normal means by which States had reacted to wrongfulness. As Mr. Lukashuk had rightly pointed out, the concept was absolutely essential in modern-day society. In asking whether countermeasures constituted a circumstance precluding wrongfulness, perhaps the Special Rapporteur had asked the wrong question. The members of the Commission had to decide whether or not the article should be kept in chapter V and the text could, if necessary, be placed in square brackets to indicate that it was provisional.

31. Mr. ADDO said that, if countermeasures were in fact considered to constitute circumstances precluding wrongfulness, something about which members such as Mr. Kamto seemed to have doubts, it was obvious that article 30 should be retained in chapter V.

32. Mr. DUGARD said that the question asked by the Special Rapporteur was simply whether countermeasures really precluded wrongfulness and therefore had a place in chapter V. One of the difficulties was that, for obvious reasons, there were no examples of resort to countermeasures in systems of internal law characterized by a vertical law enforcement mechanism. In the international context, however, that idea corresponded to a need and it should be acknowledged and taken into account.

33. Mr. GOCO said that the concept of countermeasures in international law could be compared with that of self-defence in internal law.

34. Mr. MELESCANU said that he agreed with Mr. Tomka. The Commission had to consider not the principle of countermeasures in international law per se, but whether acting within the framework of a countermeasure could be a circumstance precluding wrongfulness. In his opinion, the answer was yes.

35. Some members of the Commission had pointed out that the principle embodied in article 30 would be elucidated, or, rather, that its contents would be delineated, in part two of the draft articles, and had suggested that, pending the consideration of that part, the text of article 30 should be left in square brackets. He himself was not very much in favour of placing the statement of a fundamental principle of international law in square brackets. What was important was to explain why article 30 had been retained in chapter V, with or without square brackets.

36. Mr. PAMBOU-TCHIVOUNDA said that the conditions for resort to countermeasures provided for in articles 48 to 50 of part two of the draft were so strict that it was hard to imagine that a State that took them could be committing a wrongful act. It was therefore fairly paradoxical to say that something that was entirely in accordance with the law would be part of the circumstances precluding wrongfulness (the circumstances that made it possible not to act in conformity with the law).

37. Nevertheless, the solution proposed in paragraph 249 of the second report seemed acceptable. Article 30 could be retained in square brackets and its final wording could be decided on later, during the consideration of the regime for countermeasures in part two.

38. Mr. CRAWFORD (Special Rapporteur) said that, from the comments and observations received from Governments (A/CN.4/492),[5] it could be seen that none of them had suggested the deletion of article 30. Whatever concerns they had expressed, most of the members of the Commission seemed to be of the same view. The Commission must send a coherent draft to the Sixth Committee and no one would understand why countermeasures had not been mentioned in chapter V among the circumstances precluding wrongfulness. The solution of placing the text, but not the title, of article 30 in square brackets seemed to provide an acceptable compromise.

39. The CHAIRMAN said it appeared that the members of the Commission thought that article 30 should not be referred to the Drafting Committee, but agreed that countermeasures had their place in chapter V among the circumstances precluding wrongfulness. The Commission would come back to the wording of article 30 in the light of what would be decided later on in articles 47 to 50 of part two.

*It was so agreed.*

ARTICLE 30 bis

40. The CHAIRMAN said that article 30 bis (Non-compliance caused by prior non-compliance by another State) was a new article that was not related to any of the articles adopted on first reading. The commentary by the Special Rapporteur on the article was contained in paragraphs 314 to 329 of the second report.

41. Mr. SIMMA said he found the article to be slightly disturbing because it brought together several concepts that were only partially interrelated. First, there was the principle expressed in the maxim *exceptio inadimplenti non est adimplendum*, which the Special Rapporteur said had been enunciated by PCIJ in the case concerning the *Factory at Chorzów* [see page 31]. In his own view, the principle laid down by the Court in that case had very little to do with what was called, in international law, *exceptio inadimpleti contractus*; it related rather to the principle of *nullus commodum capere potest de sua propria injuria* (no one can obtain an advantage by his own wrong). The principle could in some instances refer to a breach of an obligation and might well have its place in the draft, but not in the chapter on circumstances precluding wrongfulness.

42. The maxim *inadimplenti non est adimplendum* (not being required to respect an obligation if the other party to the contract did not respect its own) and the *exceptio* that derived from it were always related to contractual obligations, in other words, treaty obligations in the context of international law. The principle was firmly entrenched in primary rules and had been codified as such in article 60 of the 1969 Vienna Convention. It was not a principle that applied to international law in general and was apparently not applicable in the context of customary law.

43. At its forty-fourth session, in 1992, the Commission had been right to reject a proposal by a former Special Rapporteur, Mr. Willem Riphagen, who had suggested that, in addition to countermeasures, the principle of "reciprocal measures", should be acknowledged.[6] The Commission had rightly stated that such measures constituted symmetrical reprisals. The only option available to a State for reacting to non-performance of a non-treaty obligation was to adopt a countermeasure. The purpose of countermeasures was to induce the wrongdoer to return to legality and, possibly, pay reparation. An exception to prior non-performance did not come within the framework of countermeasures. In such a situation, a State that had been injured by a breach by another party was not prevented from performing its own obligations. It had the

[5] See 2567th meeting, footnote 5.

[6] See *Yearbook ... 1992*, vol. II (Part Two), p. 23, para. 151; see also the third report on State responsibility of the Special Rapporteur, Mr. Arangio-Ruiz (*Yearbook ... 1991*, vol. II (Part One), pp. 12-13, document A/CN.4/440 and Add.1), chap. I, sect. F.

option of performing them, but was not inclined to do so, since such performance was not reciprocated. It was possible, when reading article 30 bis in conjunction with article 31 (Force majeure) as proposed in the second report, to see in article 30 bis a special case of force majeure. But, in such a situation, force majeure would actually be the act of the other party and that was why the idea of linking force majeure to the situation covered in article 30 bis seemed strange. The article should accordingly be given a separate place, but the measures for which it provided must not be construed as constituting a subcategory of force majeure. He had no objection to the adoption of article 30 bis with a small editorial correction: the phrase "by another State", which might be interpreted as meaning "by a third State", should be replaced by the phrase "by the State towards which the obligation is owed" or some similar wording.

44. Mr. CRAWFORD (Special Rapporteur) said he agreed with Mr. Simma that the *exceptio* could not be seen as a particular example of force majeure, although, in certain factual situations, the distinction between them might be difficult to draw. The idea underlying the *exceptio* was that, when two parties were bound to perform an obligation and one party did not perform, the other party was not bound to perform, without prejudice to its right to call on the other side to perform. The question involved was a performance issue, not a question of termination or suspension of a treaty within the meaning of article 60 of the 1969 Vienna Convention. The real problem was whether the *exceptio* was sufficiently reflected in the rules relating to countermeasures. He did not believe the Commission had ever considered the *exceptio* in the framework of chapter V. It had been considered exclusively in the context of countermeasures under part two, which was why the issue was still open in the context of chapter V. He was not certain that the rules and restrictions contained in part two in relation to countermeasures were appropriate for situations of non-performance of synallagmatic obligations. The *exceptio* should be adopted, but as narrowly as possible, as specifically articulated in article 80 of the United Nations Convention on Contracts for the International Sale of Goods. It was important to clarify that there had to be a clear and direct causal link between the performance of an obligation by one party and the performance of the parallel obligation by the other party. The matter was not covered by the law of treaties, which excluded all issues of performance.

45. Mr. SIMMA said that it would be dangerous to codify a rule covering both obligations under customary law and general principles under international treaties. Codifying a rule such as the one contained in article 30 bis would give States the opportunity not to perform a synallagmatic obligation without having to go through the carefully drafted limitations on countermeasures, by reacting "tit for tat" without any formalities. Furthermore, article 30 bis was drafted in a form strongly suggestive of force majeure, in which the principle *exceptio inadimplenti non est adimplendum* was hardly recognizable.

46. Mr. GOCO said that, in the framework of a reciprocal obligation, when one party committed a breach and the other party also did so, they were *in pari delicto*. There was an analogy between that concept and the concept of non-performance due to prior non-performance: both parties were guilty.

47. Mr. CRAWFORD (Special Rapporteur) said he was not convinced that the broad formulation of the *exceptio*, as found for example in the UNIDROIT Principles of International Commercial Contracts,[7] was necessary or desirable, having regard to the scope of countermeasures. In the narrower version as expressed in article 80 of the United Nations Convention on Contracts for the International Sale of Goods, the limitations on countermeasures contained in part two ought not to apply. The principle involved would be an automatic principle applying in the context of performance. Concerns about the breadth of the principle of the *exceptio* had led him to adopt a narrow formulation.

48. Mr. GAJA said that, in its current usage, the maxim *exceptio inadimplenti non est adimplendum* had a much broader meaning than that used by the Special Rapporteur. It was understandable that, if one of the parties to a treaty did not fulfil its obligation, then the other did not intend to fulfil its own obligation under that treaty. It concerned countermeasures that did not need to be treated separately in the draft. Article 30 bis seemed more likely to refer to a different hypothesis, that of the impossibility for a State to act in conformity with its obligation because of a breach of the obligation by another State. But there might be other circumstances preventing a State from performing its obligation, even without a breach of an obligation by the other State. The first State would not be reacting to a wrongful act. For example, if State A concluded an agreement with State B to finance a marble statue, but did not promise to furnish the marble and then placed an embargo on its marble exports, it was not committing a wrongful act, but was nevertheless preventing State B from fulfilling its own obligation. That example did not correspond to either force majeure or countermeasures and could be taken into consideration in the draft articles.

49. Mr. PAMBOU-TCHIVOUNDA said that the terms used in article 30 bis were too imprecise. In the French version, it would be preferable to speak of *l'impossibilité* for a State to comply with its obligation rather than its *incapacité* to do so. The expression *par un autre État* at the end of the article gave the impression that a third State was involved, whereas the context was a bilateral one. Moreover, impossibility in that situation was much more in keeping with force majeure (unforeseen external event) than with the concept of countermeasures. For those reasons, article 30 bis might be eliminated and the issue it covered might be taken up, if necessary, in the commentary, which should be reserved for article 31.

50. Mr. CRAWFORD (Special Rapporteur) said he did not believe that the situation was exactly one of impossibility. In prisoner-of-war exchanges, for example, it was perfectly clear that, if one party did not release its prisoners, the other party did not have to do so either, and that was not a matter of countermeasures. Neither would it be a case of impossibility, as the State concerned could perfectly well release its prisoners, but it was not in its interest to do so unilaterally. Similarly, in the case of the dual

[7] See 2587th meeting, footnote 19.

funding of an institution by two States, the fact that one State ceased to contribute did not prevent the other from continuing to finance the institution unilaterally. Those cases had nothing to do with countermeasures, and the conditions as now stated in part two did not apply.

51. Mr. BROWNLIE said that he regarded article 30 bis, as drafted, as reflecting a special department of impossibility, apart from force majeure. The Special Rapporteur might find his way more easily if he did not attempt to include the *exceptio inadimplenti non est adimplendum* and various related problems in article 30 bis or perhaps considered another category for them. The difficulty lay in the fact that the other category, explained at length in chapter I, section C, of the second report, led to the difficult area of contract law and contractual fault, about which common lawyers had written a great deal, although the concept was not confined to common law systems.

52. Mr. ROSENSTOCK said that he endorsed Mr. Brownlie's views, but noted that the example in question was a case of frustration of the purpose of a contract rather than impossibility, whereas article 30 bis spoke of impossibility. On the other hand, he did understand concern about frustration being given as a reason, in addition to other reasons, for termination or non-fulfilment of an obligation. Once it was acknowledged that frustration of the purpose rather than impossibility was involved, he wondered whether that could be formulated in a way that was not excessively open ended.

53. Mr. HAFNER said he shared the Special Rapporteur's view that article 30 bis was completely unrelated to article 60 of the 1969 Vienna Convention and found the reasons given by the Special Rapporteur in the second report rather convincing. In that respect, countermeasures, as understood by the Special Rapporteur in article 30 bis, were very different from the purpose of the rule contained in article 47 (Countermeasures by an injured State) of part two. He did not share Mr. Simma's view that a rule was a primary rule simply because it was contained in an article of the Vienna Convention on Diplomatic Relations, as treaties contained a fairly large number of secondary rules. If article 47 of the Vienna Convention on Diplomatic Relations was in conformity with customary law, it was part of customary law and, insofar as it reflected the idea of the *exceptio*, that idea might also be regarded as part of customary law. Unlike Mr. Simma, therefore, he did not believe that the *exceptio inadimplenti non est adimplendum* was restricted to contractual obligations.

54. He appreciated the Special Rapporteur taking up the question of the *exceptio*, which surfaced from time to time in legal textbooks and, in practice, was cited by States more often than might be thought, in particular in the field of international economic law.

55. The first question which arose was the scope of the *exceptio* rule; in his view, the Special Rapporteur had refrained from taking up the Riphagen definition,[8] mentioned in paragraph 322 of the second report, for the reasons given in paragraph 329. The problem of the escalation of the conflict (action-reaction) raised by too broad a definition could be overcome by reference to the principle of proportionality, as had been the case with the United Nations monitoring of ceasefire agreements, referred to in paragraph 328. Nevertheless, the risk remained that a State party to a dispute might misuse a broad definition of the *exceptio,* hence the Commission's only choice, if it wished to include such a principle, would be to subject it to very strict limitations. The Special Rapporteur had endeavoured to do so by restricting the possibility of using the *exceptio* rule to cases where the original act of a State prevented another State from acting in a lawful manner. That formulation came very close to the *exceptio* of impossibility dealt with in article 31, but he shared the Special Rapporteur's view that there were differences between the two, that not all the conditions spelled out in article 31 were applicable to article 30 bis and that article 30 bis should therefore be included in the draft. He also believed that the "clean hands" doctrine was not yet part of general international law and should not be included in the draft, regardless of the result of the Commission's discussion when it took up the question of diplomatic protection.

56. Secondly, the question arose as to where the provision on the *exceptio* should be inserted in the draft articles and, more particularly, how it related to the provisions on countermeasures. The point had been discussed at length and Mr. Pellet was right that the expression "countermeasures" was in a sense new and that it was up to the Commission to define it if it wanted to use it. In its ordinary meaning, the expression covered the hypothesis envisaged in the original (broad) version of article 30 bis, but then it would be necessary once again to make provision for quite a few of the restrictions in chapter III of part two of the draft articles on countermeasures. There would still be a risk of misuse. On the other hand, if the Commission confined itself to the current restrictive wording of article 30 bis as proposed by the Special Rapporteur, there would be no need to make its application subject to the restrictions set out in part two; that would simplify the situation and he therefore proposed that the current text of article 30 bis be used as a starting point for discussion in the Drafting Committee, which should take account of the various problems of formulation referred to by a number of speakers.

57. Mr. SIMMA pointed out to Mr. Hafner that his argument had been that the Commission had considered that the fact that the receiving State applied any of the provisions of the Convention restrictively because of a restrictive application of that provision to its mission in the sending State did not constitute discrimination, provided that it did not go beyond the framework set for the said rule because, otherwise, that would come within the scope of reprisals, i.e. countermeasures, which had nothing to do with the *exceptio inadimplenti*. Hence, the Commission had not thought that the article in question reflected the notion of exception.

58. Mr. Sreenivasa RAO said that he was surprised to hear Mr. Hafner and, before him, Mr. Crawford maintain that the "clean hands" rule was not a real principle of international law. The Commission's purpose was to pro-

[8] See the fifth report of the Special Rapporteur, *Yearbook ... 1984*, vol. II (Part One), p. 3, document A/CN.4/380, art. 8.

mote the progressive development of international law and its codification and it must be consistent and logical in the performance of that task. The clean hands rule was a basic principle of equity and justice; it might seem abstract to some and went well beyond the hypothesis under consideration, but that was no reason to discard it.

59. Mr. HAFNER said that, as he understood it, Mr. Simma himself had regarded article 47 of the Vienna Convention on Diplomatic Relations as a sort of exception, which could therefore be considered to be part of customary law. In any case, the clean hands rule had nothing to do with the *exceptio inadimplenti* applied to the law of State responsibility; it would be possible to revert to that idea in the discussion on diplomatic protection, but, even in that area, the principle was not generally recognized.

60. Mr. SIMMA, speaking on a point of order, said that the "clean hands" doctrine must be discussed under chapter V, whereas the current debate was on the *exceptio inadimplenti non est adimplendum*, and, in that connection, he would like to know whether the various issues which had been raised by the Special Rapporteur in chapter I, section C.4, but which could not be directly included in a draft article, such as the "clean hands" doctrine, might nevertheless be considered.

61. Mr. CRAWFORD (Special Rapporteur) said that at the end of the discussion on article 35, the Commission should be able to consider any other issues associated with the second report, of which the clean hands rule was one. In that connection, he pointed out to Mr. Sreenivasa Rao that he had merely said that the clean hands rule did not belong in chapter V.

62. Mr. LUKASHUK noted that article 30 bis raised a number of issues. First, it addressed the question of supervening impossibility of performance, which was the subject of article 61 of the 1969 Vienna Convention, although the interpretation given was different. Secondly, it referred to another special case of impossibility, namely, impossibility due to a wrongful act committed by another State—and that was a reference to article 60 of the Convention on termination of a treaty as a consequence of its breach; that idea was contained in the very title of article 30 bis: "Non-compliance caused by prior non-compliance by another State". It was clear that such cases occurred and the Special Rapporteur had described them, but they were not so common in practice as to require a separate article. Consequently, it was not wise to include the very special case of impossibility of performance in the draft; instead, the point should be discussed in the commentary on that part of the draft.

63. Mr. PELLET said that he wondered whether article 30 bis did not duplicate article 60 of the 1969 Vienna Convention. Mr. Simma had rightly pointed out that the *exceptio inadimpleti contractus* had been applied only to treaty relations and, as a general principle of law, he thought that, technically, it was in fact confined thereto. But, treaty obligations and their violation had their place in the draft articles on State responsibility, on the same basis as the violation of non-treaty obligations, such as the customary rule and the unilateral commitments of States. That made him think that article 60 of the Convention and the problem with which the Special Rapporteur was dealing were on two different levels. However, he had the feeling that article 30 bis only appeared to fill a gap because the law of State responsibility already covered every hypothesis which might occur.

64. For example, taking the example of marble cited by Mr. Gaja and notwithstanding Mr. Hafner's opinion, it seemed to him that a hypothesis of force majeure was involved, as defined in article 31: all the conditions were met and it did in fact involve impossibility of performance owing to a situation which had nothing to do with the State that reacted; if that was not an example of force majeure, then it was an example of a countermeasure. The Special Rapporteur had argued that, in the case covered by article 30 bis, it was assumed that the response was linked to the obligation breached, but, in his view, that was a variation on a simple countermeasure, unless the Commission had a very special and restricted understanding of countermeasures. Since it had been decided earlier, following a suggestion by the Special Rapporteur, that article 30 should be left in square brackets and reverted to in the context of the consideration of the articles of part two on the scope and consequences of countermeasures, he found it very difficult to refer article 30 bis to the Drafting Committee, thereby separating it from the study of countermeasures. He thus proposed that article 30 bis should also be placed in square brackets, without approval or rejection, and that it should be determined during the consideration of countermeasures whether or not it was a separate case.

65. Coming back to the function of countermeasures and referring to a comment by Mr. Pambou-Tchivounda, according to whom it could not be both a circumstance precluding wrongfulness and a way of determining responsibility, he drew attention to a difficult terminological problem. Strictly speaking, the circumstance precluding wrongfulness was not the countermeasure, but the internationally wrongful act, and the countermeasure thus in fact served as a means of determining responsibility. Hence, the circumstance was the existence of the internationally wrongful act and the Special Rapporteur might explore that avenue and report his findings during the discussion on countermeasures.

66. Unlike Mr. Hafner, he had no doubt about the fact that the "clean hands" doctrine was a principle of positive international law. However, that principle came under the determination of responsibility because it had an impact on the scope of compensation and could even lead to the elimination of compensation; the wrongfulness nevertheless persisted and it thus was not a circumstance precluding wrongfulness. The Special Rapporteur had been right not to deal with the subject, which should, however, be taken up during the consideration of part two of the draft articles, given its importance for the scope of compensation and the existence of the obligation to compensate.

*The meeting rose at 1.05 p.m.*

# 2591st MEETING

*Tuesday, 22 June 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 30 bis (*concluded*)

1. Mr. CRAWFORD (Special Rapporteur) said Mr. Pellet had suggested (2590th meeting) that, because there was a functional connection between the maxim *exceptio inadimplenti non est adimplendum* and countermeasures, even though they were conceptually distinct, the Commission should wait until it was in a position to formulate the provisions on countermeasures before deciding whether the *exceptio* should be included in chapter V. He was perfectly ready to accept that suggestion, but suspected that conditions would be attached to the invocation of countermeasures that would not be appropriate for the *exceptio*. It would nevertheless be useful to hear the views of members on the substance of his proposal in article 30 bis (Non-compliance caused by prior non-compliance by another State).

2. In his second report on State responsibility (A/CN.4/498 and Add.1-4), a reference should have been included to the *Klöckner* v. *Cameroon* case decided by ICSID and involving an investment contract governed by the law of Cameroon, which for that purpose had been treated as being exactly the same as French law. The ICSID tribunal had applied the *exceptio* in favour of the respondent State. Citing the *Diversion of Waters from the Meuse* case, it had referred to the fact that the *exceptio* was recognized in international law, but had gone on to treat the *exceptio* as grounds for the termination of the obligation. The decision had subsequently been annulled by a review tribunal, which had indicated that its understanding of the *exceptio* was that it was the basis, not for the termination, but for the suspension, of an obligation. The point on which the decision had been annulled had thus been that a circumstance precluding wrongfulness had been involved, not grounds for the termination of a contract.

3. Mr. YAMADA said he found the proposed new article 30 bis interesting in that it was thought-provoking. He had always understood the Roman law maxim of *exceptio* as providing legitimate cause for objection for a party that was sued and as not questioning the legality of non-performance of an obligation by that party. Aside from that theoretical point, there were certain practical matters. What were the cases that were covered by article 30 bis alone among the articles in chapter V?

4. The proposed article was based on the narrow form of the *exceptio*, the key phrases in the text being "if the State has been prevented from acting in conformity with the obligation" and "as a direct result of a prior breach of the same or a related international obligation by another State". In other words, there must be a direct causal link between the non-performance of an obligation by a State and the preceding non-performance of an obligation by another State. That would seem to indicate that the article's scope was limited to the case of physical impossibility. Mr. Gaja (2590th meeting) had provided the example of a contract for the supply of Italian marble from State A to State B, which was to produce a sculpture from that marble. Failure to supply the marble resulted in the inability of State B to make a sculpture. That was a typical and clear example of physical impossibility: State B had no choice in the matter, and the case was undoubtedly covered by article 30 bis. However, could it not also be covered by force majeure?

5. He asked whether article 30 bis could be interpreted as applying more broadly? Suppose there was an agreement whereby State A undertook to supply a fixed amount of a commodity to State B on condition that State B made a 30 per cent down payment in advance of delivery. State B failed to make the down payment before the specified date, and State A withheld the delivery. For State A, the down payment constituted an essential component of the deal and there was a direct causal link between down payment and delivery. It was not clear from the language of article 30 bis whether that case was covered or not. It was not a case of physical impossibility, however. State A could choose to proceed with the delivery: there was no physical constraint to prevent it from doing so. If State A opted to withhold delivery, its non-performance of the obligation could be covered by article 30 bis. It could, however, also be covered by countermeasures. In his conclusions as to chapter V, in chapter I, section C, of the second report, in note 3 to article 30 bis, the Special Rapporteur cited the examples of ceasefire agreements or agreements for exchange of prisoners of war. It would thus appear that his intention was to exclude that kind of situation from the application of article 30 bis.

6. He had understood the Special Rapporteur to say that the article would apply with respect to non-performance not only of treaty obligations but also of obligations under customary law. Was there indeed a customary obligation that had a direct causal link with an obligation of another State? He could not think of one.

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

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

[3] Ibid.

7. Another question was what actually were the cases which could not be covered either by force majeure or by countermeasures? Again, he had the impression that there were none. He was therefore inclined to take a negative view of article 30 bis. Nevertheless, a definitive answer could not be given at the current time because the final texts concerning force majeure and countermeasures had not yet been elaborated. He had no objection, therefore, to referring article 30 bis to the Drafting Committee in the hope that the Drafting Committee would examine the need for the article in the context of other relevant circumstances precluding wrongfulness.

8. Mr. ECONOMIDES said the title of article 30 bis was repetitive and not in harmony with the content. Clearly, drafting work was needed. The situations covered fell somewhere between countermeasures and force majeure. If a State had the ability to act but did not fulfil its obligation to react to a prior wrongful act, then a case of countermeasures was involved. If, on the other hand, the State failed to react because of an inability, a physical or material impossibility, then the situation was one of force majeure. The Special Rapporteur appeared to be leaning towards the second instance, that of force majeure, since the draft article spoke, at least in the French version, of the State's inability to fulfil its obligation. It stemmed not, however, from irresistible force nor from an external event, but rather from the wrongful conduct of another State.

9. What was the identity of the other State, according to article 30 bis? If one accepted the premise of *exceptio inadimpleti contractus*, it was always a co-contracting State. The *exceptio* had always applied in the past in contractual and synallagmatic relations between two States, in other words, in bilateral relations. But article 30 bis did not specify whether the other State was the other party in a contractual relationship, a State in a non-contractual relationship, or even a third State, and that had to be made clear. He could agree to the inclusion in the draft of a restrictive provision covering cases when a State could not fulfil an obligation because of a prior internationally wrongful act by the other State in an essentially contractual, and notably bilateral, relationship.

10. He wished to comment on draft articles 29 ter (Self-defence) and 30 (Countermeasures in respect of an internationally wrongful act), even though they had already been referred to the Drafting Committee. Article 29 ter was essential and he merely wondered whether the word "lawful" in paragraph 1 was necessary, inasmuch as any measure of self-defence taken in conformity with the Charter of the United Nations was by definition lawful. The obligations of total restraint mentioned in paragraph 2 so strongly resembled the obligations essential for the protection of the international community referred to in article 19 (International crimes and international delicts), paragraph 2, that they should be considered jointly. Drafting work was required on paragraph 2.

11. As to article 30, he fully shared the Special Rapporteur's view that its consideration should be correlated with that of the articles in part two dealing with countermeasures.

12. Mr. KABATSI said he wished to expand on the question raised by Mr. Yamada as to what cases were covered by article 30 bis but not by other articles in chapter V. Should the non-performance of an obligation by a second State be deemed as not wrongful, or as a case in which the obligation did not arise in the first place, since the obligation for the second State arose only after the first State had fully complied with its own obligation? Depending on the answer, there might be no need for article 30 bis.

13. Mr. GOCO said that he, too, was not sure there was a need for article 30 bis. With regard to Mr. Yamada's example, he was not certain whether an element of wrongfulness was involved, because there was malicious intent on the part of the second State owing to the fact that the first State had not complied with its obligation. It was not a matter of physical impossibility: there had been prior non-compliance, and the second State had reacted by deciding that it, too, would not comply with its obligations. In such cases, under the law of contracts, the obligations incumbent on the two parties were extinguished because both parties had failed to perform their obligations.

14. Mr. CRAWFORD (Special Rapporteur), summing up the discussion, said the first issue that had arisen was the proper scope of the codified law of treaties in relation to the draft. The Commission, when elaborating the draft that was to become the 1969 Vienna Convention, could very easily have included a section on treaty performance, as opposed to treaty application, which had been covered. The Convention stated that treaties were binding, but did not deal with situations in which a State, without suspending or terminating a treaty's operation, was nonetheless excused from performance owing to particular circumstances. The Commission, under the former Special Rapporteur, Sir Humphrey Waldock, had deliberately decided not to deal with treaty performance, in the interests of limiting the Convention sufficiently to enable it to be completed.[4] The debate at the previous meeting, and the *Klöckner* v. *Cameroon* case, made it clear that the *exceptio* was not concerned with the termination or suspension of treaty obligations but rather with excuses for non-performance.

15. The second issue emerging from the discussion was the so-called domestic analogy. The same basic idea was recognized in many national systems and there was good authority for concluding that it was also recognized in international law. While some members of the Commission had doubts, others were of the opinion that a narrow formulation of the *exceptio* could find its place in the draft.

16. The *exceptio* might be acknowledged to be a distinct case from force majeure, and because it was taken not with a view to forcing the other State to comply, but in response to a prior unlawful act, it might thus be deemed to fall within the same field as countermeasures. However, he thought it slightly odd to speak of a breach by another State as being a case of force majeure. One normally thought of force majeure as something that came from outside a relationship between two States, but the

[4] See *Yearbook ... 1966*, vol. II, p. 177, document A/6309/Rev.1, part II, para. 31.

*exceptio* was part of the relationship between two States. In any event, the *exceptio* was connected to both force majeure and countermeasures, and that was why he had incorporated the relevant provision between articles 30 and 31 (Force majeure). If a narrow formulation such as that in the case concerning the *Factory at Chorzów* was adopted, one limited expressly to synallagmatic obligations, as he believed it must be, the question was whether the article was really necessary at all. The answer would depend on the outcome of the work on countermeasures.

17. Mr. Kabatsi had asked whether, in those cases where the *exceptio* did apply, one could say that an obligation had actually arisen. It would be perfectly possible to deal with many cases of the *exceptio* by incorporating in the synallagmatic relationship a suspensive condition not requiring the performance of an obligation by one party until the other party had fulfilled its obligation. That would mean applying a strict distinction among primary obligations, something that was not done anywhere else in chapter V. The fact was that many doctrines on the secondary law of obligations had emerged from an initial inference from the circumstances: that was precisely how the *exceptio* had come to be recognized in French law. Mature systems of law recognized such doctrines as having their own limitations and as not being merely interpretative presumptions. That had happened in the law of treaties, and there was no reason why that should not happen in the law of responsibility.

18. Mr. Yamada had raised what was perhaps the most interesting question of all, namely, what was meant by one non-performance of an obligation being caused by another non-performance? The underlying idea came up in the law of watercourses, exchanges of prisoners of war, and many other fields. It was not that something was impossible to perform, but that the natural consequence of an earlier non-performance was that a party was not obliged to perform an obligation. On the other hand, it was not obliged to terminate the relationship either. Its best interests might be to keep on with the relationship to keep open the possibility of performance for the future.

19. His own view, in agreement with the comments by Mr. Economides, was that it was appropriate, in the light of the legal tradition in the field, to retain the idea of the *exceptio* as distinct from force majeure and countermeasures, but that its precise formulation and indeed the need for it in the draft could be properly assessed only when the articles on countermeasures had been formulated.

20. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to retain article 30 bis pending a final decision on the provisions on countermeasures.

*It was so agreed.*

ARTICLES 31 TO 33

21. Mr. GAJA said he supported the Special Rapporteur's proposal to align paragraph 2 of article 31 with article 61 of the 1969 Vienna Convention. As also pointed out by ICJ in the *Gabčíkovo-Nagymaros Project* case, there might be cases in which impossibility excused non-compliance but did allow termination or suspension of the treaty. He was also basically in agreement with the proposed text for article 33 (State of necessity) and, in particular, welcomed the reference to "the protection of some common or general interest" in paragraph 1 (*b*) (ii). He wondered, however, whether it would not be desirable to indicate that necessity could be invoked not only as a factor in balancing the interests of the offending State with those of the victim State but also as between the interests of the offending State and those of the international community as a whole, for example in the case of a ship polluting the high seas by dumping dangerous chemicals.

22. Mr. KATEKA welcomed the deletion of the subjective requirement of knowledge of wrongfulness from article 31 as reformulated by the Special Rapporteur, but remarked that it might have been even better to use the language in the *Rainbow Warrior* arbitration,[5] namely, absolute and material impossibility. The reference to the assumption of risk in paragraph 2 (*b*) of article 31 gave rise to some doubts. In view of the technological progress in the modern world, some States might assume obligations whose magnitude they did not fully understand. It might be wiser to leave the point to the discretion of the judge in each particular case. As for article 32 (Distress), it should be confined essentially to situations in which human life was at stake, widening the scope of application of the notion of distress could open up possibilities of abuse. The use of the word "extreme" in paragraph 1 of the version adopted on first reading had a certain psychological value and should not be dispensed with.

23. Lastly, with reference to article 33, he drew attention to the danger of abusive reliance on the doctrine of humanitarian intervention. It was difficult to reconcile oneself to the contention that genuine humanitarian action could be excused because it did not violate a peremptory norm. If a European State dispatched paratroopers to an African country, allegedly to protect its nationals, and in the process killed some of that country's nationals, could it invoke necessity on humanitarian grounds? Recalling a case which had arisen in nineteenth century English domestic law, when a shipwrecked seaman had killed and eaten a teenage boy and had then pleaded his own necessity to survive, he said that the whole issue of necessity on humanitarian grounds should be treated with the greatest circumspection.

24. Mr. ROSENSTOCK asked the Special Rapporteur whether the issue of non-wrongful conduct by the affected State, ruled out as having no relevance to article 31, did not perhaps have a certain relevance in the context of article 35 (Consequences of invoking a circumstance precluding wrongfulness) as proposed by the Special Rapporteur. The total elimination of that aspect of the problem from the draft would not, in his view, be necessary or prudent. Referring to article 32, he said that he generally agreed with the Special Rapporteur but wondered if restricting it to persons with whom the State had a special relationship was fully in accord with contemporary thinking on human rights law. While recognizing the danger of elusive criteria, he was concerned at the apparent rigour of the criteria applied to the notion of distress. As for article 33, expressly incorporating the precaution-

[5] See 2567th meeting, footnote 7.

ary principle would create too many problems. He agreed that the criterion was not, in all cases, the individual interest of the complaining State but the general interest protected by the obligation, and he therefore accepted the wording proposed by the Special Rapporteur.

25. Mr. HE said that he agreed that article 31 should be retained with the changes proposed by the Special Rapporteur. In particular, he welcomed the proposed change in the title of the article. In paragraph 1, a clearer definition of force majeure would perhaps be helpful. A distinction should be drawn between actual or material impossibility of performance, on the one hand, and increased difficulty of performance, on the other. In the *Rainbow Warrior* arbitration, the arbitral tribunal had drawn such a distinction by stating that the excuse of force majeure was not of relevance because the test of its applicability was that of absolute and material impossibility and because a circumstance which rendered performance more difficult did not constitute force majeure. In addition to the definition provided in paragraph 1, a more extensive explanation could perhaps be provided in the commentary to the article.

26. Mr. ELARABY said that the concept of state of necessity enunciated in article 33, called for the utmost precision. He agreed with other members that every effort should be made to exclude certain matters from the domain covered by the plea of necessity. The Special Rapporteur's position on the question of humanitarian intervention abroad—a position with which he had no fundamental disagreement—was clearly stated in paragraph 287 of the second report. In that connection, he drew attention to paragraph (25) of the commentary to article 33[6] as adopted on first reading, which claimed that there was only one known case in which a State had invoked a state of necessity to justify violation of the territory of a foreign State, namely, the dispatch of parachutists to the Congo by the Belgian Government in 1960. In actual fact, the plea of a state of necessity had also been used in 1956 by the United Kingdom of Great Britain and Northern Ireland and France when informing the Egyptian Government that, failing Egypt's immediate withdrawal from the Suez Canal, they would have to occupy the Canal because of the necessity to safeguard navigation.[7] As to article 31, he agreed with the Special Rapporteur's proposal to delete the subjective element of knowledge of wrongfulness from paragraph 1.

27. Mr. LUKASHUK said that, in principle, all three articles were well founded and deserved to be referred to the Drafting Committee. However, in order to avoid conveying the impression that the proposed provisions diverged substantially from the rule set forth in article 61 of the 1969 Vienna Convention, he would recommend making it clear in the commentary that force majeure, distress and necessity did not suspend international obligations but could merely, in the cases specified, preclude the wrongfulness of failure to comply with those obligations. In connection with article 33, he noted with regret that paragraph 2 did not include any reference to the Charter of the United Nations. It was to be hoped that the Special Rapporteur and the Drafting Committee would further improve the drafting of the article so as to set stricter limits on the possibility of invoking necessity to include so-called humanitarian intervention.

28. Mr. CRAWFORD (Special Rapporteur) said that the question of humanitarian intervention was governed by substantive international law and above all by the Charter of the United Nations. It was not governed by article 33 of the draft and hence there was no difficulty attaching to the exclusion of peremptory norms from the scope of that article. It would not be useful for the Commission to take a position on the extremely controversial issue of humanitarian intervention involving the use of force. While he had largely followed the text of article 33 as adopted on first reading, he did not—as would be seen from the second report—entirely subscribe to the commentary to that article.

29. Mr. YAMADA said that he supported the Special Rapporteur's proposal to delete the reference to "fortuitous event" from the title of article 31 and to omit the reference in paragraph 1 to the State's knowing that its conduct was not in conformity with the obligation. Noting that the Special Rapporteur retained the term "unforeseen external event", as well as the term "irresistible force", in paragraph 1, he drew attention to paragraph (5) of, and footnote 616 to the commentary to, article 31[8] as adopted on first reading, in the light of which the reference to "unforeseen external event" appeared unnecessary. The point could, however, be left for the Drafting Committee to decide.

30. Mr. PELLET said that he had no love for the circumstances precluding wrongfulness and was pleased to note that judges were rarely impressed by arguments used as an excuse for failing to carry out international obligations. While he had no major objection to the texts being proposed, he rather regretted the Special Rapporteur's tendency to tone down the articles adopted on first reading. For example, the deletion of the reminder, in paragraph 2 of article 31, of the fact that the State must not have contributed to the occurrence of the situation of material impossibility, the removal of the word "extreme" from article 32, and the insertion of the word "materially" in article 33, paragraph 2 (*c*), were all instances of that tendency. On the other hand, with reference to article 32, he had never understood why a situation of distress should be confined to cases of saving human life. After all, some people held honour or moral integrity to be more precious. Again, he had always had some doubt as to the need for three articles. With reference to article 31, the Special Rapporteur had said in connection with article 30 bis that force majeure arose outside the sphere of contractual relations. Nothing seemed to justify the Special Rapporteur's affirmation concerning the *exceptio non adimpleti contractus*. The irresistible force or the event should be external, but external to the act of the State and not to the contractual relationship between the States concerned. If that was true, it should be stated, at least in the commentary, to paragraph 1 of article 31.

[6] See 2587th meeting, footnote 12.

[7] See 2576th meeting, footnote 7; see also *Yearbook of the United Nations, 1956* (United Nations publication, Sales No. 1957.I.1), pp. 19 et seq. and 53 et seq.; and ibid., *1957* (United Nations publication, Sales No. 1958.I.1), pp. 44 et seq.

[8] See 2587th meeting, footnote 8.

31. Article 33 was very restrictively worded, which was extremely important, and it was gratifying that paragraph 2 (*a*) specifically said that necessity could not be invoked if the international obligation arose from a peremptory norm of general international law; that precaution was essential. But why was it included in article 33 and not elsewhere? Why could *jus cogens* be violated in cases of distress, force majeure and, possibly, consent, but not in the present instance? At issue was a fundamental principle which should be extended to all the circumstances precluding wrongfulness. That was certainly the case with consent: if the article was reintroduced, it was difficult to imagine that a State could consent to the violation of a peremptory norm of general international law. That might also simplify the problems posed by article 29 ter, paragraph 2: a *jus cogens* norm could not be violated on the pretext of self-defence. There was no doubt about countermeasures, but the peremptory norm exception was already covered by article 50 (Prohibited countermeasures) of chapter III of part two. It was also obvious for article 30 bis, on the *exceptio non adimpleti contractus*. He therefore suggested extending the exception of the peremptory norm of general international law to all circumstances precluding wrongfulness. It would be easier to do so by means of a separate article than to add it to each provision.

32. He was not always in agreement with the drafting, which was sometimes rather loose and weak. It was important to limit to the greatest possible extent the invocation of the circumstances in question.

33. Mr. ECONOMIDES said that the wording of article 31 needed to be considerably simplified. He was in favour of using the definition adopted on first reading, which had subsumed the new one. He proposed that the two sentences in paragraph 1, should be combined to read:

> "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to the occurrence of an irresistible force or an unforeseen external event beyond the control of the State making it materially impossible to perform the obligation."

The words "in the circumstances" were superfluous. He asked in that context whether, in the French version, the words *d'exécuter l'obligation* (to perform the obligation) meant the same thing as *se conformer à l'obligation*, which was the more common and, to his mind, preferable usage.

34. Paragraph 2 (*a*) contained the term "wrongful", which had been added by the Special Rapporteur. In his opinion, that was very restrictive, unlike the wording in the version adopted on first reading, which had used a better phrase, namely "if the State in question has contributed to the occurrence of the situation of material impossibility". The word "contributed" implied an intentional action. It might be wrongful or not, and it might be at the limit of wrongfulness, but once a State contributed to the situation, it was reasonable and fair for it to bear the consequences. He therefore favoured the version adopted on first reading and proposed deleting the word "wrongful", which greatly restricted the scope of force majeure.

35. Article 31, paragraph 2 (*b*), was a new and interesting idea, but he wondered whether it might not be better reflected in the commentary.

36. As to article 32, the version proposed by the Special Rapporteur substantially weakened the article adopted on first reading by introducing the words "reasonably believed", which greatly broadened the scope of distress. The article adopted on first reading was rigid and restrictive, whereas the proposed new version was more flexible. Perhaps a compromise wording could be found, for example by saying that the State "did not reasonably have any other way than the one chosen". His remarks concerning article 31, paragraph 2 (*a*), applied equally to article 32, paragraph 2 (*a*).

37. It was questionable whether article 33 was necessary. The article was such a delicate balancing act that he did not see how it could be implemented in reality. So many things had to be proved that he thought it could perhaps be deleted. The Special Rapporteur had formulated the provision very cautiously. He agreed with Mr. Kateka, Mr. Elaraby and the Special Rapporteur, who had all spoken of the need to avoid any abuse which might be based on the provision. The Special Rapporteur had himself pointed out that article 33 did not cover humanitarian intervention. The commentaries to the contrary contained in the earlier drafts should be deleted from the new commentary in order to avoid any misunderstanding.

38. Again, article 33 spoke of "necessity" rather than "state of necessity", so as to avoid repeating "State", but the Commission had grown accustomed to the words "state of necessity", and he was not certain that "necessity" alone was equally good. The Drafting Committee should give careful consideration to that matter.

39. With regard to paragraph 1 (*b*) (i), he failed to see why the interest of a State towards which the obligation existed had to be essential, whereas the interest of the international community did not. The interest of the international community also had to be essential. Lastly, like Mr. Pellet, he had misgivings about the word "materially", in paragraph 2 (*c*).

40. Mr. PELLET said that he fully agreed with Mr. Economides' objection to the word "wrongful" and his proposal to restore "contributed to the occurrence of the situation of material impossibility" in articles 31 and 32, as well as his remark on "materially". However, he saw no reason, in article 33, to create a balance between essential interests of States and of the international community. States had particular interests, and he did not follow the logic for drawing such a parallel, which would be purely artificial.

41. Mr. LUKASHUK said that from the outset he had had doubts about article 33 and the commentary. Perhaps it would be wiser to do without it.

42. The CHAIRMAN suggested that a decision on articles 31 to 33 should be suspended until the next meeting because a number of members wished to speak on the subject at that time.

*It was so agreed.*

ARTICLES 34 bis AND 35

43. Mr. LUKASHUK said that he had no objections of principle to articles 34 bis (Procedure for invoking a circumstance precluding wrongfulness) and 35 (Consequences of invoking a circumstance precluding wrongfulness) but paragraph 2 of article 34 bis, which pertained to a completely different section, namely dispute settlement, should be deleted.

44. Article 35, subparagraph (*b*), contemplated compensation for any actual harm, something that raised the question of the legal basis for such compensation. Compensation for acts which were not wrongful was involved and, the thing at issue was either responsibility for harm as a result of acts which were not wrongful or obligations stemming from the causing of harm. Neither concept had a sufficiently promising basis in international law for the moment, and an appropriate explanation should be provided in the commentary.

45. Mr. CRAWFORD (Special Rapporteur) said that article 35, subparagraph (*b*), was appropriate because, although a State might invoke distress or necessity as a reason for its action, there was no reason for it to require the other, innocent State to bear the costs. For example, if a ship in navigational distress put into a port and caused some oil pollution of the port as a result of leakage, it was appropriate for the State concerned to pay for the clean-up costs. It was not a wrongful act that was involved, but a condition for invocation of a circumstance precluding wrongfulness. That was within the scope of the draft articles and it did not raise the general question of liability for lawful acts, a subject which fell outside the subject of the draft.

46. He did not object to the deletion of article 34 bis, paragraph 2, provided it was understood that the Commission must revert to the question of dispute settlement later on. The paragraph was simply there *pro memoria*.

47. Mr. ECONOMIDES said that the Special Rapporteur had rightly spoken of innocent States in cases of force majeure, distress and a state of necessity. Could there not also be cases of innocent third States which incurred damage arising out of self-defence or countermeasures? In those cases, it was important to distinguish between two situations: that of the wrongdoing State which had committed the initial wrongful act and for which no compensation was conceivable, and that of innocent third States which also incurred damage as in a state of necessity or distress. He wondered whether, for the same reason, that eventuality should not also be covered.

48. Mr. SIMMA, referring to article 35 and cases in which compensation should or should not be envisaged, said it seemed to him that there were two criteria. One was apparent in paragraph 338 of the second report, which said that the United Kingdom welcomed article 35 as applied to cases where the circumstance precluding wrongfulness operated as an excuse rather than a justification. That would be one way of looking at the question of compensation. The other criterion was mentioned in paragraph 342, where it was stressed that if the conduct of the "target" State had been wrongful, there was no basis to compensate it, whereas a State must pay compensation for infringing the rights and interests of an innocent State. First, how did those two criteria interrelate, and secondly, what was the difference between an act which was justified, an act which was excused and an act for which responsibility did not exist?

49. Mr. HAFNER said he agreed with the Special Rapporteur that article 34 bis should merely serve as a reminder. As such, he thought it could probably be covered in the commentary. Paragraph 2 could certainly be omitted and he wondered what purpose was served by the words "should" and "as soon as possible" in paragraph 1, which considerably weakened its impact.

50. He endorsed Mr. Economides' comment regarding article 35 and asked why it was necessary to confine the question of financial compensation to articles 32 and 33. In the case of force majeure, it was not inconceivable that other States might suffer more than the State invoking it. Should not some form of compensation be envisaged to equalize the burden among the States concerned? For that reason, he slightly preferred the wording of article 35 as adopted on first reading.

51. Mr. PELLET said it was gratifying to hear that the Special Rapporteur was willing to delete article 34 bis, paragraph 2, to which he was strongly opposed, not because of its content but because it took the existence of a future part three for granted and prejudged the form of the future articles—only a convention could provide for binding means of settlement of disputes.

52. He was not so sure that article 34 bis, paragraph 1, was merely a reminder. He saw it as a sound contribution to the progressive development of international law that would help to curb the enthusiasm of States for the invocation of circumstances precluding wrongfulness in order to shirk unwelcome obligations. Accordingly, he greatly favoured paragraph 1, but the wording should be improved. It would be better to say "as soon as possible after the occurrence of the circumstance" instead of "as soon as possible after it has notice of the circumstance". Moreover, the commentary should explain the *ratio legis* of the provision in greater detail.

53. He had the impression that article 35 addressed an issue that belonged in another part of the draft, since it concerned implementation. If it was merely a precautionary clause, as in the case of article 35 adopted on first reading, he would be able go along with it, but it should probably be re-examined following the adoption of part two. He was in favour of referring the article to the Drafting Committee on that understanding. The title of the article was misleading because the main consequence of invoking a circumstance precluding wrongfulness was that no compensation was due inasmuch as the normal consequences of a breach of obligation had been ruled out. The article thus dealt with exceptional consequences rather than consequences in general. He was very much in favour of subparagraph (*a*), which dealt with an issue that had been addressed at length in the *Gabčíkovo-Nagymaros Project* case. International obligations should clearly be respected as far as possible.

54. As to subparagraph (*b*), he was inclined to agree with Mr. Hafner and thought it was unwise to cite certain articles and omit others. Moreover, the obligation to pay

financial compensation did not necessarily arise in all circumstances. The subparagraph should be rewritten in more general terms, not confining it to articles 32 and 33 and making it clear that the question of financial compensation depended on the circumstances prevailing in individual cases.

55. With reference to the question put by Mr. Economides, he suggested that the Special Rapporteur should give further thought to the issue of the fate of third States in the cases in question, including perhaps cases of a breach of an obligation *erga omnes*.

56. Mr. ECONOMIDES, referring to article 34 bis, paragraph 1, asked why a State which was defending itself by invoking a circumstance precluding wrongfulness was required to do so before being attacked by another State.

57. Mr. HAFNER said he had described article 34 bis as a reminder because he thought it should be taken up again in the procedural part of the draft articles (part three).

58. Mr. SIMMA argued in favour of keeping article 34 bis in its present place because of the difficulty of including such a provision in part three. It was, in his view, an important and beneficial step in the progressive development of international law. He supported the proposal to delete the reference in article 35 to articles 32 and 33.

59. Mr. PELLET took issue with Mr Economides' reference to an "attack" by another State. The question of "attack" or "defence" did not arise. As States were obliged to respect international law, it was only logical that they should inform other States when they realized that they were unable to perform or failed to respect an obligation. Even Article 51 of the Charter of the United Nations, which recognized the right of self-defence, required States to inform the Security Council immediately of their intention to exercise that right. Article 34 bis, paragraph 1, clearly represented progressive development of the law. It would be interesting to know from the draft commentary whether there were any precedents of States warning their partners of their inability to comply with an obligation.

60. Mr. ROSENSTOCK said he had some doubts about the use of the word "should" in article 34 bis, paragraph 1. Would it apply in all cases or only in circumstances in which such action could contribute to the mitigation of damages? The words "in writing" also suggested a rigour and formality that was out of place. He thought that the point made in the article probably belonged in the commentary.

61. He suggested that article 31 might be of relevance to article 35, subparagraph (*b*), in a situation in which the State had contributed to the situation, albeit not by a wrongful act. It might be prudent to reflect that point in article 35, subparagraph (*b*).

62. Mr. PELLET drew attention to an inconsistency between the French and English versions of article 34 bis, paragraph 1: "should" in English became *doit* in French. He was actually more partial to the French version, which created a clear obligation.

63. Mr. CRAWFORD (Special Rapporteur), summing up the discussion, said he was grateful for all constructive drafting suggestions, many of which could be dealt with by the Drafting Committee. He was also pleased that the new elements in article 34 bis, paragraph 1, and article 35, subparagraph (*a*), had been reasonably well received. The latter innovation was more important because it remedied an omission in the draft articles adopted on first reading which had given rise to confusion, for example where States thought that the invocation of a circumstance precluding wrongfulness nullified the obligation, which was obviously not the case.

64. He had deliberately used the word "should" in article 34 bis, paragraph 1. Although he supported the progressive development of international law that it entailed, he did not wish to give the impression of creating a new obligation to inform. He had envisaged the requirement to inform as a consequence of the situation and not as an independent norm. Naturally, if the requirement could be reinforced while maintaining that distinction, he would be happy to do so. A notification requirement seemed to be essential to the credibility of the circumstances precluding wrongfulness. It was specifically enjoined by the Charter of the United Nations in the case of self-defence. With regard to the words "in writing", the problem with unwritten communications was that they were difficult to prove. The *exceptio* could actually be invoked in court after the event. His impression of State practice was that the invocation of circumstances precluding wrongfulness was taken seriously, for example the invocation in writing of a state of necessity in the *Gabčíkovo-Nagymaros Project* case.

65. Article 34 bis, paragraph 2, did not prejudice the form of the draft articles or the question of dispute settlement, as expressly stated in the note thereto, contained in the conclusions as to chapter V of the draft, in chapter I, section C, of the second report. However, he would be willing to omit it on the understanding that the issue would be addressed in the framework of part three.

66. With regard to Mr. Pellet's suggestion that it should be referred to the Drafting Committee on the understanding that it might need to be re-examined under part three, the problem was that part three had not yet been fully thought out. It had been drafted on the assumption that the draft would take the form of a convention, which was an open question. In any case, it was concerned with the implementation of responsibility and not, or not only, with dispute settlement. It was only after consideration of the important elements of part three to be presented at the next session that the Commission would be able to take a final decision as to where article 34 bis belonged. In the meantime, he agreed with Mr. Simma that the existing placement of article 34 bis was appropriate.

67. He took Mr. Pellet's point that the title of article 35 failed to address the main consequence of invoking a circumstance precluding wrongfulness. The Drafting Committee might wish to consider whether that main circumstance, i.e. the State not being responsible for the incompatible conduct, might be dealt with in that context. To do so might actually solve the problem of ensuring consistency between chapter III of part two and chapter V of part one.

68. He had taken note of the view that it was undesirable to limit article 35, subparagraph (*b*), to articles 32 and 33 and also deferred to the view that the Commission should not attempt to elaborate in detail the content and bases for compensation. Mr. Simma would have preferred more detail but it would be unwise to overload the text and the circumstances that could be envisaged for the allocation of losses among parties raised a whole range of issues that went beyond the scope of the draft articles. The solution was to reword subparagraph (*b*) in general terms, indicating that it might be applicable in certain circumstances to third parties, at least where they were beneficiaries of the obligation in question. In the legal systems with which he was familiar, the courts were usually empowered to adjust the financial consequences of a situation in which obligations were suspended or brought to an end.

69. He suggested that article 34 bis, paragraph 1, and article 35 should be referred to the Drafting Committee, bearing in mind that the question of the placement of article 34 bis might need to be reconsidered in the light of part three.

70. Mr. HAFNER asked why article 35 referred only to the fact of cessation, without any reference to the duty of cessation.

71. Mr. CRAWFORD (Special Rapporteur) said that the main point being made in article 35 was that the obligation subsisted. So long as that was clear, he thought the Drafting Committee could deal with problems such as that raised by Mr. Hafner.

72. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer article 34 bis, paragraph 1, and article 35, with all relevant observations and suggestions, to the Drafting Committee.

*It was so agreed.*

*The meeting rose at 1 p.m.*

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## 2592nd MEETING

*Wednesday, 23 June 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 31 TO 33 (*concluded*)

1. The CHAIRMAN invited the Commission to continue its consideration of articles 31 (Force majeure), 32 (Distress) and 33 (State of necessity).

2. Mr. SIMMA said that he wished to make a joint statement with Mr. Hafner on article 31.

3. The draft articles, as they currently stood, made no reference to due diligence as a standard to be applied in the performance of international law obligations. The question of what was to be expected of States if they wanted to avoid responsibility for a breach of an obligation was still unanswered. In determining that the answer to the question was in the realm of primary rules, the Commission, in its earlier composition, had been refusing to respond to the concerns of the real world of international law. The fact was that the standard of due diligence was taken into consideration by primary rules only in rare cases, but the responsibility of a State that had committed a breach of an international obligation must certainly not be seen as absolute. In the codification of State responsibility, the degree of diligence shown by a State must be addressed as a matter of secondary rules in a general and comprehensive way.

4. One way of dealing with the issue would be to require that the element of fault (with intent or by negligence) should be made part of the conditions for the existence of an internationally wrongful act, but that approach was very much on the retreat in the literature. On the other hand, the view that fault was a necessary element of internationally wrongful acts consisting of omissions or, in other words, of violations of obligations of prevention, was still widely held. It appeared that the Commission had been strictly opposed to the introduction of any subjective element into a standard of due diligence. A closer look, however, demonstrated that the exclusion of the subjective element had never been as total as might appear prima facie. For example, in article 11 (conduct of private individuals), paragraph 2,[4] proposed by a former Special Rapporteur, Mr. Roberto Ago, he had allowed for the attribution of acts of private persons to States. Subsequently, he had proposed article 23 (Breach of an international obligation to prevent a given event)[5] which provided for an obligation of prevention. True, references to subjective elements appeared only in the commentary, never in the text of the draft articles, but they certainly

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

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

[3] Ibid.

[4] *Yearbook ... 1972*, vol. II, p. 126, document A/CN.4/264 and Add.1.

[5] *Yearbook ... 1978*, vol. II (Part One), p. 37, document A/CN.4/307 and Add.1 and 2.

went beyond mere references to primary rules. Mr. Ago had introduced the subjective element as a constitutive element, not of the internationally wrongful act, but of circumstances precluding wrongfulness, in the form of a draft article on fortuitous event, which would have exonerated a State from responsibility if it had been impossible for the author of the conduct attributable to the State to realize that its conduct was not in conformity with the international obligation. The effect of that wording had been to shift the burden of proof.

5. At its thirty-first session, in 1979, the Commission had merged that proposal with a separate proposal, also by Mr. Ago, on force majeure, thereby creating the rather monstrous article 31, which had rightly been criticized by the current Special Rapporteur. Having deleted article 11, paragraph 2 (Conduct of persons not acting on behalf of the State), the Commission could now delete article 23 and any reference to fortuitous event in article 31. By so doing, it would deconstruct the edifice built by Mr. Ago and create a situation where the only defence available to a State accused of a breach of international law and trying to argue that it had done everything that could have reasonably been expected of it under the circumstances would be to claim force majeure. But force majeure was particularly unfit to accommodate the case in point, which was essentially a claim of a breach of an obligation of prevention. Duties of prevention were enacted with a specific event in mind, namely, the event to be prevented. If that event occurred, the State must not be able to claim force majeure to justify the non-performance of its obligation because the event could very well have been foreseen. There was clearly a lacuna in the draft articles in that regard. The theory of fault was based on a legitimate concern which was not dispelled by primary rules. The concept of due diligence turned that concern into an objective standard which could and must be applied across the board (except where expressly excluded by saving clauses in a *lex specialis* providing for absolute responsibility).

6. The CHAIRMAN pointed out that due diligence and the subjective element were general concepts that permeated the entire draft. It would be preferable to take them up at the end of consideration of the topic.

7. Mr. HAFNER, continuing Mr. Simma's explanations, said that he had two solutions to propose. The first could be found in the context of chapter III (Breach of an international obligation). Article 16 (Existence of a breach of an international obligation) in its present formulation, as drawn up by the Drafting Committee ("There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of the origin or the character of that obligation"), could be supplemented with a sentence reflecting the following idea: "However, such an act does not constitute a breach of an international obligation if this act occurred despite the application of due diligence".

8. The second solution would consist, in the framework of chapter V (Circumstances precluding wrongfulness), of an addition to article 31 to reflect the following idea: "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act occurred despite the application of due diligence".

9. When choosing between those two solutions, the consequences of the choice must be taken into consideration. Those consequences related in particular to the onus of proof and the object to be proven. According to the first solution, the non-application of due diligence would be a condition for the existence of a breach and the claimant would have to prove that due diligence had not been met, in addition to all the other elements of the breach. According to the second solution, due diligence would be considered a circumstance precluding wrongfulness and the claimant would have to prove only the well-known elements of the breach, it being the duty of the respondent to prove that due diligence had been implied so that no responsibility arose. Hence, the second solution would impose the duty to prove due diligence on the respondent, whereas the first would impose it on the claimant. If the basic principle that a State was presumed to behave lawfully was taken into account, there was no question but that the second solution should take precedence. But a definitive decision did not have to be taken as yet, it was simply a matter of pinpointing the various consequences of the two solutions which should be taken into account.

10. The rule of due diligence was difficult to formulate and had not been precisely defined in diplomatic practice or jurisprudence; hammering out a clear-cut definition which would satisfy everybody was impossible. That was why Mr. Simma and he proposed that the relevant draft article should not contain a definition of due diligence, but only refer to it, as was done in certain judgements, while the commentary should provide an explanation.

11. To corroborate his assertion, he referred to the 1975 terrorist attack on a ministerial meeting of OPEC held in Austria.[6] Austria had rejected any responsibility for the success of the attack, arguing that it had applied due diligence, as proven by the fact that a police officer had been killed and other persons seriously wounded. In such a case, the object and purpose of the duty of protection was to thwart such attacks; they could thus not be considered to be an unforeseen event. It would have been possible to avoid the incident by placing half the Austrian army around the conference premises, but a State could hardly be expected to go to such extremes. That was why article 31 as it stood could not apply and another limit on responsibility, expressed in particular by the rule of due diligence, should be established.

12. Mr. CRAWFORD (Special Rapporteur) said that the issue of force majeure as formulated on first reading and irrespective of the intentions of Mr. Ago was a different matter from the question raised by Mr. Hafner and Mr. Simma. A discussion on due diligence would be entirely relevant, but it would be more appropriate in the context of part two.

13. In practice, force majeure was taken to be distinct from the general principle of fault. An article defining force majeure in its traditional sense and at the same time

[6] See "Chronique des faits internationaux", edited by C. Rousseau, RGDIP (Paris), 3rd series, vol. LXXX (1976), No. 3, pp. 892 et seq.

taking up the issue of fault as a failure to observe due diligence would be seen to have two separate objectives.

14. As the Chairman had suggested, it would be best to complete the consideration of articles 31 to 33.

15. Mr. ADDO said that he did not quite follow the conclusions of Mr. Simma and Mr. Hafner. Were they suggesting that article 31 should be deleted if it was decided that the question of diligence should not be included in it? Taking the example of a State faced with the material impossibility of paying its debt because of an unexpected collapse in the price of its main export commodity, it might be asked what the point would be for it to respect due diligence. What precautions might be taken to prevent such a situation? Would that not be a case of force majeure? How might the very idea of diligence be applied in such a case?

16. Mr. LUKASHUK said that the extremely complicated rules which had been discussed could only have been born in the minds of law professors. Professors' law was not always of great practical utility. In retrospect, that had long been the case with *exceptio inadimplenti non est adimplendum*. Members should perhaps try to achieve greater clarity.

17. Mr. KUSUMA-ATMADJA said that articles 31 to 33 gave rise to complex problems of both form and substance. With regard to force majeure (art. 31), he wondered whether the provisions of article 18 of the United Nations Convention on the Law of the Sea, cited by the Special Rapporteur as embodying the general principle of customary international law according to which force majeure had an exonerating effect, were not contradicted by those of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. For example, if a ship transporting plutonium stopped, invoking force majeure, and seriously polluted its mooring site, should it be freed from responsibility?

18. It was also possible to imagine that the case of force majeure which prevented compliance with an obligation simply resulted from a governmental regulation. What would happen then?

19. Regarding due diligence, a State could respect the principle of precaution, for example, by prohibiting the use of mercury in the production of gold, but, if the ban was ignored by the mining companies, should a State which fulfilled its international environmental protection obligations still be held responsible? The Timor Gap Treaty[7] was a similar example. The question became more complicated if the person who committed the offence was not a State official or civil servant, but the Head of State himself.

20. There were thus many problems and it might be preferable to decide not to deal with them in the draft articles and merely to refer to them in the commentary or even relegate them to a footnote. The Special Rapporteur's desire for perfection and exhaustiveness was praiseworthy, but, as the famous example of Schubert's *Unfinished Symphony* showed, the quality of a work was not necessarily judged by its degree of completion.

21. Mr. KATEKA said that he could very well accept the desire for perfection. To give an illustration, and remaining in the maritime area, he told an anecdote about a landlocked country which felt it necessary to have a navy.

22. Mr. DUGARD said that, regrettably, duress had not been contemplated as a circumstance precluding wrongfulness; he was not sure whether it was covered by the articles on force majeure, distress or even state of necessity. He referred to the situations set out in articles 51 and 52 of the 1969 Vienna Convention: if the representative of the State of Ruritania was coerced by the representative of the State of Utopia to deport all Arcadian nationals in the State of Utopia back to Arcadia, was it a case of force majeure which came under article 31 or a situation of distress (art. 32) in which the State of Ruritania "had no other means ... of saving [the] life ... of persons entrusted to [its] care"? What if the State of Utopia threatened the State of Ruritania with invasion? It was difficult to say because the word "duress" appeared nowhere in the commentary and because there were various forms of duress, ranging from subtle coercion to direct military threat.

23. While not necessarily drawing a parallel with articles 51 and 52 of the 1969 Vienna Convention, the Commission should at least recognize that duress as a circumstance precluding wrongfulness arose in specific cases and should be discussed at some stage. It was interesting to note that duress as a ground for excluding individual criminal responsibility was specifically mentioned in article 31, paragraph 1 (*d*), of the Rome Statute of the International Criminal Court.[8] There was a case for including duress by way of analogy in the draft articles on State responsibility or at least mentioning it in the commentary.

24. Mr. HE, referring to article 33, said that there was a considerable difference between state of necessity, on the one hand, and force majeure (art. 31) or distress (art. 32), on the other. Whereas in the latter cases, the author of the wrongful act had no choice but to act in a certain way, in the former, he was fully aware that he was deliberately acting in a manner not in conformity with international obligations. Recognition of state of necessity as a circumstance precluding wrongfulness might open the door to abuse: state of necessity might be invoked as a justification for annexation, occupation by armed forces, and so forth. It should also be noted that necessity could not be invoked where it was expressly or implicitly excluded by a treaty.

25. As necessity was generally recognized in customary international law as a circumstance precluding the wrongfulness of an act not in conformity with an international obligation, article 33 could not be entirely deleted, but, in order to prevent the above-mentioned abuse, it should be formulated with very strict conditions and limitations on

[7] Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia (Timor Sea, 11 December 1989), *Australian Treaty Series 1991, No. 9* (Canberra, Australian Government Publishing Service, 1995).

[8] See 2575th meeting, footnote 10.

its application. That might be the reason why the text adopted on first reading and the text proposed by the Special Rapporteur both used a negative wording: "A state of necessity may not be invoked by a State ...".

26. Paragraphs 286 and 287 of the second report on State responsibility (A/CN.4/498 and Add.1-4), concerning article 33, dealt with humanitarian intervention. In view of the controversy over that concept, which was not really recognized by international law, the Commission should, as in the past, refrain from taking a position on it when formulating secondary rules of State responsibility. As a matter of fact, it seemed that humanitarian intervention was not really regulated in article 33, but it would nevertheless be better to make that point in the commentary to ensure that state of necessity was not improperly invoked in that field as well.

27. Mr. KAMTO said that the concept of force majeure which was covered in article 31 and was well established in many legal systems and in international law unquestionably belonged in chapter V, but the way in which the Special Rapporteur dealt with it called for a number of comments.

28. Beginning with the title, he said that, although the distinction between force majeure and fortuitous event was not always very clear, article 31 did in fact deal with two different situations, namely, "irresistible force"—which corresponded exactly to the definition of force majeure—and "an unforeseen external event", which was actually a fortuitous event. The fortuitous case fitted perfectly in the classical theory of unforeseeability and the title might therefore read: "Force majeure and unforeseeability". The legal consequences of those two distinct circumstances were the same and that justified treating them jointly.

29. His second comment related to the conditions in which force majeure operated as a circumstance precluding wrongfulness. In the *Rainbow Warrior* case, to which the Special Rapporteur had referred, the Court of Arbitration had set out two such circumstances: absolute impossibility and material impossibility. The Special Rapporteur had retained only the latter. He would have liked to see an explanation in the commentary on why the Special Rapporteur had discarded absolute impossibility. Furthermore, the conditions contained in paragraph 260 on the ignorance of a State's legal obligations, far from helping understand the subject, complicated matters. All in all, it would be better to revert to the definition of force majeure contained in article 31 as adopted on first reading, possibly combining the two sentences proposed by the Special Rapporteur, as suggested by Mr. Economides.

30. Turning to article 32, he said that the Special Rapporteur's comments were very clear and that he fully endorsed his narrow conception of distress, which should only apply to ships and aircraft, and on no account should it be possible to invoke it to justify a humanitarian intervention.

31. On the other hand, the new wording proposed by the Special Rapporteur gave rise to a number of problems because it changed the spirit of the article by shifting the emphasis from the material aspect (the author of the wrongful act "had no other means") to the psychological aspect (the author "reasonably believed" that there was no other way). It did not seem to be a good idea to introduce that subjective aspect into article 32 and he suggested the following formulation for the Drafting Committee's consideration: "... if, reasonably, the author of the act in question had no other means of saving his life or that of persons entrusted to his care because of the situation of distress in which he found himself". In other words, the State which was the author of the wrongful act should not be judged on its intentions, but on its acts.

32. For the same reasons, on the face of it, he was in favour of the deletion of article 33 because, once again, the state of necessity was a notion subject to a subjective assessment criterion. However, as noted by the various special rapporteurs, it was a recognized ground for exoneration under customary international law. If it could not be discarded, it should at least be very rigorously delimited and, accordingly, it might be possible to remove the element of uncertainty which the words "for the protection of some common [...] interest" had introduced in paragraph 1 (*b*) (ii), proposed by the Special Rapporteur in his second report, a phrase which might well lead to dangerous abuse. In sum, regardless of the eventual fate of article 33, paragraph 1 (*b*) should be reformulated more rigorously.

33. Mr. GOCO, referring to the distinction between force majeure and fortuitous event, pointed out that the two situations actually related to the same law of obligations and contracts. The new wording of article 31 proposed by the Special Rapporteur seemed to be particularly well put and welcome and should be retained.

34. Mr. CRAWFORD (Special Rapporteur), summing up the debate on articles 31 to 33, noted that most of the suggestions made by members of the Commission were essentially matters for the Drafting Committee.

35. With regard to article 31, he agreed with Mr. Kamto's suggestion that paragraphs 1 and 2 should be joined together and wondered whether the same could not be done with article 32. He also agreed that the introduction of the qualifying adjective "absolute" did not seem necessary, notwithstanding the use of that word by the arbitral tribunal in the *Rainbow Warrior* case.

36. For the reasons which he had stated when introducing the draft and which most members had endorsed, he was opposed to the reintroduction of the concept of "fortuitous event" in either the title or the body of the article. Not all legal systems regarded the occurrence of a fortuitous event as a circumstance precluding wrongfulness. The French system did so, but in an article of the Civil Code combining fortuitous event with force majeure. At the international level, the term "force majeure" had achieved very substantial currency—admittedly, in most cases, in a commercial context. In article 31, it was sufficient by itself because it covered both "an irresistible force" and "an unforeseen external event". It should be recalled that not all unforeseen external events which made it in some sense impossible to do something precluded responsibility for fault. For example, a massive drop in the price of a commodity could not be considered an "irresistible force" even if it was an unforeseen external event and even if it could be invoked under the head-

ing of "fundamental change of circumstances". The definition of force majeure given in article 31 seemed adequate.

37. Article 31, paragraph 2 (*a*), proposed in his second report was better than the wording adopted on first reading, which had spoken of the State having "contributed to the occurrence of the situation of material impossibility". In English at least, the verb "to contribute" did not have the narrower meaning which it had in French and to which Mr. Economides had referred (2591st meeting), placing emphasis on the element of intention. For example, it could be said in English that someone who attended the Pope's arrival at Cracow together with some hundreds of thousands of others "contributed" to the event. His own problem with the English expression, especially in the light of the judgment of ICJ in the *Gabčíkovo-Nagymaros Project* case, which concerned the relationship between "material impossibility" as a ground for terminating a treaty and "force majeure" as a circumstance precluding unlawfulness, was that article 31 was more narrowly confined than article 61 of the 1969 Vienna Convention yet the Court had suggested it should be wider.

38. Some members had proposed that paragraph 2 (*b*) should be deleted, arguing that what it said was obvious. Yet the qualification it contained was important, especially as the Commission wanted to give a narrow definition to force majeure. In all legal traditions which recognized force majeure, it was impossible to plead it having assumed the risk of a specific event. For example, an insurer who offered cover against the risk of earthquakes certainly could not claim the occurrence of a real earthquake to evade responsibility. Similarly, the builder of a dam which collapsed was considered to have assumed that risk. The only question that remained to be settled was therefore whether the reference to risk should be included in the article itself or in the commentary.

39. Turning to article 32, he recalled that Mr. Economides had expressed doubts (ibid.) about the use of the words "reasonably believed" and had suggested that it should be replaced by the words "had no other reasonable way". Mr. Economides would agree that, when an aircraft was in distress, there was no time to carry out tests so as to establish that the risk of a crash was real. Situations of that kind called for a certain latitude within the limits of which immediate measures had to be taken. The idea could no doubt be expressed differently and the Drafting Committee would certainly benefit from Mr. Economides' suggestion.

40. He did not think that it would be wise to expand the concept of distress to include persons other than those entrusted to the care of the author of the act in question, as stated in article 32. If other persons were involved, the situation was no longer one of compulsion, but, rather, one of moral choice, with which article 32 did not deal.

41. As to the problem of "duress" raised by Mr. Dugard, it would appear on consideration that all the circumstances which justified the termination of a treaty according to the 1969 Vienna Convention were already covered in chapter V of the draft articles. The problem of coercion had already been discussed in connection with chapter IV, when it had emerged that most cases of coercion could be reduced to situations of force majeure, dealt with in article 31.

42. With regard to article 33, there seemed to be a clear consensus in favour of providing the narrowest possible definition of necessity in terms of precluding wrongfulness and also in favour of maintaining the article adopted on first reading. As Mr. Gaja had suggested, it might be desirable to create a parallelism between article 33 and the article on force majeure (art. 31), where the definition was indeed the narrowest possible.

43. The Commission also seemed to take the view that article 33 did not cover the use of force because it excluded the violation of a peremptory norm of general international law from circumstances precluding wrongfulness. In any case, the use of force was governed by the Charter of the United Nations and the primary rules associated with it. That would have to be stated with absolute clarity in the commentary. Similarly, the article could hardly be used as the vehicle for a debate on the question of humanitarian intervention involving use of force in the territory of another State.

44. He hoped for guidance from the Drafting Committee on whether a general reference to peremptory norms of international law should be included in chapter V or even, perhaps, in the draft as a whole, as Mr. Pellet had suggested. For his own part, he was not entirely convinced that to speak of responsibility being precluded in the event of a violation of a peremptory rule of law would be a good idea within the framework of chapter V. As had been pointed out, the question was relevant to that of consent as well as that of necessity, but he could not see how such a situation could really arise in connection with distress. In his view, it would be better to prepare a more general provision and try to find an appropriate place for it in the draft. He was therefore in favour of maintaining article 33, paragraph 2, in the form adopted on first reading.

45. Article 33 had survived the debate materially unscathed, no doubt because ICJ had approved it almost word for word in its judgment in the *Gabčikovo-Nagymaros Project* case. Those who were wary of incorporating it in the draft should recall that the same concerns had been expressed in connection with "fundamental change of circumstances" in the context of the 1969 Vienna Convention. Yet those concerns had proved unfounded; the *rebus sic stantibus* argument had rarely been invoked and had been rejected in most cases. Lastly, the discussion had shown that to include a clause on the precautionary principle in article 33 would be difficult. The Commission could undoubtedly mention the principle in the commentary and he would agree with that solution.

46. In conclusion, he proposed that articles 31 to 33 should be referred to the Drafting Committee.

47. Mr. AL-BAHARNA said that he had wanted to make a comment on the use of the word "contribute" in articles 31 and 32, but, in line with a suggestion by the Chairman, he would submit it to the Drafting Committee.

48. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer articles 31 to 33 to the Drafting Committee.

*It was so agreed.*

49. Mr. CRAWFORD (Special Rapporteur), referring to the continuation of work on the topic, said he hoped that the Commission would find time to convene a working group to work through his new commentaries, which would be issued shortly and which he believed to be very important. He would also submit a new introduction to the draft as a whole, as well as a new introduction to part one. The recommendations of such a working group would be of great assistance in the preparation of commentaries to articles yet to come.

50. Two points remained to be settled in connection with his second report. The first concerned countermeasures, a subject which some thought went beyond the framework of the topic. He would do his best to prepare a working paper on the subject. The second was that of the "clean hands" doctrine. Those members who had spoken on that subject seemed to hold convergent views; no one had wanted the doctrine to be mentioned in chapter V of part one. That was to be welcomed, since the "clean hands" argument, in any of its versions, could not be advanced as an excuse for unlawfulness. The doctrine could, perhaps, be analysed in part three in connection with the loss of the right to invoke State responsibility.

51. The CHAIRMAN recalled that the problem of due diligence had been raised by Mr. Hafner and Mr. Simma.

52. Mr. CRAWFORD (Special Rapporteur) said that Sir Humphrey Waldock, as Special Rapporteur for succession in respect of treaties, had had to face the problem of the scope of the text and to settle thorny issues such as that of objective regimes and that of excuses for non-performance of a treaty, but had succeeded in circumscribing the subject by limiting it to the treaty as an instrument. The decision had enabled the Commission to bring its work to fruition, although other solutions would also have been possible. There was thus a link with a part of the problem dealt with in chapter V, that of the relationship between the law of treaties as codified and the law of State responsibility.

53. So far as the latter topic was concerned, opinions varied as to the scope of the draft articles. At the twenty-second session of the Commission, the then Special Rapporteur, Mr. Ago, had proposed the distinction between primary and secondary rules,[9] a distinction which was certainly useful but, to some extent, arbitrary and difficult to draw and which Mr. Ago himself had transgressed in relation to some of the articles. But he had been right, as the proposal by Mr. Hafner and Mr. Simma demonstrated: it was completely impossible to codify the law of primary obligations. Primary obligations in international law which gave rise to State responsibility could be formulated in a thousand ways, whereas there were general excuses such as force majeure the equivalent for which could be derived from the sources of international law and, to a significant extent, from comparative law. But it was impossible to find any equivalent in relation to primary obligations and, in particular, in the definition of the concept of fault.

54. He did not like the terminology which distinguished between objective and subjective responsibility, equivocal terms which could create more difficulties than they resolved, and had made no use of that terminology in his commentary. Certain primary rules created an absolute responsibility, in the sense that the State had undertaken something in the nature of a guarantee or a warranty in relation to a given situation. Others gave rise to responsibility based on the idea of fault. But the precise content of those primary obligations varied from one case to another and could not be encapsulated in any formula whatever, whether due diligence or anything else. He agreed that it was interesting to discuss the precise nature of due diligence and that it would be good to solve that problem, but, first of all, that could not be done in the context of the draft articles without spending a further five years on the topic and, secondly, even if the problem were resolved, that would in effect be based on the presumption that any primary rule, or a certain class of primary rules, contained a qualification of due diligence. Would it be for the claimant State to demonstrate that there had been a lack of diligence or for the respondent State to demonstrate that it had shown due diligence? The draft articles did not set out to settle the burden of proof problem.

55. The example quoted in the commentary showed the wisdom of referring those issues to the primary rules. To do so was not only sensible in principle, but also necessary in practice if the draft was to be completed before the end of the current quinquennium. The Commission's position on the draft articles should be the defensible one it had maintained since its fifteenth session, in 1963. That position would have to be explained in the commentary, which, as currently drafted, quoted Ago to that effect.

56. Generally speaking, the question whether an international obligation had been breached, leaving aside circumstances precluding wrongfulness, was not one that could be resolved by any formula. The only solution was to interpret the obligation if it was a textual one, or to construe it if it was a customary law obligation, but in any case to analyse the facts of the case. That important task was for courts to perform and it could not be performed by reference to the secondary rules. The Commission was not called upon to reformulate obligations already undertaken by States; it could only establish the framework within which those obligations, whatever they might be, would be applied—and that was already a great deal.

57. Like Mr. Hafner and Mr. Simma, he would like to know in what precisely due diligence consisted. In common law, too, it was necessary to define in what negligence consisted; sometimes it had to be invoked by the claimant, while in other cases it was the respondent who had to demonstrate that he was not guilty of it. In common law, there could not be negligence in the abstract and the same thing could be said of due diligence in international law. Due diligence depended not only on the circumstances, but also on the specific context of the rule concerned. What diligence was involved, for example, in the case of the attack against OPEC representatives that Mr. Hafner had mentioned? For those reasons, while sympathizing with Mr. Hafner's and Mr. Simma's call, he would invite the members of the Commission not to accept it.

58. The main point remained that the Commission had to finish its text for the sake of its own credibility. It could explain its concerns, develop the concept of fault—

[9] *Yearbook ... 1970*, vol. II, p. 179, document A/CN.4/233, para. 11.

which, by the way, should not be equated with lack of due diligence—and say in the commentary that lack of diligence could take many forms, but it could not formulate a primary rule, especially in chapter V and certainly not in article 31.

59. Mr. SIMMA said that, in his view, the comparison between the Fitzmaurice approach and the Waldock approach was not particularly relevant because, while it was true that the latter had decided to jettison a number of issues, such as that of objective regimes, the outcome had been the 1969 Vienna Convention that contained an article 73 which stipulated that the provisions of the Convention were not to prejudge any questions that had been set aside. Instead of completely ignoring the issue of due diligence by relegating it to the area of primary obligations, the codification of which—it should be borne in mind—did not form part of the Commission's mandate, the Commission could draw inspiration from that approach by incorporating a similar provision, thereby responding to the concern expressed by Mr. Hafner and himself.

60. However, he persisted in believing that due diligence formed part of the secondary rules and was a principle that pervaded the field of State responsibility. Many writers took the view, at least in cases of omission, that the due diligence standard would have to apply across the board in the area of State responsibility. Moreover, no real argument had been advanced during the current discussion in support of the assertion that due diligence formed part of the primary rules.

61. Mr. HAFNER said he agreed with the Special Rapporteur that it was important for the Commission to complete the draft articles on State responsibility by the end of the quinquennium. At the same time, he joined Mr. Simma in stressing that due diligence belonged to the category of secondary rules—at least according to Hart's definition[10] of the concept. Moreover, the issue of due diligence came up more and more frequently in practice and would have to be discussed.

62. As some members were opposed to the idea of mentioning it in the commentary to article 31, something that was understandable inasmuch as the present version of the article was far removed from the original version drafted by Mr. Ago, which could have accommodated to some extent a reference to the issue of due diligence, he wondered where—in the commentary to which article—it could be covered and whether it could be addressed exhaustively in that context. He therefore suggested that the Commission should decide not to address State responsibility in its entirety, but to confine itself to the most important and most urgent aspects, thereby indicating that it did not rule out the possibility that the regime of State responsibility also encompassed other rules.

63. Mr. ECONOMIDES said he shared the Special Rapporteur's view that the obligation of due diligence belonged essentially, if not exclusively, among the primary rules and that a great number of provisions existed that imposed such an obligation. According to article 16, there was a breach of an international obligation by a State when an act of that State was not in conformity with what was required of it by that obligation. All eventualities were covered by that provision and reference should therefore be made to the primary rule to establish what form the State's conduct should take.

64. The basic hypothesis underlying the rules laid down in chapter V was an act by a State that was not in conformity with an international obligation. But, if the obligation of due diligence had been respected, the State had not breached an international obligation. There was thus a clear-cut difference between the question of responsibility itself and the question of wrongfulness. For responsibility to exist, there should have been a breach of an international obligation.

65. It would certainly be possible to include additional elements on the obligation of due diligence in the commentary to article 16, as proposed by Mr. Hafner and Mr. Simma, but it would take far too long to devote a separate article to the idea, not to mention that it would be almost impossible to define due diligence and to differentiate it from other obligations of vigilance that were more flexible or more rigid.

66. Mr. GAJA said that, while he understood some of the concerns that had led to the proposal to mention due diligence, he shared the Special Rapporteur's view that it would be difficult to formulate a general rule to the effect that the absence of due diligence was a necessary requirement for the existence of a wrongful act. The same was true even if the rule was limited to omissions. Notwithstanding Mr. Hafner's argument based on the case of OPEC ministers being taken hostage by terrorists in Vienna, he did not see the need to justify Austria's conduct by a reference to due diligence in the commentary to article 31, as the case was already covered by the fortuitous event hypothesis. One could contemplate, as Mr. Hafner had suggested, mentioning due diligence in the commentary to another article or else, as proposed by Mr. Simma, referring to it in a "without prejudice to" provision.

67. Mr. PELLET said he thought it could be argued that due diligence formed part of the secondary rules if they were defined, according to Hart, as norms relating to the formation, production and application of the law. However, he did not think that that argument warranted the inclusion of the body of rules applicable to due diligence in the draft articles on State responsibility because the obligation of vigilance existed on a different plane, in his view, from the draft articles.

68. In response to the question of what State responsibility was, the Commission had eventually replied, in line with Ago's position, that the term covered all consequences of the breach of primary rules of international law. Unlike Mr. Hafner and Mr. Simma, he was convinced that due diligence did not relate to such consequences, but arose at an earlier stage. It could be argued that, while many international obligations entailed an obligation of due diligence, many other principles (the principle of good faith, the duty to act reasonably, the prohibition of abuse of right) operated in the same way. In all such cases, conditions were attached to the validity of conduct pursu-

[10] H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford, Clarendon Press, 1994), in particular, pp. 79-99.

ant to the primary rule which, if they were not fulfilled, gave rise to State responsibility. If the Special Rapporteur agreed to get involved in the consideration of due diligence, he should be asked to carry out a similar study of the other rules, which, in the final analysis, formed the body of secondary rules governing the application of international law.

69. Mr. GOCO noted that due diligence had introduced a new theme that the Special Rapporteur had not contemplated in his report, even though the concept was familiar to jurists. He feared it was not a wise approach, since it would impose an additional burden on a State that invoked a circumstance precluding wrongfulness to relieve itself of responsibility, that of demonstrating that it had exercised due diligence.

70. Mr. SIMMA said that his concerns could be adequately met by either of the two options contemplated: either a reference to the principle of diligence in the commentary to an article or an additional article stating that, in the Commission's view, the subject came within an area that it did not propose to codify, without prejudice, however, to its relevance to State responsibility.

71. Mr. CRAWFORD (Special Rapporteur) said that the discussion had been useful in that it had brought to light a real problem of differentiation between primary and secondary rules. The draft articles would obviously have to include a provision comparable to article 73 of the 1969 Vienna Convention, i.e. a "without prejudice to" clause that would clarify the scope of the draft articles. That would meet the concerns that had prompted Mr. Hafner and Mr. Simma to raise a question of substance which had actually been dealt with already in the commentaries to certain articles, especially articles 23 and 26 (Moment and duration of the breach of an international obligation to prevent a given event), the main elements of which should be included in the commentary to article 16. All of the foregoing should bring it home to States that the Commission had been unable to exhaust the topic of State responsibility even after working on it for 44 years.

*The meeting rose at 1 p.m.*

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## 2593rd MEETING

*Thursday, 24 June 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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### Unilateral acts of States (A/CN.4/496, sect. C, A/CN.4/500 and Add.1,[1] A/CN.4/L.588)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his second report on unilateral acts of States (A/CN.4/500 and Add.1).

2. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that, in terms of both structure and spirit, the 1969 Vienna Convention was the appropriate frame of reference for the Commission's present work. That did not mean the rules applicable to treaty acts laid down in the Convention were applicable mutatis mutandis to unilateral acts. If that were so, there would be no need to regulate the functioning of unilateral acts, which were to be understood as autonomous or independent acts with their own distinctive characteristics and were to be distinguished from unilateral acts which fell within the scope of treaties and for which specific operational rules could be formulated.

3. There were important differences between treaty acts and unilateral acts. The former were based on an agreement (a joint expression of will) involving two or more subjects of international law, while the latter were based on an expression of will—whether individual or collective—with a view to creating a new legal relationship with another State or States or with subjects of international law that had not participated in the formulation or elaboration of the act.

4. While a treaty act was the product of negotiations in which States coordinated their will to enter into a commitment, the elaboration, or rather the formulation, of a unilateral act was based on the sole participation of a State or several States, which incurred an obligation towards another State that had not participated in its elaboration. It was therefore a heteronormative act.

5. To determine the specific character of unilateral acts and justify the formulation of specific rules, possibly based on different criteria from those applicable to treaty acts, it should be borne in mind that a State usually formulated a unilateral act when it could not or did not wish to negotiate a treaty act, that is to say when, for political reasons, it did not wish to enter into negotiations. He would consider in due course whether, for example, unilateral declarations containing negative security guarantees in the context of disarmament negotiations, guarantees formulated outside the context of bilateral or multilateral negotiations, could be classed as legal unilateral acts. For

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

the time being, he would simply note that nuclear-weapon States preferred not to negotiate with non-nuclear-weapon States on certain undertakings that they considered adequate although in reality they were not. The addressees—the non-nuclear-weapon States—did not participate in the negotiations for the formulation of the act.

6. It followed that a different approach was required in elaborating rules to govern the operation of unilateral legal acts. In particular, they should be restrictive, particularly as regards the expression of consent, the interpretation and the effects of such acts. Considerable caution should also be exercised in view of the need to take full account of political realities. The Commission's work could only be successful if it was undertaken in a spirit of steadfast political realism. It would be unwise to draft purely academic articles without reflecting the views of States, even where they were not fully consonant with the criteria underlying the Commission's draft. Political realism was vital. The Commission's work might suffer if it engaged in a process of codification that was divorced from reality, that is to say from the will of States. While it had every right to champion its own criteria, it should not overstep the boundaries set by the wishes of States, which would probably prefer rules that did not unduly restrict their political and legal freedom of action in the international field.

7. State representatives in the Sixth Committee had referred to acts that should be excluded from the study and commented on the components of the definition. The first favourable point to be noted was that the existence of a specific category of unilateral acts of States had been recognized. In international relations, States usually acted, in both the political and legal field, through the formulation of unilateral acts. Some were unequivocally political; others were easily identifiable as belonging in the legal field. Still others were ambiguous and would require careful study to determine in which category they belonged.

8. In the case of legal acts, some were designed solely to produce internal legal effects and could be ignored. Even where the State's intention was otherwise, such acts could not produce international legal effects unless the addressee State gave its consent. While a State was entitled to formulate acts in order to incur international legal obligations, it was a well-established principle of international law that a State could not impose obligations on other States or subjects of international law without their consent.

9. Other unilateral legal acts could produce international effects but not qualify as autonomous. They could easily be placed in the treaty category as acts related to a pre-existing norm, whether of customary, treaty or even unilateral origin.

10. A common feature of such acts was their formal unilateral character. They could be formulated by a State, in which case they were unilateral legal acts of individual origin, or they could be formulated by two or more States, in which case they would be of collective or joint origin. The latter, in turn, presented significant variations, since collective acts might be based on a single instrument, while joint acts would be formulated through separate acts but of similar purport. The important point in all cases, one that constituted a first criterion for identifying the acts with which the Commission was concerned, was that their elaboration was unilateral, which did not prevent them from having a bilateral effect, that is to say where there was a possibility of the relationship created in a unilateral way becoming bilateral when the addressee acquired a right and exercised it. Some writers had rightly said that all acts were bilateral because the obligation was ultimately accompanied by a right and a bilateral relationship was forged. However, the unilateral nature of the act was not based on that synallagmatic criterion; it depended on the coming into existence of the act at the time of its formulation.

11. The unilateral character of an act was thus closely bound up with its genesis which occurred when one or more States formulated a unilateral act and incurred unilateral obligations, with no need, in order for effects to be produced—for their genesis to be completed by the subsequent acceptance or behaviour of the addressee State. That concept corresponded in large measure to what had been called, in the first report on unilateral acts of States,[2] the autonomy of the obligation assumed by the State. It was confirmed not only by a large body of legal opinion but also by ICJ, especially in its judgments in the *Nuclear Tests* cases.

12. In approaching the question of autonomy, a distinction had to be drawn between the legal or formal act and the norm it contained, and, within the norm, between the obligations incurred and the rights acquired as a counterpart to the obligations. A unilateral act thus existed when it was formally unilateral, when it did not depend on a pre-existing act (first form of autonomy) and when the obligation incurred was independent of its acceptance by another State (second form of autonomy).

13. The Commission had attempted at its fiftieth session to distinguish the act from the norm and, within the norm, to identify the obligation and give it an autonomous character in relation to the genesis of the act. It was also important to distinguish between the formal act and the material act, since it would then be possible to distinguish the operation whereby the norm was created from the actual norm itself. It followed that the formal act, as a result of which the norm—particularly the obligation—came into being, was the declaration.

14. In treaty law, the treaty was the instrument most frequently used by States to create legal norms. Treaties were regulated, of course, by the 1969 Vienna Convention, although there could be other norms of different origin produced by legal acts or operations unrelated to treaties.

15. In the law governing unilateral acts, particularly strictly unilateral, autonomous and independent or separately existing acts, the mechanism that was generally used to create legal norms and that could be used, more specifically, to incur unilateral obligations was the declaration. Not everyone in the Sixth Committee or in the Commission concurred with that assessment. Some felt that the use of the term "declaration" to identify a legal act would be restrictive inasmuch as other unilateral acts could be left outside the scope of the present study or

[2] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486.

regulatory provisions. But that need not be the case, because the declaration as a formal act was unique, while material acts, that is to say the content of such acts, could be diverse. For example, a waiver, a protest, a recognition or a promise was an act with its own separate characteristics, which would make the establishment of rules governing all such acts a complex task. It should be noted, however, that consideration of the material act would be important when the rules governing its effects were elaborated. Rules that were consistent with each of those acts would probably need to be formulated.

16. For the time being, the Commission should focus on the declaration as a formal act creating legal norms. The rules applicable to a declaration, as a formal act whereby a State waived a right or a claim, recognized a situation, made a protest or promised to act in a particular way, could be homogeneous, but the rules governing the effects would have to correspond to the category of the material act—a waiver, a recognition, a protest or a promise.

17. The Sixth Committee had raised important questions about the relationship between unilateral acts and acts pertaining to international responsibility, international organization, estoppel, reservations and interpretative declarations.

18. In the case of international responsibility, two different categories of unilateral acts needed to be distinguished: one that could be autonomous and would be the primary act, and another that could not be autonomous, whereby a State would fail to fulfil the requirement of the obligation contained in the former. The Special Rapporteur on State responsibility, Mr. James Crawford, had referred in one of the draft articles in his second report (A/CN.4/498 and Add.1-4) to the inconsistency of the conduct of a State with the requirements of an obligation incurred by that State, which could entail the international responsibility of the State with the ensuing legal consequences. He had included customary norms, treaty norms and others which were to be understood primarily as norms—or rather obligations—of unilateral origin. Acts by a State that failed to fulfil a previously incurred unilateral obligation thus formed the basis for the State's international responsibility. Such acts were or might be autonomous unilateral acts.

19. A State could formulate a unilateral act that was in breach of, or inconsistent with, a previously incurred unilateral obligation. That secondary act constituted the basis of international responsibility. But it was not autonomous in the same way as the primary act, despite being unilateral in formal terms, since it related to a pre-existing obligation. It did not occur autonomously because it was indissociable from a pre-existing norm in the absence of which the proposed effect could not ensue as a generator of international responsibility. As a result, it did not, in his opinion, fall within the scope of the Commission's study.

20. Acts pertaining to international organizations were also closely related to unilateral acts but were to be excluded from the study for the time being, because they fell outside the Commission's mandate and would be difficult to cover along with acts of States. But a distinction had to be drawn between the elaboration of the act and its effects, that is to say acts elaborated by organizations and those elaborated by States and addressed to an international organization. In his view, there were some State acts addressed to international organizations as subjects of international law capable of acquiring international rights that could not be excluded. Whether he would later attempt to formulate rules governing such acts would depend on how the study evolved.

21. Acts relating to estoppel were also an important issue. Although they could be classed as unilateral acts in formal terms, they did not of themselves produce effects. They depended on the reaction of other States and the damage caused by a State's primary act. There was certainly a close connection between the two. A State could carry out or formulate a unilateral act that could trigger the invocation of estoppel by another State that felt it was affected. Yet it was a different kind of act because, unlike a non-treaty-based promise, a waiver, a protest or a recognition, it did not of itself produce effects, that is to say it did not come into existence solely through its formulation but depended on the reaction of the other State and the damage it caused, conditions that were viewed as a prerequisite for the invocation of estoppel in a proceeding.

22. A final issue was the relationship between unilateral acts and reservations and interpretative declarations. Again, there were two separate questions to be addressed: the unilateral character of the act whereby a reservation or interpretative declaration was formulated, and whether the type of unilateral act with which the Commission was concerned could give rise to reservations or interpretative declarations, a question that would be taken up at the fifty-second session.

23. The act whereby a reservation or interpretative declaration was formulated was plainly a non-independent unilateral act by virtue of its relationship with a pre-existing act. It was therefore covered by existing rules, as reflected in the 1969 Vienna Convention.

24. The draft articles proposed in his second report read:

*Article 1. Scope of the present draft articles*

**The present draft articles apply to unilateral legal acts formulated by States which have international effects.**

*Article 2. Unilateral legal acts of States*

**For the purposes of the present draft articles, unilateral legal act [declaration] means an unequivocal, autonomous expression of will, formulated publicly by one or more States in relation to one or more other States, the international community as a whole or an international organization, with the intention of acquiring international legal obligations.**

*Article 3. Capacity of States*

**Every State possesses capacity to formulate unilateral legal acts.**

*Article 4. Representatives of a State for the purpose of formulating unilateral acts*

**1. Heads of State, heads of Government and ministers for foreign affairs are considered as representatives of the State for the purpose of formulating unilateral acts on its behalf.**

**2. A person is also considered as representing a State for the purpose of formulating unilateral acts on its behalf if it appears**

**from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes.**

**3. Heads of diplomatic missions to the accrediting State and the representatives accredited by that State to an international conference or to an international organization or one of its organs are also considered as representatives of the State in relation to the jurisdiction of that conference, organization or organ.**

***Article 5. Subsequent confirmation of a unilateral act formulated without authorization***

**A unilateral act formulated by a person who cannot be considered under article 4 as authorized to represent a State for that purpose and to engage it at the international level is without legal effect unless expressly confirmed by that State.**

***Article 6. Expression of consent***

**The consent of a State to acquire an obligation by formulating a unilateral act is expressed by its representative when making an unvitiated declaration on behalf of the State with the intention of engaging it at the international level and assuming obligations for that State in relation to one or more other subjects of international law.**

***Article 7. Invalidity of unilateral acts***

**A State may invoke the invalidity of a unilateral act:**

**(*a*) If the expression of the State's consent to formulate the act was based on an error of fact or a situation which was assumed by that State to exist at the time when the act was formulated and formed an essential basis of its consent to be bound by the act. The foregoing shall not apply if the State contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error;**

**(*b*) If a State has been induced to formulate an act by the fraudulent conduct of another State;**

**(*c*) If the expression of a State's consent to be bound by a unilateral act has been procured through the corruption of its representative directly or indirectly by another State;**

**(*d*) If the expression of a State's consent to be bound by a unilateral act has been procured by the coercion of its representative through acts or threats directed against him;**

**(*e*) If the formulation of the unilateral act has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations;**

**(*f*) If, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law;**

**(*g*) If the expression of a State's consent to be bound by a unilateral act has been in clear violation of a norm of fundamental importance to its domestic law.**

25. The draft articles were, in their present form, merely intended to serve as a basis for discussion. Draft article 1 (Scope of the present draft articles), was based largely on the 1969 Vienna Convention. It spoke of legal acts, thereby excluding political acts, a difficult distinction the Commission had already discussed. He had tried in the commentary to reflect a question that had arisen in the context of the Conference on Disarmament, namely whether unilateral declarations formulated by nuclear-weapon States and known as negative security guarantees were political declarations or unilateral legal acts. Such declarations were unilateral and of joint origin because, although formulated by means of separate acts, they were virtually identical. They were also formulated well-nigh simultaneously and, in some cases, in the same context, that is to say at the Conference. They were formulated not through negotiations but in the context of the negotiating mandate of the Conference, the only forum for negotiations on nuclear disarmament.

26. Some States maintained that they were political declarations and should be reflected in a legal document to be really effective. That reaction was, of course, politically based or motivated because non-nuclear-weapon States insisted that the undertakings of the nuclear-weapon States should proceed from multilateral negotiations in the framework of the Conference on Disarmament.

27. It was an extremely complicated and political issue. He was inclined to consider that they were genuine declarations or acts that were legally binding for the States concerned. The fact that they were vague and subject to conditions did not necessarily mean they were not legal. They were, however, inadequate in terms of the expectations of non-nuclear-weapon States.

28. Even if they were legal, such declarations were not unequivocally autonomous inasmuch as they could be linked to existing treaties concerning nuclear-weapon-free zones. For example, Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco) specified the guarantees to be provided by nuclear Powers to the effect that they would not use or threaten to use nuclear weapons against States parties to the Treaty. Protocol 2 to the South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga) contained a similar clause.

29. Draft article 1 also stated that the acts concerned had international legal effects, a question that had already been thoroughly debated. Unilateral acts of internal scope would not be covered by the draft.

30. Draft article 2 (Unilateral legal acts of States), which defined a unilateral legal act, was closely related to draft article 1. He had included the word "declaration" in brackets because he did not wish to impose it, although he was personally convinced that it constituted the act to be regulated. It was an issue for the Commission to decide.

31. Draft article 3 (Capacity of States), concerning the capacity of States to formulate unilateral legal acts, was based to a large extent on the wording of article 6 of the 1969 Vienna Convention and the discussion preceding its adoption, an article which applied only to States and not to federal entities. Although recent developments in international action by decentralized federal States might favour its extension to federal entities, it was unlikely that such entities could formulate declarations or unilateral acts that would entail commitments at that level. Only the State, as an administrative political unit, was capable of incurring international unilateral obligations.

32. Draft article 4 (Representatives of a State for the purpose of formulating unilateral acts) was based on article 7 of the 1969 Vienna Convention. A unilateral act, like all legal acts by a State, had to be formulated by a body possessing authority to act on behalf of the State in the sphere of international law. In other words, for a unilateral act to produce international legal effects, it would have to be formulated by a body possessing the authority to engage the State in its international relations.

33. As the 1969 Vienna Convention indicated, such representatives of States were persons who, in virtue of their functions or other circumstances, were empowered to engage the State at the international level. The phrase "in virtue of their functions" must be understood as relating to representatives who were deemed by the doctrine, international practice and jurisprudence to be empowered to act on behalf of the State with no need for additional formalities such as full powers. Such representatives were heads of State, heads of Government and ministers for foreign affairs. International courts had enshrined the principle, for example, in the *Legal Status of Eastern Greenland* case and in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*.

34. The intention of the State that formulated the act and the good faith that should apply in international relations made it possible to assume that other representatives could also engage the State without the need for special powers, and that was clearly shown in international practice. Representatives of States had been known to undertake commitments vis-à-vis their negotiating counterparts in the specific fields of their competence. He was referring to documents signed by ministers of education, health, labour and trade following official meetings which established programmes of cooperation and assistance or even more specific commitments. Such acts were often called agreements, memoranda of understanding, communiqués or declarations, but whatever the name they had legal value and could produce specific legal effects by establishing rights and obligations. Representatives of States were usually officials in the strict sense of the term, but they could also be individuals with a different status, persons with implicit powers granted to represent the State in a specific field of international relations, such as special commissioners, advisers and special ambassadors. It therefore seemed appropriate to consider persons other than the head of State and those as empowered ex officio to make commitments on the State's behalf. For example, in respect of the management or use of common spaces, particularly among neighbouring States, ministers of the environment and public works and commissioners for border zones could make commitments on behalf of the State through the formulation of autonomous unilateral acts.

35. It was an important consideration in view of the need for stability and confidence in international relations, but some restrictions should be applied. It was acceptable and even appropriate that certain categories of individuals, such as technicians, should not be empowered to engage the State internationally. The issue had been examined not only in the doctrine but also by international courts, including ICJ in its judgment in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, in which it had rightly held that a communication emanating from a technical official did not constitute an official declaration by the United States Government concerning its international maritime boundaries [see pages 307 to 309, paragraph 139, of the judgment]. Unfortunately, information was lacking on the apparently abundant State practice in that regard, and the Secretariat should request Governments to provide information.

36. One important question was whether all declarations and legal acts produced effects at the time they were formulated, regardless of the subject matter and the internal rules of the State, or had to be ratified, as was the case with treaties. A specific example was the formulation by a State's representative of a legal act on the delimitation or establishment of borders. The internal rules governing the expression of consent might make ratification necessary and even indispensable in such matters as territorial space and, in particular, the establishment of borders. In his opinion, not all unilateral acts could have immediate effect from the time of formulation, inasmuch as the rules applicable to expression of consent in treaty matters applied equally in respect of the formulation of unilateral acts. According to the 1969 Vienna Convention, heads of diplomatic missions could enter into commitments to the State to which they were accredited, as could heads of permanent missions to international organizations or delegations to international conferences, who had the capacity to act on behalf of the State and make commitments on its behalf, and consequently were able to formulate unilateral acts.

37. One question about which he had doubts was whether it was necessary to include a provision on full powers, as in the 1969 Vienna Convention. His initial feeling was that full powers were not indispensable. For heads of diplomatic missions, heads of permanent missions to international organizations and heads of delegations to international conferences they were implicit in the letters of accreditation which authorized them to act vis-à-vis the State, international organization or international conference to which they were accredited. Those powers were, of course, limited to a specific sphere of activities in respect of that State, organization or conference.

38. Draft article 5 (Subsequent confirmation of a unilateral act formulated without authorization) was based on article 8 of the 1969 Vienna Convention and was basically concerned with the implicit or explicit confirmation of a unilateral act by a State. The Convention allowed for both implicit and explicit confirmation. During the consideration of the draft article at the United Nations Conference on the Law of Treaties, a broad formulation had been adopted. Venezuela had made a proposal that had not been taken up but which now appeared pertinent in respect of autonomous unilateral acts: that such acts should only be confirmed explicitly.[3] That seemed appropriate in view of the specific nature of such unilateral acts and the restrictive approach that should be applied to them.

39. Draft article 6 (Expression of consent) stipulated that the consent of a State to acquire an obligation by formulating a unilateral act was expressed by its representative when it was formulated on behalf of the State, when the declaration was unvitiated and when there was an intention to engage the State at the international level or in relation to one or more other subjects of international

[3] See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969*, *Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), document A/CONF.39/14, p. 121; and ibid., *First Session, Vienna, 26 March-24 May 1968*, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), 14th meeting of the Committee of the Whole, pp. 76 and 80.

law. In order for a legal act to be valid under international law, it must be attributable to a State, the representative of that State must have the capacity to engage it at the international level, the act must be the expression of its will and free of irregularities and it must be formulated in the proper manner. It had to have a lawful object and must not derogate from prior obligations. Draft article 6 referred specifically to obligations: the State must not be able to acquire rights through its acts and, conversely, it must not be able to place obligations on other States without their consent. Intention was fundamental to the interpretation of the act. Under article 31 of the 1969 Vienna Convention, the context for the interpretation of an act comprised, in addition to the text, its preamble and annexes, a whole series of acts carried out by the State before, during and after the formulation of the act.

40. Draft article 7 (Invalidity of unilateral acts) brought together the causes of invalidity of a unilateral act, which were nearly identical to those applied in the law of treaties, although they had been ordered somewhat differently for ease of consultation. Subparagraph (*a*) indicated that an error of fact or a situation which was assumed by the State to exist at the time when the act was formulated formed an essential basis of its consent. It reproduced the principle set out in article 48, paragraph 2, of the 1969 Vienna Convention and referred to by ICJ in its judgment in the *Temple of Preah Vihear* case that a State could not invoke the invalidity of a unilateral act if it had contributed by its own conduct to the error [see page 26 of the judgment]. Subparagraph (*b*) stated that invalidity could be invoked if the State had been induced to formulate an act by the fraudulent conduct of another State. Since that principle applied in the law of treaties it should likewise be relevant to the law of unilateral acts. Other causes mentioned for invoking invalidity were corruption of a State□┗╒ representative, acts or threats directed against a representative and conflict of the unilateral act with a peremptory norm of international law.

41. At the fifty-second session of the Commission, he proposed to address extremely important and complex issues such as the observance, application and interpretation of unilateral acts and whether a State could amend, revoke or suspend the application of one unilateral act by formulating another. He would venture to say that, if the act was formulated unilaterally and did not necessitate a reaction on the part of the State or States to which it was addressed, it fell into the context of "bilateralization" of unilateral acts, and that did not affect its autonomous or unilateral nature.

42. Mr. LUKASHUK congratulated the Special Rapporteur on a very professional report on a matter of great practical significance that had been given very little study to date. Unilateral acts were increasingly being used in international practice. They were extremely diverse in terms of content as well as of binding force, but each variety had its specific features. The Special Rapporteur had correctly identified the acts that must be examined and was also right in saying that unilateral acts of international organizations must be considered separately. That approach was justified by experience with the elaboration of the 1969 and 1986 Vienna Conventions and the fact that unilateral acts of international organizations raised broader and more complex problems than did those of States.

43. The Special Rapporteur had rightly pointed to one of the most difficult problems, namely that of distinguishing between legal and political acts. A special section on that distinction should be included in the report and in the commentary. Unilateral political acts were just as important as unilateral legal acts. Their use had become extremely widespread, yet they had still not been studied, largely because many jurists retained a purely formalistic approach, considering that rules and obligations could only be of a legal nature. Yet a vast array of normative standards came into play in international relations. True, the best way of settling problems was through legal means, but political declarations and moral standards also had their place in certain situations, their own way of operating and their own force—even if they were not legally binding.

44. The principle of good faith applied not only in the law, but also in politics and morality. International conflicts and the need for timely settlement had spawned a wide variety of political standards that could be applied more rapidly, won acceptance more easily and were more flexible in practice than legal rules. Political standards had proved their effectiveness during the cold war, when the creation of legal rules had been difficult, as acknowledged by representatives of both the East and the West. Political standards were instrumental in resolving security problems, as demonstrated by the example given in the second report of the Special Rapporteur, in the footnote on State practice in paragraph 23 of the report concerning the unilateral acts of nuclear-weapon States in 1995 by which they had undertaken a political obligation not to use nuclear weapons against non-nuclear-weapon States.

45. The sphere of action of political standards also extended to new areas of international cooperation in which legal settlements were impeded for particular reasons: environmental law, for example, which was currently, in general terms, an area of "soft" law.

46. A report of the Foreign Relations Committee of the Senate of the United States of America, with the expressive title "National Commitments", indicated that simply by repeating something often enough with regard to their relations with some particular country, they came to suppose that their honour was involved in an engagement no less solemn than a duly ratified treaty. Thus, the force of declarations was almost commensurate with that of a duly ratified treaty, but it was not of a legal character.

47. The Special Rapporteur had properly emphasized that what really distinguished political acts from legal acts was the intention of their authors. Intention was indeed the key, but, unfortunately, it could not be discerned clearly in every instance. An example was given in the footnote on State practice (see paragraph 44 above): the declarations made by nuclear Powers could be international legal engagements because they had clearly been intended to undertake legal obligations. ICJ, in its interpretation of the unilateral declarations formulated by the French Government in the *Nuclear Tests* cases, had also grappled with the issue. He himself suspected that

through those declarations, France had intended to undertake legal obligations.

48. Draft article 1 referred to unilateral legal acts by States which had international effects. However, many legal acts of States—for example, legislation in the field of private international law—could have international effects. The acts of concern to the Commission had, not international effects, but international legal effects. They created international legal obligations. The Special Rapporteur made that clear in his second report, in his commentary to draft article 1, but passed it over in silence in the article itself.

49. Similarly, draft article 2 should be entitled "Unilateral international legal acts", not just unilateral legal acts. The international community was referred to as a subject of international law, but opinions on that point differed greatly in the literature, and he did not think the draft on unilateral acts was the proper place to raise that question. The requirement of unequivocal expression must relate, not to will, but to intention. Finally, he did not think the requirement that the expression of will be formulated publicly was appropriate. What mattered most was that the addressee State should be made aware of it, as the Special Rapporteur indicated in paragraph 55 of his second report. The term "formulate" as used in draft article 3 and elsewhere seemed inappropriate: it designated a process that had not been completed, whereas the word "adopt" would better convey the sense of completion of the act, as when a parliament adopted a piece of legislation.

50. As to draft article 4, the analogy with the 1969 Vienna Convention appeared, in that instance, to be justified. True, the range of persons formulating unilateral acts, especially in the sphere of specialized cooperation, tended in practice to be wider than that of persons empowered to conclude treaties, but that point was adequately covered by paragraph 2 of the proposed article.

51. With regard to draft article 5, it was difficult to agree with the view expressed in paragraph 107 of the second report that unilateral acts had to be expressly confirmed if they were to have legal effect. In practice, tacit consent was generally considered to suffice.

52. With reference to draft article 7, and particularly subparagraph (*f*), he could not accept the view expressed in paragraph 140 of the report that only norms of *jus cogens* admitted of no exceptions. Norms of *jus dispositivum*, too, were binding in international law and could not be unilaterally waived by States. A State could renounce a norm of *jus dispositivum* in its mutual relations with other States only on the basis of mutual consent. A unilateral act which conflicted with any norm of general international law must therefore be considered invalid. Unilateral acts designed to bring about a change in existing international law—the Truman Proclamation[4] being one example—represented a separate problem the Special Rapporteur ought perhaps to consider.

53. He agreed with the suggestion contained in paragraph 147 of the report that the Special Rapporteur should elaborate and address in a third report questions relating to the termination or suspension of the application of unilateral acts, but he doubted the usefulness of elaborating a provision on *acta sunt servanda* or on such issues as the non-retroactivity and the territorial scope of unilateral acts.

54. Mr. PELLET said that he entirely agreed with Mr. Lukashuk's interpretation of France's intention to be engaged by the so-called unilateral acts that ICJ had found, in the *Nuclear Tests* cases, in the declarations by various politicians. He was, however, less convinced by Mr. Lukashuk's remarks in connection with subparagraph (*f*) of draft article 7, which should in fact speak of peremptory norms of general international law. An act against such a norm was certainly null and void. However, he could not agree that a unilateral act could not depart from customary law. Such an act could not produce legal effects if it was not accepted by the addressee States. The problem was one of legal effects rather than invalidity. States could derogate from customary law by agreement. He saw no reason why the declaring State should not, as it were, make an offer to its treaty partners, and still less why it should not make a unilateral declaration extending or amplifying its obligations under the customary rule in question.

55. Mr. KATEKA, referring to draft article 1, noted that in the commentary the Special Rapporteur, while excluding acts of a political character as well as those which, while legal, did not produce international effects, admitted the complexity of distinguishing political acts from legal ones. The Special Rapporteur, in a footnote to paragraph 23 of the report, referred to declarations made by the nuclear Powers in 1995 providing so-called negative security guarantees to non-nuclear States. In his view, such declarations were purely political and had no legal import. For example, the United States had reaffirmed that it would not use nuclear weapons against non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons except in the case of "an invasion ... on the United States ... carried out or sustained by ... a non-nuclear-weapon State in association or alliance with a nuclear-weapon State".[5] What, he wondered, would happen if a non-nuclear-weapon State in association with a nuclear-weapon State were to attack the United States with conventional weapons? The Commission should not, perhaps, concern itself unduly with disarmament issues of that kind, but the conclusion of the non-aligned countries that security guarantees had to take the form of a negotiated and legally binding international instrument seemed to him to represent the correct approach. In any event, he doubted whether the Special Rapporteur was justified in singling out so-called negative security guarantees as an example of legal acts formulated in the framework of international organizations or conferences. The declarations in question should have been categorized as political.

[4] Proclamation on the "Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf" of 28 September 1945 (M. M. Whiteman, *Digest of International Law*, vol. 4 (Washington, D.C., U.S. Government Printing Office, 1965), pp. 756-757).

[5] A/50/153-S/1995/263, annex; see *Official Records of the Security Council, Fiftieth Year, Supplement for April, May and June 1995,* document S/1995/263.

56. Throughout his commentaries to the draft articles under consideration, the Special Rapporteur referred extensively to the 1969 Vienna Convention but not to the 1986 Vienna Convention. It was to be hoped that the Commission would avoid the pitfall of relying exclusively on the 1969 Vienna Convention, thus giving currency to the view that the 1986 Vienna Convention was of relatively minor importance.

57. It would be useful to add a "whatever form" clause in draft article 2, in conformity with the view taken by ICJ in the *Nuclear Tests* cases to the effect that it made no essential difference whether a declaration was made orally or in writing. Lastly, referring to the mention in paragraph 62 of the report of unilateral legal acts adopted in connection with the establishment of an exclusive economic zone, he remarked that the adoption of the United Nations Convention on the Law of the Sea in 1982 had fundamentally altered the situation in an area where earlier State practice, from the Truman Proclamation to subsequent declarations on the territorial sea and the continental shelf, had been rich in unilateralism. In that connection, he invited Mr. Pellet to clarify his remarks concerning the role of unilateral declarations in connection with customary international law.

58. Mr. PAMBOU-TCHIVOUNDA said that he shared the doubts expressed by Mr. Kateka concerning the Special Rapporteur's exclusive reliance on the 1969 Vienna Convention. In particular, he would encourage the Special Rapporteur to give further thought in that connection to draft articles 6 and 7.

59. Mr. ROSENSTOCK said that, in his view, all the work done in Vienna in 1986 could have been performed with far less trouble in 1969 had it not been for certain doctrinaire views current in the earlier context which had fortunately been overcome by the later date. As to Mr. Kateka's comments concerning the United States declaration of 1995, the key issue was whether a declaration was political or legal. He wondered whether the non-aligned States' objections to the declaration were addressed to that issue or to the poor comfort to be derived from the declaration, an aspect which could hardly be said to invalidate the act. A treaty to the same effect between the United States and, say, Costa Rica, though perhaps of little practical value, would unquestionably be valid, and he wondered why the same should not be true of a unilateral statement. The Special Rapporteur had shown great intellectual integrity in leaving it to the Commission to decide whether criteria for distinguishing political acts from legal ones existed. To what extent, for example, was intention a meaningful criterion? Without an answer to those issues, the Commission could not hope to make a positive contribution to the topic.

60. Mr. KATEKA said that, as Mr. Rosenstock had implied, the form of a statement could sometimes cloud the judgement of its recipients. Nevertheless, he continued to believe that the non-aligned countries had been on the right track in taking an adverse view of the security guarantees offered by the nuclear Powers because the offer had been made in the form of a unilateral act rather than an international treaty. He agreed that the Commission should begin by trying to define the criteria for distinguishing between political and legal acts.

61. Mr. PELLET said, he too, agreed with Mr. Rosenstock's call for a definition of the criteria to be applied. The essential element of draft article 2 was that the declarant State intended to create legal effects. The nuclear-weapon States' security guarantees sought to have legal effects. The fact that the non-nuclear-weapon States did not accept the "offer" because of the form in which it was made was a different problem. As he saw it, the question whether acceptance was a condition for validity was a separate issue which did not affect the definition of unilateral legal acts. As to Mr. Kateka's comments, the new law of the sea was very much the consequence of an accumulation of unilateralism. In his view, the unilateral acts of States doing away with the old customary three-mile rule had clearly been initially contrary to international law: it was interesting to consider whether or not such acts should be taken into account in the draft. However, the problem was not one of definition. The accumulation of unlawful acts had ultimately overturned the old rule, and he saw no reason to exclude them from the definition.

62. Mr. HAFNER said that, while not necessarily agreeing with all Mr. Pellet's arguments, he endorsed his conclusions. Regarding Mr. Kateka's point about the nuclear-weapon States' declaration in 1995, he queried which criterion the non-aligned countries used to decide on the legal effect of that declaration. He believed the non-aligned countries' objection had been based on the content of the act rather than on its form.

63. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that it was difficult to determine whether an act was legal or political solely on the basis of the intention of the declarant State. In rejecting the nuclear-weapon States' declarations, the non-aligned States had argued that decisions on nuclear disarmament negotiations could not be taken at a unilateral or bilateral level but had to be negotiated in the context of the Conference on Disarmament. The non-acceptance of a unilateral act by its addressees undoubtedly affected the issue of its validity but had little to do with its status as a unilateral legal act having international effects.

64. Mr. LUKASHUK said that the only way to solve the problem would be a provision to the effect that the intention to undertake a legal obligation must be set out in a clearly expressed form in the act itself or in an accompanying act. Only if the party declared that it was taking on legal obligations would the act become valid in international law.

65. Mr. ECONOMIDES said that draft article 1 must be pruned back considerably. It currently covered a large number of unilateral acts which the Commission wanted to exclude from the scope of the draft. Mr. Pellet had rightly underscored the importance of a unilateral act for the formation of international custom. As it stood, draft article 1 concerned unilateral acts which could help in creating international custom. In reality, what was at issue was not the internal act, which merely applied an international custom; rather, it was the internal act which created a new custom that did not exist as yet but would in the future. It was the act which would create effects at international level, once custom had taken root, that was of particular interest to the Commission. The same applied

to internal acts which, to cite Mr. Pellet's example, did not simply apply a custom but sought to modify, extend or even cancel a customary rule. In a sense, the unilateral act set itself against custom. If it prevailed, it became an act which produced legal effects.

66. He had the impression that the Special Rapporteur wanted to eliminate such cases, which were very difficult, and was not wrong to contemplate the unilateral act as a kind of source of international law: when a State, by means of a unilateral act, could create a new legal rule containing rights and obligations.

67. Mr. KATEKA, referring to Mr. Economides' question as to when a State, through a unilateral declaration, created a legal effect, said that that was the essence of the problem facing the Commission. Regarding Mr. Hafner's comment, it was difficult to state the criteria for rejecting negative security guarantees, because, regardless of the intention of the States making the declarations, disarmament, and especially its nuclear aspect, were matters of life and death. It had been the cold war which had led to the arms race and the present situation. One side made a declaration that it would not be the first to use nuclear weapons, whereupon the other side followed suit. Hence, the declarations had been made by nuclear Powers and were more political than legal. He did not think that it would be possible to create binding unilateral declarations on nuclear security guarantees.

68. Mr. SIMMA, commenting on the exchange regarding the binding or non-binding nature of negative security guarantees, said the lesson one could draw was that if a State made a unilateral declaration with the intention of it being binding, in other words, a State said that it wanted to assume an obligation by way of a unilateral act, other States could refuse such a "gift" if they did not want it. No State was required to accept that another State wanted to enter into an obligation with it, because there might be less pleasant things concealed behind that obligation. Even if a State intentionally made a unilateral commitment, other States could ask that State to take the treaty avenue.

69. Mr. LUKASHUK said the proposal that the Special Rapporteur should study the role of unilateral acts in forming custom was contrary to the very essence of the Commission's decision at its fiftieth session to consider only autonomous acts, which were not tied in with the creation of other norms. If the Commission started to look at the role of unilateral acts in the development of custom, then why not examine the role of unilateral acts in the creation of international agreements? The proposal to consider the role of unilateral acts in the formation of custom had nothing whatsoever to do with the Special Rapporteur's topic.

70. Mr. GOCO said that the issue had been touched upon already, in particular the distinction between political and legal acts. Unilateral declarations arose simply because, rather than enter into formal commitments in treaties, States formulated a unilateral act that was viewed as creating a legal obligation. But normally the State would be hesitant about that kind of declaration or act creating legal effects. He agreed with the comment made earlier about the *Nuclear Tests* cases. He did not think that there had been an intention to create legal effects, but ICJ had found that France was bound by the unilateral declaration. On the other hand, even the Court had not been certain about the criteria for distinguishing between political and legal acts. He had taken due note of Mr. Lukashuk's point that there must be a clear statement concerning intention. Yet that would be a difficult undertaking too. Eventually it would be a matter of judicial inquiry to determine the intention of the party. The Special Rapporteur had admitted to the difficulty of drawing the line between political and legal acts. If the Commission attempted to formulate criteria for so doing, it would have to rely on judicial precedents.

71. Mr. HAFNER said that he was concerned about Mr. Lukashuk's comment to the effect that the Commission should not deal with unilateral acts which had a bearing on the creation of customary rules in international law. He would have problems with such a working method. It was impossible to know whether a unilateral act would lead to the creation of a new rule of customary international law or whether it would have another effect on existing customary international law. Consequently, it was essential to deal with unilateral acts irrespective of whether they had an effect on customary law, including the creation of new rules of customary international law.

72. Mr. ROSENSTOCK, referring to Mr. Simma's comment, wondered whether a State would really be released from an obligation made in a unilateral declaration when another State refused to recognize it. For example, if a case was brought against a State for particular behaviour, it was assumed that the State in question did not regard the other State as bound by the unilateral declaration to which reference was not made. Did that mean the unilateral declaration was of no validity? Certainly, mere non-action to accept it was not enough, but he wondered whether even a rejection of a unilateral declaration as inadequate released the State which had made the declaration from the obligation it had undertaken, however slight that obligation might be. He did not know the answer, but he thought that it did not. In his view, the other party was irrelevant to whether there was a commitment, perhaps not irrelevant to whether the commitment was legal or illegal, but its quality as a commitment by the State making it had to be unaffected by the response from the "donee" State—assuming the issue was not that the "donee" State had done something to adopt a particular course of conduct.

73. Mr. SIMMA said Mr. Rosenstock's comment brought the Commission back to the fundamental issue of unilateral acts of States, namely the foundation of the binding nature. There were two schools on that question. One derived from Roman law, according to which a promise was binding simply because it had been made. The other school, to which he adhered, was that unilateral promises or other statements could become binding only if another party expected the promising State to keep its promises. That expectation created a legal obligation. The philosophical foundation of the problem could have an impact on the solution of very practical topical issues.

74. Mr. GAJA said that while the definition of treaties raised some problems in a few borderline cases, and the legal regime of treaties was basically uniform, the same could not be said of unilateral acts, which lay largely in uncharted territory. The first difficulty that arose was to

identify unilateral acts and then try to arrange those which were to be considered unilateral acts but formed a rather heterogeneous group into reasonably homogeneous categories. Some unilateral acts could be considered to be analogous to treaties to a certain extent. Others, while they involved the State's intention to produce effects, were of another nature. One example of that was acquiescence. He noted in that context that what the Special Rapporteur had said about estoppel, which was a procedural institution, did not apply to acquiescence, which was a well-known element that was also addressed in the 1969 Vienna Convention. Hence, there was a range of unilateral acts, from promise to acquiescence, some formal and some not, some producing well-defined legal effects and others more doubtful legal effects, such as recognition.

75. One of the consequences of the great variety of unilateral acts was that it was difficult to apply the principles stated in respect of one unilateral act—for example by ICJ with regard to promise in the *Nuclear Tests* cases—to all the others. Should it really be said that recognition, waiver, acquiescence and the like had to be made publicly and explicitly? The Special Rapporteur recognized the variety of elements which needed to be considered, but seemed to think that that variety affected not so much the formation, as the content, of the various acts. That view was reflected in his basic approach, which was to try and apply rules similar to those in the 1969 Vienna Convention to all unilateral acts. That approach had already been criticized from a slightly different perspective by Mr. Kateka and Mr. Pambou-Tchivounda. In his opinion, that sort of analogy could apply to some categories of unilateral acts, such as promise, but would not be suitable for all other acts.

76. It did not seem that the basic approach had been adopted consistently. In some cases, the Special Rapporteur had given reasons for deviating from the application of the rules of the 1969 Vienna Convention, but not in others. He had referred to the issue of the competence of State organs to make a unilateral act. There was no mention of article 46 of the Convention when the second report on unilateral acts of States dealt with validity, and the only rules present were based on article 7 of the Convention, which addressed another problem. Even before defining the scope of the articles, there should be an in-depth analysis of the various categories to see whether the Commission could deal with all unilateral acts or with a subcategory of those which might be more similar to treaties.

77. In his introduction to the second report, the Special Rapporteur argued that issues of international responsibility should not be considered in the context of unilateral acts. That was not clear, partly because no example was given of the issues he wanted to leave aside. The matter had been clarified in the oral presentation: insofar as a unilateral act produced legal effects, they could comprise an obligation under international law; infringement caused international responsibility, and there was no reason to distinguish between that type of international responsibility and other types referred to in article 16 of the draft articles on State responsibility.[6] There was no doubt that such issues should be left aside. Yet the problems started when the Special Rapporteur mentioned unilateral acts by which States engaged their international responsibility. That should not be taken as implying that reference was being made to conduct, albeit deliberate conduct, on the part of the State infringing an obligation. In his opinion, asserting that a deliberate infringement was a unilateral act would sound odd.

78. The Commission might consider the case in which a unilateral act might produce legal effects towards one State, while at the same time being an infringement of an obligation towards another State. One example would be premature recognition by one State of a State "in the making", which would produce an infringement of an obligation towards the sovereign State. That kind of issue had to be considered in the draft.

79. Mr. GOCO said that he had also taken note of the remark in the Special Rapporteur's report, in response to the Sixth Committee's request, to address the subject of State responsibility. However, although the effects of unilateral acts and State responsibility were related, the Special Rapporteur had done well to point out that the latter topic was being considered elsewhere.

*The meeting rose at 1 p.m.*

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## 2594th MEETING

*Friday, 25 June 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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### Unilateral acts of States (*continued*) (A/CN.4/496, sect. C, A/CN.4/500 and Add.1,[1] A/CN.4/L.588)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the draft articles contained in the

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

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

second report on unilateral acts of States (A/CN.4/500 and Add.1).

2. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) proposed that, since the topic under consideration was so complex, as shown by the constructive debate on the day before, a working group on unilateral acts of States should be set up, as at the fiftieth session, to define the scope of the topic and provide guidelines for the Commission's work, particularly with a view to the drafting of the next report. He would like to know the opinion of the members of the Commission on that point.

3. Mr. KAMTO said that, instead of referring in draft article 1 (Scope of the present draft articles), as the Special Rapporteur had done, to "unilateral legal acts formulated by States which have international effects", it would be preferable to be less categorical and refer to "unilateral acts which purport to have legal effects", thus using the definition of a reservation, which was also a unilateral statement. That clarification should help to distinguish between unilateral legal acts and what the Special Rapporteur called acts of a political character. In fact, when the Special Rapporteur described such acts as those which, while also unilateral and legal, do not produce international effects, he was running the risk of a contradiction with the situation following the formulation of the act, for no one ever knew beforehand whether such acts would have legal effects and a judge could arrive at such a conclusion only a posteriori through analysis and interpretation.

4. The definition of "unilateral legal acts" and the commentaries thereto called for at least two substantive observations. First, the Special Rapporteur rightly noted that, since the scope of unilateral acts was far-reaching and extremely complex, the Commission should not try to cover all its diverse aspects. It would therefore be advantageous to include in the draft (either in the form of an article following the definition or a second paragraph of draft article 2 (Unilateral legal acts of States)) a provision based on article 3 of the 1969 Vienna Convention and indicating that the definition did not affect the legal force of any other unilateral acts (or unilateral statements). Secondly, the definition, in draft article 2, referred to "will, formulated publicly". The word "publicly" gave rise to both theoretical and practical problems, particularly as the Special Rapporteur did not provide any cogent argument in favour of its use. For example, in paragraph 50 of his second report, he quoted a passage from the 1974 judgment of ICJ in the *Nuclear Tests* cases which was not relevant. The Special Rapporteur emphasized that publicity was a necessary part of a unilateral act and that the addressee State must be made aware of it, stating, that otherwise, the act would be without legal force. Such a statement conflicted with the idea of the autonomous nature of a unilateral act, for, if that act could exist and produce effects without the consent of the addressee being necessary, it was hard to see why its validity should be conditional on publicity. Moreover, at the theoretical level, that approach recalled the voluntarist doctrine, which maintained the fiction that a unilateral legal act would exist only subject to the addressee's tacit consent, which could be given only if the addressee was aware of the act. Since the distinctive feature of a unilateral legal act was that will was expressed in a statement, according to the Special Rapporteur's approach, the notification of an act to its addressee seemed in practice to be the logical, inevitable consequence. In his own opinion, the word "publicly" would be warranted only in the event of an oral unilateral act, but, as it happened, the Special Rapporteur ruled out that hypothesis. For example, at the end of one of its meetings, the group of seven major industrialized nations (G7) could conceivably cancel the entire debt of the developing countries without backing its statement up by a written act. If that were to happen, should no legal consequence be attached to a statement of that kind because it was unwritten? On the other hand, publicity would be useful in that case, because the public statement would be the only means of acknowledging the existence of the act. Such a requirement was less warranted when a statement was written.

5. Two comments should be made on the expression of consent. The first related to the status of silence, which the Special Rapporteur did not discuss in his second report, and the second had to do with the consensual link which resulted from a unilateral act, in other words, the legal offer contained in such an act and the response to it in the form of the addressee's consent.

6. The Special Rapporteur should make a detailed study of the status of silence, as, in some situations, the expression of will seemed to be an obligation which was not compatible with silence. In the San Juan River case (Costa Rica, Nicaragua),[2] the arbitrator had found that the Government of Nicaragua had remained silent when it should have spoken. Admittedly, he had reached that conclusion in respect of a treaty, but it was transposable mutatis mutandis to unilateral acts. Furthermore, protest against a unilateral act which a State condemned was known to play a significant role in international law. In the *Delagoa Bay Railway* case, the arbitrator had found that Portugal's acts of occupation had been tacitly accepted by the United States of America and the United Kingdom which had never raised a protest. Conversely, in the *Minquiers and Ecrehos* case, France had interpreted its absence of any protest as not being indicative of tacit assent.

7. The legal effect of consent on the legal nature of a unilateral act and whether it created a new legal situation in which the unilateral act and the addressee's consent constituted an exchange of wills forging a contractual, consensual link would require clarification by the Special Rapporteur, at least in the commentary.

8. The Special Rapporteur should also examine the legal consequences of a co-author State's opting out of a collective unilateral act, for example, in the above-mentioned case of a statement by the G7. He should amend the wording of draft article 7 (Invalidity of unilateral acts) to bring it more into line with the provisions of articles 48 to 53 of the 1969 Vienna Convention, on which it was obviously based.

[2] See award of 22 March 1888 by Grover Cleveland, President of the United States of America, as arbitrator (J. B. Moore, *History and Digest of international arbitrations to which the United States has been a party* (Washington, D.C., U.S. Government Printing Office, 1898), vol. 2, p. 1964; and H. La Fontaine, *Pasicrisie internationale 1794-1900* (The Hague, Kluwer Law International, 1997), p. 299).

9. Mr. PELLET noted that, in the second report, the Special Rapporteur considered the comments of Governments made in the Sixth Committee of the General Assembly at its fifty-third session and went back over the scope of his topic from three main points of view: the unilateral acts of international organizations, international responsibility and estoppel.

10. In principle, the Special Rapporteur excluded unilateral acts of international organizations. On that point, he fully agreed with him, but, on the basis of certain paragraphs of the report, he did not seem to be sticking very closely to that position and he wondered why. One of the reasons was that the Special Rapporteur was dealing with several fairly disparate topics. There was no doubt, first of all, that the classical unilateral acts of international organizations, in other words the resolutions of bodies in which member States were represented, should not be included, for they were too dissimilar to the unilateral acts of States and raised excessively complicated issues. The Special Rapporteur then mentioned the unilateral acts of international organizations which resembled those of States, which emanated from a subject of law, which were directed at particular addressees and through which, in general, an international organization could unilaterally accept obligations with regard to other subjects of law. In the opinion of the Special Rapporteur, those acts could be formulated by the officials of organizations—a rare occurrence, in reality—but it was true that an international organization, as such, could enter into unilateral commitments with regard to both member States and third parties. Although, in all probability, such acts would have the same legal profile as the unilateral acts of States, he was sceptical about the advisability of taking such acts into account—less for entirely conceivable theoretical reasons than for practical reasons—because their consideration would introduce a further element of complexity in material which was already complicated enough. Moreover, in paragraph 36 of his report, the Special Rapporteur proposed the inclusion in the subject matter of legal acts formulated by a State in the framework of international conferences. He not only agreed with that suggestion, but thought that statements which were made by States in the framework of international organizations and which purported to produce general legal effects should also be dealt with. Like international conferences, international organizations were a forum where publicity could be given to commitments undertaken or requests made by a State through a unilateral act. The Special Rapporteur rightly attached prime importance to publicity in the legal regime governing unilateral acts and in the definition thereof. Unilateral commitments entered into by States with regard to international organizations certainly had to be covered by the draft articles, and that seemed to be the opinion of the Special Rapporteur.

11. As to the relationship between unilateral acts and international responsibility, he concurred with the Special Rapporteur that the former did not involve any responsibility which might derive from a unilateral act. There was no doubt that, if a State adopted a unilateral act conflicting with one of its obligations, it could incur responsibility, but that went beyond the scope of the topic under consideration. That did not, however, mean that no interest should be taken in the relationship between unilateral acts and other sources of international law, which could entail responsibility, especially the relationship of unilateral acts to custom and the peremptory norms of international law.

12. The same comment should be made with regard to estoppel. Admittedly, a unilateral act could give rise to an estoppel, but it was a consequence of the act and, contrary to what had been stated by the Special Rapporteur in his oral introduction, no category of acts which would constitute "estoppel acts" seemed to exist. The only thing that could be said was that, in certain circumstances, a unilateral act could form the basis for an estoppel. Contrary to what the Special Rapporteur had stated in paragraphs 13 and 14 of his report, he personally did not think that estoppel could be excluded from the field of investigation on the pretext that the acts giving rise to an estoppel were not autonomous unilateral acts. Estoppel probably was dealt with in the national procedural rules of common law countries, but it was impossible to dismiss it lightly as a mere procedural principle. In international law, estoppel was a consequence of the principle of good faith which, as Mr. Lukashuk had pointed out (2593rd meeting), governed the rules on the legal effects of unilateral acts.

13. Generally speaking, he had doubts about the Special Rapporteur's restriction of the topic to "autonomous" unilateral acts, for he still thought that there was no valid reason to rule out, for example, acts formulated under a customary or treaty rule. He therefore did not see why the Commission should not concern itself with unilateral acts whereby States defined the width of their maritime areas. Apart from their purpose, which should not be taken into consideration, such acts did come within the ambit of the topic and were, moreover, the most frequent examples of that particular concept, namely, unilateral acts in international law. In that connection, he completely disagreed with the Special Rapporteur's statement in paragraph 62 of his report that such acts went beyond the scope of strictly unilateral acts and fell within the realm of treaty relations. They were, strictly speaking, unilateral acts and gave effect to a customary or a treaty rule. Many unilateral acts did so, moreover, and he wondered whether it was not possible to consider that all unilateral acts were based on a customary norm, starting with the one which permitted States to undertake commitments. The idea that some unilateral acts ought to be excluded from the field of study on the pretext that, as in the case of maritime areas, for example, provision was made for them by a general rule of international law still seemed very strange to him. If that were the case, the topic would be much less interesting, for the study would cover only unilateral acts of the 1974 *Nuclear Tests* cases type, which were only of a marginal nature. Perhaps the Special Rapporteur's extremely narrow approach explained why his report was characterized by an almost total lack of examples. In order to stick closely to the idea of the autonomy of the acts in question, the Special Rapporteur was denying himself the possibility of describing a practice because such practice existed above all in respect of acts which the Special Rapporteur considered to be non-autonomous. That restriction, which had not been justified in a convincing manner by the Special Rapporteur in his report, was very difficult to apply because, in the final analysis, it was difficult to imagine completely non-autonomous unilateral acts and the difference between what the Special Rappor-

teur meant by autonomous acts and those he termed non-autonomous was practically imperceptible.

14. Before going on to the specific draft articles, he said that, like Mr. Kateka and Mr. Pambou-Tchivounda (ibid.), he was concerned about the Special Rapporteur's tendency to appropriate the rules of the 1969 Vienna Convention. It was perfectly legitimate to use them as a starting point, for legal acts that gave rise to somewhat comparable problems that were involved in both instances, but unilateral acts and treaties were nevertheless separate categories of legal acts and there was every advantage to be gained from giving in-depth consideration in each case to whether or not the rules of the law of treaties could be transposed to unilateral acts precisely because of the different nature of the two. What was needed was to develop a paradigm, to define a system of reference to help distinguish between the two instruments, which could not be placed on the same footing. He did not believe that the inclusion of a rule in the 1969 Vienna Convention or the 1986 Vienna Convention was sufficient justification for including a similar rule in the draft articles, contrary to what was stated in paragraphs 70 and 131 of the report. Many rules of the law of treaties were derived from the conventional nature of those instruments, i.e. from the convergence of the wills of the States parties, but that element was absent by definition from unilateral acts. In that connection, he was disturbed by what the Special Rapporteur had written on reservations at the end of his report. He did not believe, for example, that it could be stated, as in paragraph 143 of the report, that it was true that a State could formulate reservations when performing a unilateral act. In his view, the opposite was true: a unilateral act could not be accompanied by reservations. It could be modulated and supplemented by conditions, but introducing the idea of reservation in that context would create a great deal of confusion. The topic under consideration and the topic of reservations to treaties were nevertheless clearly related, primarily as a result of the fact that reservations were unilateral declarations that corresponded *grosso modo* to the definition of unilateral acts proposed by the Special Rapporteur. Unless the two topics were combined, however, and that was certainly not very realistic, he did not think that reservations should be dealt with in any way. The reason was not that reservations were not autonomous in respect of the treaty to which they applied, which would undoubtedly be the Special Rapporteur's explanation, but, rather, that reservations were governed by a specific set of rules. Hence, it would be useful to include a general saving clause somewhere in the draft articles on unilateral acts of States to indicate that the draft was without prejudice to the specific rules that could be applicable to a given category of unilateral acts in view of their nature. It seemed to him that that proposal corresponded to one made by Mr. Kamto.

15. The very brief treatment given by the Special Rapporteur in paragraphs 144 to 146 of his second report to the non-existence of a unilateral act made him fear, subject to seeing the future report that was to cover that aspect, that the Special Rapporteur was mixing two very different things up under the general heading of "non-existence": wrongfulness on the one hand, and on the other, non-existence in the strict sense, which was something very particular and was not, moreover, referred to in the 1969 Vienna Convention. There might be decisive arguments for referring in the draft articles to the theory of non-existence, which was highly controversial in international law, but they were not immediately apparent and nothing in the second report gave reason to change that opinion.

16. Turning to the individual draft articles proposed by the Special Rapporteur in his second report, he said that he found the wording of draft article 1 very unsatisfactory. First, he wondered whether the draft article might be combined with draft article 2; if not, the two provisions should at the least be fully compatible. That did not seem to be the case, however, for a number of reasons. The proposed text of draft article 1 stated that unilateral acts "have international effects", whereas draft article 2 indicated, more appropriately, that unilateral acts were formulated "with the intention of acquiring international legal obligations". That was the sort of wording that should be included in draft article 1 by using the phrase "with a view to producing effects", as proposed by Mr. Kamto, for example. With regard to the definition of effects, there was no doubt that all unilateral acts aimed to create effects. States said something in order to produce an effect in the legal, political or other spheres. What was interesting and specific was that the effects sought were legal in nature, the point being to create obligations, but also rights, something about which the Special Rapporteur said nothing. It should therefore be made clear that the unilateral acts of concern to the Commission aimed to produce legal effects at the international level. That would also make it possible to avoid using the words "unilateral legal acts", which were somewhat pleonastic in the context of the Commission and were also a departure from the title of the draft articles, namely, "Unilateral acts of States". The adoption of that definition would help solve the extremely important problem mentioned by many members of the Commission (ibid.) and referred to in the footnote on State practice in the Special Rapporteur's commentary to draft article 1. If it was said that the draft articles related to unilateral acts aimed at producing international legal effects, it did not matter whether negative nuclear security guarantees produced legal effects or not. What did matter was that they aimed to produce such effects and that they could be included with no particular difficulty in the scope of the topic without prejudice to the answer to that question. That must, however, be indicated by appropriate wording in draft article 1 for the scope of the draft articles.

17. Turning to draft article 2 and leaving aside purely drafting problems, for example, the order in which the potential addressees of the unilateral act were listed or the debatable words "unilateral legal act", a number of major substantive issues remained. First, there was the one which the Special Rapporteur had clearly understood and which had made him hesitate between the term "unilateral legal act" and the term "unilateral declaration". Personally, he was firmly opposed to the replacement of the word "act" by the word "declaration", not only because that would amount to changing the very subject matter of the exercise, but also for much more important reasons. Unilateral acts, like treaties, were both *instrumenta* and *negotia*, or rather, they were *negotia*, or content, carried by instruments, something which the Special Rapporteur appeared to acknowledge in paragraph 44 of his report. If "declarations" were the centre of attention, then the focus

would be on the instrument, the formal side of things, and the *negotium* would be forgotten. It might also be asked, as the Special Rapporteur hinted in paragraph 78, whether a unilateral act was not a combination of multiple instruments in some cases. In the *Nuclear Tests* cases, for example, and, as the Special Rapporteur had pointed out, the French "declarations" formed a whole and it was probably that combination that had prompted ICJ to regard the separate declarations as a unilateral act which created a commitment for France. True, the *negotium* could be varied, but the art of that type of codification was precisely to reduce diversity to unity or at least to a few basic rules, and that was, moreover, what the proposed definition did. What all those unilateral acts had in common, their basic purpose, was that their author had the intention of producing legal effects—obligations or rights—at the international level. He was of the opinion that, instead of referring to legal obligations at the international level, it would be wiser to refer to legal effects, as in draft article 1, if his proposal was followed because it was always a pair that was established—a pair of rights and obligations. Auto-normative acts created obligations for the State making the commitment and rights for others, while the opposite was true of heteronormative acts.

18. The word "declaration" seemed very restrictive, unless it was construed very broadly to cover all possible eventualities. In actual fact, the expression of will involved could take the form of a law, for example, or, if ICJ was to be believed in the *Nuclear Tests* cases, of a press conference, a ministerial statement to the General Assembly, press releases or a combination thereof.

19. Another problem to which the proposed definition gave rise related, once again, to the use of the word "autonomous". In the commentary to draft article 2, and specifically in paragraphs 47 and 63, what the Special Rapporteur seemed to be referring to was not the autonomy of the act in relation to other rules of international law, or in relation to the customary or treaty foundations of unilateral acts, but the fact that such acts produced legal effects without requiring either the acceptance or any other conduct on the part of the addressee. In his own view, that statement was entirely premature. In some cases, a unilateral act might produce effects solely in function of the reactions of other States, whereas, in other cases, it would produce reactions ipso facto, but to say so in the definition, when the Special Rapporteur had provided no proof whatsoever, seemed very arbitrary and would probably deprive the Commission of extremely important conceptual elements. In any case, the report provided no justification for what seemed to be an unduly general statement which consequently did not seem to fall within the definition of unilateral acts.

20. He was less bothered than Mr. Kamto by the word "publicly". It might not be the best choice, but the problem was not whether the unilateral act was formulated in public. What had to be made clear at the definition stage was that the addressee must be aware of the act. Publicity was absolutely essential vis-à-vis the addressee, but not necessary vis-à-vis the rest of the international community if it was not addressed to each of the elements making up that community. The problem was merely one of terminology and he agreed with the Special Rapporteur on the substance. To put it simply, there was hardly any need to "broadcast" a unilateral act if it was intended only for one other State. In the *Legal Status of Eastern Greenland* case, the Ihlen declaration [see pages 69 to 70 of the judgment] had been made behind the closed cabinet doors of the Norwegian Minister for Foreign Affairs.

21. The fact that the Special Rapporteur defined a unilateral act as an expression of will that could come from a number of States could be disconcerting, as it might appear at first glance that there was a contradiction in terms. He did not think that there was and he agreed with the Special Rapporteur on that point, but it had to be explained why such unilateral acts could nevertheless be collective acts and paragraph 58 of the commentary to draft article 2 did not do so; it simply paraphrased the proposed definition. He believed that what was meant was acts such as the decisions of the four occupying Powers in Germany between the end of the war and reunification or even certain instruments which looked like treaties, but operated like unilateral acts, for example, the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis setting up the International Military Tribunal at Nürnberg.[3] The commentary would have to explain that it was by no means easy to distinguish a collective unilateral act from a treaty. Collective unilateral acts could perhaps be excluded from the draft articles, but that would have to be made clear in the article on the scope of the draft. In any event, the question should be given serious consideration. For the time being, the Special Rapporteur had included collective unilateral acts and he tended to agree with that approach, but thought that the explanations given in paragraph 58, which were inadequate, would have to be expanded.

22. With regard to draft article 3 (Capacity of States), he found that the commentary, which was based on article 6 of the 1969 Vienna Convention, was inadequate. The draft article itself seemed acceptable, but he would like to have more information on which to base an opinion.

23. Starting with draft article 4 (Representatives of a State for the purpose of formulating unilateral acts), the French version of the report frequently used the words *accomplir des actes unilatéraux* or *exprimer* unilateral acts. The word *formuler* was far better in all cases and should be used systematically.

24. Draft article 4 should be reviewed carefully to take account of the particular characteristics of unilateral acts because the transposition from the law of treaties was too obvious and without convincing justification. That was also true for the commentary. Even with the precautions taken by the Special Rapporteur in paragraph 97 of his second report, full powers could hardly be referred to in connection with unilateral acts, which had absolutely nothing to do with full powers. The Special Rapporteur was undoubtedly right in paragraph 90 to stress the fact that international practice in the field covered by draft article 4 had not been examined in great detail. That was why the absence of any description of that practice in the report was all the more regrettable. Without knowing the practice, he found it difficult to take a definite position on whether draft article 4 was well founded.

[3] United Nations, *Treaty Series*, vol. 82, No. II-251, p. 279.

25. That comment also applied to draft article 5 (Subsequent confirmation of a unilateral act formulated without authorization). The lack of a description of practice, except for a few examples of case law, was just as striking in the commentary to draft articles 6 (Expression of consent) and 7. But even without knowing the precedents, draft articles 6 and 7 appeared to give rise to a number of problems, some of them quite serious.

26. First, he did not think that reference could be made to "consent to be bound by a unilateral act" or *consentement unilatéral* and, as in the case of draft articles 4 and 5, he had doubts about the word "representative". Those terms, which were too closely associated with treaties, did not adequately reflect the specific features of the unilateralism that characterized the instruments under consideration. In more general terms, draft article 6 could quite simply be deleted, since it largely duplicated draft article 4, the only new element being the need for the act to be unvitiated, as was made clear in draft article 7. If draft article 6 was retained, a number of drafting problems would have to be considered, particularly the use of the words "consent to acquire" [an obligation], "representative", a very awkward term in the context of unilateral acts, and "declaration". Draft article 6 was restricted to "auto-normative" acts by referring exclusively to the "obligations" assumed when formulating a unilateral act, whereas heteronormative unilateral acts could and did exist. Lastly, the phrase referring to addressees of the act at the end of the draft article did not correspond to the wording of draft article 2. In any event, there would be no harm in deleting draft article 6.

27. He was afraid that draft article 7 was too mathematically, arbitrarily and mechanically aligned on the corresponding provisions of the 1969 Vienna Convention. It also gave rise to a number of drafting problems in French, including the repetition of the word *consentement*, which was used six times, and the terms *accomplir* or *accomplissement*, which were used four times. It might be better to split the draft article up into separate articles for each subparagraph.

28. Each subparagraph deserved fairly lengthy comments, but he would restrict himself to a number of observations on subparagraph (*f*) relating to the unilateral act which, "at the time of its formulation", conflicted with *jus cogens*. For once, it would be useful to transpose the wording of article 53 of the 1969 Vienna Convention, but carefully weighing every word. The word *accomplissement* gave rise not only to a problem of drafting, but, first and foremost, to one of substance. It was not at the time of its formulation—or performance—that the unilateral act that conflicted with a peremptory norm of general international law became null and void, but, rather, at the time of its adoption. It was void *ab initio*, ipso facto. If a State indicated that it was going to commit aggression against another State, it was the declaration itself that must be considered invalid on the day it was made, not at the time when it was implemented, but the word "formulation", seemed to indicate the contrary.

29. Moreover, in paragraph 116 of his report, the Special Rapporteur quoted Skubiszewski's assertion that unilateral acts could not derogate either from general international law, meaning customary international law, or from the obligations assumed by their authors.[4] Curiously, that idea on an extremely important point, which the Special Rapporteur appeared to endorse, was not reflected in the draft article itself. That seemed to call for very careful study based not only on an assessment of the practice, limited as it was, but also on an examination of the consequences of every position adopted, one way or the other. In any case, the problem could not be passed over in silence and it made no sense to consider the problem of non-conformity with a rule of *jus cogens* without considering that of non-conformity with general international law plain and simple. Also, the problem did not arise in the same terms as under the law of treaties.

30. The Special Rapporteur would be aware of his great interest in the subject. The report constituted a useful and rich basis for discussion. It raised many interesting and important concerns, and left open a number of questions relating to the points it addressed. He therefore warmly welcomed the Special Rapporteur's proposal that the draft articles should be referred not to the Drafting Committee, since it would be too early for that, but to a working group that could, by agreement with and under the guidance of the Special Rapporteur, review the outstanding problems, suggest new ways of considering them and, above all, try to present the issues in a way which clearly demonstrated that the approach used with the law of treaties could not simply be transposed. On the basis of those reflections, the Special Rapporteur could shape and further refine the draft articles in a third report to be discussed by the Commission.

31. Mr. LUKASHUK thanked Mr. Pellet for his well-justified statement, which raised many questions in his mind. First, Mr. Pellet had identified very clearly the most difficult aspect of the second report of the Special Rapporteur, its Achilles heel as it were—the very small number of examples taken from practice which it contained. The declaration made by Egypt in 1957[5] was perhaps the sole classic illustration of a unilateral act. In the absence of practice, it was extremely difficult to codify the corresponding rules. That essential point required further consideration.

32. Mr. Pellet had raised a second issue, namely unilateral acts adopted by States within the framework of the implementation of international treaties. That concerned the case in the third report on reservations to treaties in which a State assumed additional and more extensive obligations.[6] The question to be considered then was what degree of autonomy those acts had. If a State related a unilateral act directly to the existence of a treaty, it was difficult to speak of autonomy, even when there was no doubt that a unilateral act was involved. If, on the other hand, the State did not cite such a connection, a purely autonomous unilateral act was clearly involved. Moreover, he himself believed that a State could also take such unilat-

[4] K. Skubiszewski, "Unilateral acts of States", *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1991), pp. 221-240, at p. 230, para. 44.

[5] Declaration (with letter of transmittal to the Secretary-General of the United Nations) on the Suez Canal and the arrangements for its operation (Cairo, 24 April 1957), United Nations, *Treaty Series*, vol. 265, No. 3821, p. 299.

[6] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.16, paras. 208-212.

eral legal acts within the framework of the implementation of ordinary rules of international law. They would certainly be unilateral acts.

33. He regarded Mr. Pellet as someone closely associated with the subject of reservations to treaties. Accordingly, he would like to ask him the following question: did he believe that it was possible to formulate reservations and interpretative declarations in respect of a unilateral act? He himself believed that, if a State acknowledged a unilateral act by expressing a reservation to it, i.e. by accepting it on certain conditions, and the State author of the unilateral act raised no objection, that act was valid. A unilateral act established not only rights for States, but also corresponding obligations. Acceptance of the arrangements for the operation of the Suez Canal implied an obligation to observe the rules established by it, but that did not mean that interpretative declarations or reservations concerning the latter could not be formulated.

34. As to the problem of estoppel, which the Special Rapporteur viewed unfavourably, his opinion was that estoppel was acceptable, but only in respect of other unilateral legal acts. A case in which a State gave a position statement and another State took that statement into account, although it was not lawful raised an important and complex issue. From that viewpoint, it was clear that estoppel must be reflected in the draft articles.

35. Mr. ECONOMIDES, said that, having listened to the statements by Mr. Kamto and Mr. Pellet, he felt that the most important consideration was to define the scope of the topic. However, before doing so he would like to make some general comments. First, it was clear that unilateral acts of international organizations should be left out of the reckoning for the moment, not because it was difficult to deal with them or because the issue had not yet reached a sufficiently advanced stage, but simply because it had been decided to concentrate first on unilateral acts of States. Once that objective had been achieved, the Commission could, on the basis of earlier experience, return to unilateral acts of international organizations, an issue of obvious importance.

36. Secondly, with regard to the use of the term "declaration", what counted was not so much the designation of a unilateral act, but its content and, in particular, the legal effects that that act produced or purported to produce.

37. Thirdly, there could be no doubt that the 1969 Vienna Convention was a highly valuable model and an indispensable tool in the context of the Commission's work. However, where unilateral acts of States were concerned, efforts must be made, to the extent possible, to find more appropriate criteria that were more relevant to such acts than those on treaty acts provided for in the Convention. He therefore shared the opinion expressed by Mr. Pellet and other members in that regard.

38. He therefore wondered, for example, whether it was necessary to retain provisions such as those in draft article 3, which stated "Every State possesses capacity to formulate unilateral legal acts".

39. With regard to draft article 1, which was highly important as it helped define the scope of the topic, he felt that the Commission would be well advised to adopt a restrictive approach and set itself the objective of considering unilateral acts of States which either were not related to other sources of international law, namely, treaties, customs or decisions of international organizations, or which themselves directly established rights and obligations at the international level on an autonomous basis. The point was to determine when, in what circumstances and under what conditions a unilateral act of a State might constitute an autonomous source of international law which, at the normative level, produced the same effect as other sources of international law. According to that approach, the first step would be to delete the term "legal" in draft article 1 because it was absolutely pointless to discuss the difference between political acts and legal acts. The main thing was that an act could establish rights and obligations; if it did, it was always a legal act. The second step would be to substitute a more exact term for the word "effects". As it stood, draft article 1 covered a large number of unilateral acts, for example, those relating to other sources of international law, which should be excluded from the scope of the draft articles. In the case of unilateral acts relating to treaties, it was clear that a reservation, the withdrawal of a reservation, an objection to a reservation, the ratification of a treaty, its denunciation or its registration or an interpretative declaration clarifying or explaining an ambiguous treaty provision were just as much unilateral acts which had effects at the international level, but, in general, they came within the scope of treaty law. Likewise, acts which gave effect to customary rules were related to international custom and acts which related to the implementation of decisions of international organizations belonged to "international institutional law": which was the case, for example, of an internal act giving effect to a European Community directive. Such acts were in fact concerned with the implementation of international law at the internal level. They were thus internal acts subordinate to other sources of international law.

40. In concrete terms, that should lead the Commission to amend the wording of draft article 1, which would thus read: "The present draft articles apply to unilateral autonomous acts of States which establish rights and obligations at the international level."

41. With the scope of the topic thus defined, the Commission still had to bear in mind that the corresponding practice was very limited, and that made the issue an extremely difficult one and provided further justification for establishing a working group on the subject. The group would have the task of examining the entire issue, in particular the delimitation of the topic, and also of drawing up a programme of future work that would enable the Commission to complete the first reading of the draft articles before the end of the quinquennium.

42. Mr. PAMBOU-TCHIVOUNDA, referring to the second report on unilateral acts of States, said that the aim of the report should be to present in quintessential form the law relating to what was a highly complex category, as everyone recognized. In that regard, the work by the Special Rapporteur was worthy of consideration, even though, in other respects, it was open to criticism.

43. In general, there was no doubt that a great deal of time could probably be spent discussing the Special Rap-

porteur's choice of the declaration as the prototype of a unilateral act of State on account of its supposed propensity to remain autonomous amid the tangle of different ways of producing law. The discussion was potentially inexhaustible, for, among the unilateral expressions of will formulated by States in relation to other States or other subjects of international law, the declaration was one of a kind and even an unknown quantity, if not both at once.

44. The controversy over the elusive demarcation line between "politically unilateral" and "legally unilateral" threatened to go on forever, or at least for the time being because, in both cases, a formal criterion for retaining a unilateral legal act and excluding a unilateral political act from the scope of the study was itself fraught with ambiguity. Did "formal criterion" mean the organic aspect or the instrumental aspect? Those were issues which had not been fully clarified as far as a means of differentiation was concerned.

45. At first sight, the declaration *Vive le Québec libre!* made by General de Gaulle[7] in Quebec was political. However, in French law, the head of State was a political institution whose status also permitted him to formulate legal rules. Immediately after that speech, in fact Quebec, a component and member State of the greater Federation of Canada, had opened up to the world and begun concluding international agreements. There was no doubt that, even if only tacitly, most of Quebec's partners had endorsed that declaration as being appropriate. Behind the slogan lay a unilateral legal act, which it might be wrong to portray in overly abstract terms.

46. The Commission had to look at what States did and, on that basis, at whether they communicated or not, come to an agreement based on the fact that unilateral legal acts, especially those which created rights and obligations, belonged to all types. Singling out a declaration, particularly one which could only be legal, as opposed to other types of declaration that were political, would thus be arbitrary to say the least, and that was one of the first problems the Commission must try to solve when it gave the Special Rapporteur new guidelines.

47. For the Special Rapporteur, the declaration's reductionist paradigm was surely convenient for the edifice which he had decided to build and was delivering in his second report, paragraph 17 of which contained the structure. That paragraph was the key to the organization of the report and, in that regard, he felt that a number of clarifications were called for.

48. Thus, in subparagraph (*c*), which dealt with capacity to formulate unilateral acts, he would be tempted to replace the word "formulate" by the word "issue".

49. In subparagraph (*d*), on "Representatives of a State who can engage the State by formulating unilateral acts", much simpler wording should be adopted. Instead of "capacity", what was meant was the competence of organs to engage States unilaterally. Subparagraph (*d*) should read: "Competence to engage the State by formulating unilateral acts."

50. In the French text of subparagraph (*e*), he proposed that the words *sans autorisation*, which were not legal, should be replaced by the words *sans habilitation*. In all Governments, only heads of State and ministers had the competence, as defined in general texts, to engage a State at the international level. However, there was a whole circle of people who, without having that constitutional legal capacity, were permitted to express a position in one forum or another. If such views were considered important by the country concerned, the central authorities confirmed what their official had said *sans habilitation*. In the same subparagraph, he proposed that the word "subsequent", should be deleted because it served no purpose, as the confirmation always followed the act chronologically.

51. In subparagraph (*g*), it might be better to avoid the possible risk of confusion in the title by reversing the order, namely, by beginning with conditional unilateral acts, should there be any, and then going on to reservations, the purpose being to show that, although a reservation was a unilateral act which was not autonomous because it followed on from an agreement, its most characteristic form of expression was unilateralism. In the context of the Commission's efforts to delimit the topic, it would be difficult to leave out reservations, which in turn raised the problem of expanding the topic to other categories of "conduct" or "attitudes" on the part of certain State organs which advocated the same method of expression, namely, unilateralism. The Commission would then be forced to find a middle way between the Economides approach, which was relatively focused, and the Pellet approach, which would tend much more towards expansion. A balance would have to be struck and that was the task of the working group whose re-establishment was being proposed.

52. On a general point, he was concerned about the method which the Special Rapporteur had used in the rest of the second report and which was based on a parallel with the Vienna approach. Whereas the logic of unilateralism could be transformed into the logic of bilateralism or multilateralism, the opposite was impossible. The question, then, was how to apply the same methods to two ways of, and indeed two systems for, producing law. Moreover, nothing guaranteed, at least not at first glance, that, in the adaptation effort which would need to be made, the unilateral act would not be distorted or that the exercise would not expose for all to see the many cracks running through the edifice of the 1969 Vienna Convention. If those cracks were made visible, would the Commission be prepared to propose to the General Assembly the revision of its work? Would not the law of treaties, as codified, not then seem to be an unfinished—or at least an imperfect—work? And, if so, why was that not true for other topics which had already been codified? That lesson was worth thinking about because there was modesty to learn from it.

53. With regard to draft article 1, he said that, in paragraph 22 of his second report, the Special Rapporteur had in mind the ambivalence of unilateral acts when he stressed that they could be either individual or collective. In fact, it was in draft article 2 that that idea was expressed. Hence, the Special Rapporteur must make a clear choice: either develop the idea in the commentary to draft article 2 or retain it in the commentary to draft

[7] See C. Rousseau, "Chronique des faits internationaux", RGDIP (Paris), vol. 72, No. 1 (January-March 1968), pp. 164 et seq.

article 1, to which a paragraph 2 must then be added to take that fact into account. In no way would that be prejudicial to the key role played by the Special Rapporteur's formal criterion, which would be given greater prominence. At the same time, in order to avoid any confusion and ambiguity, paragraph 22 might be recast, the words *aux actes unilatéraux qui sont le fait d'États* in the French text being replaced by the words *aux actes unilatéraux émis par les États*.

54. Draft article 2 showed the first limit of the Special Rapporteur's method, i.e. following the parallel with the law of treaties. He wondered why that draft article contained only a definition of unilateral acts of States, whereas there were many other terms which were directly related to the topic or which in any case would be related to the regime of unilateral acts, such as "declaration", "representatives of the State", or "the non-existence of the legal acts", which would be better spelled out in a separate provision that might be entitled "Use of terms". If it was decided that article 2 should contain a set of definitions, the word "declaration" in parentheses would have to be deleted. Also, in both draft article 2 and draft article 3, the word *formuler* in the French version should be replaced by the word *émettre*. In draft article 3, the word "legal" should be deleted because, once it had been decided that unilateral acts should be defined on the basis of their effects, i.e. their legal effects, it would be tautological to continue to speak of "unilateral legal acts".

55. Mr. SIMMA said that he fully endorsed Mr. Pellet's analysis, except that he was not convinced that the topic under consideration was really ripe for codification; neither a reading of the second report nor the comments of his colleagues had persuaded him otherwise.

56. He was sceptical about the Special Rapporteur's approach, which consisted in following the 1969 Vienna Convention. That might restrict the Commission's scope by placing certain questions in a straitjacket. The idea of applying the approach in the Convention to unilateral acts was based on a hypothesis that would not necessarily seem relevant once State practice had been assessed—something which still remained to be done.

57. As to the introduction to the second report, he had nothing to add to the comments by Mr. Pellet, who had admirably analysed the relationship between unilateral acts and estoppel. However, he had a major criticism to make concerning draft article 1 proposed by the Special Rapporteur: it should be harmonized with draft article 2 because, as it stood, it gave the impression of having a much broader scope. Since the Special Rapporteur had taken the 1969 Vienna Convention as a model, he pointed out that article 1 of that instrument merely stated that "The present Convention applies to treaties between States", without entering into related considerations.

58. Draft article 2 gave rise to a number of terminological problems. He did not see why the Special Rapporteur maintained that the State which expressed its will by means of a unilateral act must do so "unequivocally". Judging by State practice, the opposite seemed to be the case. Even if that idea was to reappear later when the Commission considered how declarations must be formulated as unilateral legal acts, it did not belong in a definition. In that context, he observed that paragraphs 126 and 128 of the commentary to draft article 7 were somewhat "equivocal" or even contradictory because the former stated that "lack of clarity does not signify lack of intention" whereas the latter said that "the intention ... must always be clear if it is to be the basis of the engagement made by the State".

59. Another awkward terminological problem was the use of the word "autonomous" in draft article 2. For the layman, an "autonomous expression of will" might be understood as having a psychological connotation, like the "free expression of will". Hence, if the Commission wished to retain the element of autonomy in the definition in draft article 2, it should place it elsewhere in the sentence. The idea of an autonomous unilateral legal act referred to in paragraph 46 had never seemed very clear to him because it presupposed that States were in some kind of "vacuum". The question had been discussed at length by Mr. Pellet.

60. The word "publicly" in draft article 2 did not seem appropriate either. In reality, it was sufficient for declarations to be heard and received by those to whom they were addressed without it being necessary for them to be formulated publicly. In the English version, the last words of the draft article, "with the intention of acquiring international legal obligations", were unsatisfactory, and the verb "to assume" was preferable to "to acquire". Also, for the last part of the sentence, the Commission should perhaps adopt Mr. Pellet's proposal to speak of "legal effects" rather than "legal obligations" so as not to exclude the eventuality of "rights". Similarly, could it really be said, as the Special Rapporteur maintained in paragraph 51 of the commentary to draft article 2, that the author really had the power to "create a juridical norm" by making a unilateral declaration? A State could create rights and obligations, but not norms. The Special Rapporteur had perhaps been thinking of the old distinction between concrete norms and abstract norms, but, if that was the case, he should explain it.

61. Concerning norms, he said that there was a discrepancy between the English and French versions of paragraph 139, the first sentence of the English text speaking of "a State's own previous norms", a phrase which the French text had fortunately omitted.

62. Draft article 3 was as bare as article 6 of the 1969 Vienna Convention and, although it did not call for any comments, it made little sense.

63. Draft article 4 had a very formal aspect which did not necessarily fit the reality of unilateral acts. Moreover, he was not sure whether it was a good idea to specify that unilateral acts could be formulated only by heads of State, heads of Government or ministers for foreign affairs. History had unfortunately proved that those persons were not always best qualified to do so; they should confine themselves to a ceremonial role and let others draft their declarations.

64. He had no comment to make on draft article 5, but draft article 6 was awkwardly worded. As stressed by Mr. Pellet, the phrase "The consent of a State to acquire an obligation" was not very felicitous. As to the word "unvitiated", it had the same drawback as "unequivocal" in

draft article 2, i.e. it was an important qualifier, but did not belong in an initial definition. All in all, draft article 6 could very well be deleted without any loss to the draft as a whole.

65. In draft article 7, the phrase "the expression of the State's consent to formulate the act" was even less felicitous than the words "the consent ... to acquire an obligation" in draft article 6. As to the different grounds of invalidity, such as error and fraud, he wondered whether the Special Rapporteur had not gone too far by assuming that they applied to unilateral acts in the same way as to treaties. Would a State which made an error in formulating a unilateral declaration which it then wanted to go back on encounter the same difficulties as a State which wanted to do so in respect of a declaration made during the conclusion of a treaty? Nothing at the current stage proved that that would be the case. Concerning, for example, the idea referred to in paragraph 136 that fraud could even occur through omission, was it not an art of foreign policy for a State which thought that it had a better idea of the actual situation to bring other States to adopt a certain line of conduct?

66. With regard to invalidity resulting from a conflict with a "peremptory norm of international law", he agreed with the previous speakers and wondered whether the reference to a norm of domestic law, which was based on a similar phrase in article 46 of the 1969 Vienna Convention, should not be formulated in a more flexible manner in the case of unilateral acts.

67. Likewise, the Special Rapporteur had perhaps gone too far in stating in paragraph 112 that in case of invalidity, a unilateral act could be declared void and would therefore be without legal effect. He was thinking in particular of a unilateral act which might lead to a situation of estoppel.

68. In closing, he said that he had two comments to make on paragraphs 142 and 146 of the second report. If he understood correctly, in paragraph 142, the Special Rapporteur stated in substance that, if a State formulated a reservation or added certain conditions to a unilateral act, it was no longer in the sphere of unilateral acts, but that of treaties. That assertion seemed too dogmatic: he did not see why unilateral acts were themselves not subject to conditions. He agreed with Mr. Pellet's analysis on that point. It also seemed a great exaggeration to say, as the Special Rapporteur had in paragraph 146, that an act was non-existent if not formulated in the proper manner.

69. In view of the work which remained to be done on the topic, the proposal to re-establish the working group on unilateral acts was an excellent idea and he would be pleased to take part in it.

70. Mr. HAFNER said that Mr. Simma's remark on "conditions" applied to those which were set out in the declaration itself and were thus part of its content, whereas the conditions to which the Special Rapporteur referred in paragraph 142 were outside the act.

71. Mr. SIMMA said that he did not see why the comment he had made should not be applicable in both cases.

72. Mr. HAFNER said that, when a condition was formulated outside the act, the initial content of the latter remained unchanged, whereas a condition laid down in the declaration itself already reduced its content.

73. Mr. LUKASHUK said that he agreed with Mr. Simma on the use of the word "unequivocal" in draft article 2. In fact, it was the intention which should not be equivocal.

74. Regarding the reservations referred to in paragraph 142 of the second report, he took it that the Special Rapporteur meant reservations made not by the State which was the author of the act, but by other States; that would fall within the sphere of treaty relations.

75. The most important point stressed by Mr. Simma was, however, that the Commission must draft articles which were perfectly comprehensible to the layman; it must be borne in mind that, as far as international law was concerned, diplomats were basically laymen.

76. Mr. PELLET, referring to the question of "conditions", said that it was important to distinguish between the case in which the author of the unilateral act formulated it in a conditional manner—it was perfectly entitled to do so and that was obviously not a "reservation"—and that in which the State or States to which the unilateral act was addressed accepted a particular condition. The latter case was obviously closer to the idea of reservation. However, for reasons of terminological clarity, it might be better to avoid speaking of "reservation" in the context of unilateral acts so as not to mix up the two topics. At issue was a unilateral act which was in response to another unilateral act; at some point, that "dialogue" would have to be taken into account in the draft articles.

77. Mr. KAMTO said that he wondered whether it was possible to settle the problem of the legal nature of what some called conditional acceptance and others "reservation" as long as the problem had not been solved of the consensual link that was established between the State which formulated a unilateral act and the State which responded to it. It would be necessary to determine the nature of that consensual link and, if it was of a contractual or treaty nature, the Commission would have to resign itself to using "reservation".

78. The CHAIRMAN, noting that the proposal by the Special Rapporteur that the working group on the topic should be re-established seemed to meet with the support of the members, suggested that the Commission should take a decision on that matter. If he heard no objection, he would take it that the Commission wished to re-establish the working group on unilateral acts of States.

*It was so decided.*

79. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that the debate had been very instructive, although he sometimes had the impression that the Commission was backtracking. For example, Mr. Simma had questioned whether the topic under consideration was ready for

codification, whereas he himself had no doubt whatsoever on the matter.

80. The decision to re-establish the working group was a very good thing and he announced that, apart from himself, the Working Group on unilateral acts of States would be made up of the following members: Mr. Baena Soares, Mr. Gaja, Mr. Hafner, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock and Mr. Simma. Needless to say, any other members of the Commission who wished to join were welcome.

81. In its task of defining unilateral acts of States, the Working Group should focus in particular on what had been called "dual autonomy" in view of the fact that, first, if a State acquired a right by means of a unilateral act, in so doing, it imposed an obligation on other States and, secondly, it might be necessary at some stage to tie unilateral acts in with the existing norms of customary international law or with treaty rules.

*The meeting rose at 1.05 p.m.*

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## 2595th MEETING

*Tuesday, 29 June 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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### Unilateral acts of States (*continued*) (A/CN.4/496, sect. C, A/CN.4/500 and Add.1,[1] A/CN.4/L.588)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GOCO said that the law of treaties did not contain strict requirements as to form. In fact, in the *Legal Status of Eastern Greenland* case, PCIJ had held to be valid and binding the oral statement by the Norwegian Minister for Foreign Affairs on Norway's acceptance of Denmark's claim to the whole of Greenland. There were also other kinds of "transactions" which were acts of conduct of Governments that might not be directed towards the formation of agreements and yet were capable of creating legal effects. They included unilateral acts of States. In preparing his second report on the topic (A/CN.4/500 and Add.1), the Special Rapporteur had taken into account the many comments of representatives of States in the Sixth Committee. While not ruling out in the future legal acts which States might formulate within the framework of international organizations, draft article 1 (Scope of the present draft articles) clearly stipulated that the draft applied only to unilateral acts formulated by States.

2. By speaking of unilateral acts, the draft article underscored the fact that the draft was not meant to cover political acts which did not produce international legal effects, or other acts which, although legal, might be considered to fall within the treaty sphere. He wondered, however, whether draft article 1 in its present form could totally eliminate declarations by heads of State which, in reality, were acts of States and had their underpinning and obligatory nature in morality and politics.

3. Draft article 1 was modelled on article 1 of the 1969 Vienna Convention, which expressly provided that the Convention applied only to treaties between States. In the same way, draft article 1 referred exclusively to unilateral acts of States, no doubt in order to exclude other unilateral acts from its scope. He suggested that the following should be added to the article: "It is understood that the present draft articles shall not apply to other subjects of international law or international organizations. Acts of a political character and other acts, although unilateral, do not produce international effects." It would then be clear what was not included in the draft.

4. Admittedly, there was little State practice in regard to unilateral acts of States. The report acknowledged that, in order to ascertain the nature of such State acts, it was fundamental to determine the intention of the State formulating them. In other words, to be bound as a consequence of a unilateral act would to a large extent depend on the specific facts and, more importantly, the subsequent assessment. For example, in the *Nuclear Tests* cases, ICJ had held that France was legally bound by its declaration to cease conducting nuclear tests in the atmosphere. The Court had cited France's public declaration to abide by that obligation. In the *North Sea Continental Shelf* cases, however, the Court had held that unilateral assumption of the obligation by conduct was not likely to be presumed and that a very consistent course of conduct was required in such a situation. In the *Nuclear Tests* cases, the Court had found that the criteria were the State's intention to be bound by the terms of its declaration and that the undertaking be given publicly. There was no requirement of a *quid pro quo* or other subsequent acceptance. In any event, the principle recognized by the Court in the *Nuclear Tests* cases had been applied in the *Military and Paramilitary Activities in and against Nicaragua* case and also by one chamber of the Court in the *Frontier Dispute* case.

5. The question whether a particular unilateral act would have the consequence of blurring the international obligation of the declarant State would depend on the specific facts of each case, notwithstanding the definition of the scope in draft article 1.

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

6. The formulation of draft article 2 (Unilateral legal acts of States) should be simplified. For example, a head of State could be assumed not to make equivocal or ambiguous statements, and it was therefore unnecessary to speak of "unequivocal" expressions of will. Once made, the declaration could not fail to be autonomous, meaning that it was couched independently. Furthermore, with the modern media, a declaration by a head of State was invariably publicized, especially when made at the time of a significant international event, for example the statement made by the President of the United States of America, Mr. Clinton, on 25 June 1999[2] that no aid would be forthcoming to Yugoslavia as long as President Milosovic remained in office and that US$ 5 million were being offered for the latter's ouster. Those were unilateral declarations which could be regarded as binding because they could be relied upon by other States.

7. Nor was it prudent automatically to label a unilateral act "legal", because that was presumptive. It was enough to speak of a unilateral act. It would also be better to say "incurring" international obligations rather than "acquiring".

8. Draft article 2 could be reformulated to read:

> "For the purposes of the present draft articles, unilateral act means an expression of intent, made publicly by one or more States in relation to one or more other States, the international community or an international organization, with the objective of making an engagement at international level."

9. He was not opposed to draft article 3 (Capacity of States) or to draft article 4 (Representatives of a State for the purpose of formulating unilateral acts), although paragraph 2 of draft article 4 again pertained to intentions based on the practice of the States concerned. Perhaps the principle of estoppel might apply, by allowing the person to represent the State, assuming no objection was raised.

10. As to draft article 5 (Subsequent confirmation of a unilateral act formulated without authorization), according to paragraph 107 of the second report, confirmation guaranteed the real intention of the State that formulated the act, since it was tantamount to a treaty. However, which was the proper ratifying body when confirmation was required? Should the officials be of the same or of a higher rank?

11. In draft article 6 (Expression of consent), the word "acquire" should simply be replaced by "incur" or "assume". He had misgivings about draft article 7 (Invalidity of unilateral acts). Subparagraph (*a*) implied recklessness on the part of the State concerned by acknowledging an error and inexperience on the part of the executive officials who committed the error. Subparagraph (*b*) was also ambiguous and subparagraphs (*c*) and (*d*) suggested that a State had allowed its own representatives to be corrupted and coerced.

12. Lastly, the very nature of unilateral acts was their different treatment, devoid of the rigidity and solemnity of treaties. A declaration did not even require acceptance by the addressee or any conduct that might signify acceptance. Even verbal declarations could be allowed.

13. Mr. HE said that, given the difficulties involved and for reasons of practical relevance and manageability, it was appropriate to limit the scope of the draft articles to unilateral acts of States for the purpose of producing legal effects, thus excluding acts of a non-legal nature as well as other unilateral expressions of the will of States. Such limitation of the scope of the topic would simplify the work and ensure that it was brought to a successful conclusion.

14. Notwithstanding that practical approach, some issues still warranted further analysis. The present draft articles were intended to apply to unilateral legal acts formulated by States, whether individually or collectively, thus excluding acts of a political nature. But in practice, it would be a complex matter to ascertain the extent of the legal effectiveness of such acts. The unilateral declarations made by nuclear-weapon States providing guarantees to non-nuclear-weapon States was an interesting example. Such a case showed the need to establish clear rules to regulate the operation of unilateral acts of States. The problem was whether the definition in the draft together with the other articles addressing the various legal aspects of unilateral acts of States, would be sufficient to eliminate the ambiguities and doubts about the legal effects of the unilateral acts and guarantees he had mentioned.

15. The views on the definition of unilateral legal acts differed, but the autonomous elements of such acts might be regarded as essential in the sense that the acts were capable in themselves of producing legal effects under international law and did not depend on the performance of another act by other States or on failure to act. Meanwhile, the basis of the binding nature of a unilateral act must also depend on other elements and principles. On that point, it had been noted that the obligatory nature of such an act was also based on the intention of the State that performed it, rather than another State's legal interest in compliance with the obligations which it created.

16. It was also important to stress the criteria for a unilateral act that must produce legal effects for States which had not participated in its performance and must generate legal consequences independently of the manifestation of the will of other States. In that respect, such acts were strictly unilateral and considerations were restricted to existing principles of good faith, estoppel and international custom and practice. All those elements needed to be further explored so as to help define the issue properly.

17. The topic was to a great extent related to the law of treaties, but by no means did the draft articles have to follow all the relevant provisions of the 1969 Vienna Convention. For instance, on the issue of the addressee of unilateral acts of States, a broader approach was clearly preferable. In view of the dynamic development of the international legal system, unilateral acts of States should be extended to cover both States and international organizations. On the other hand, with the exception of the problem of the invalidity of unilateral legal acts, many procedural and other relevant matters were not addressed in the present draft. For those cases, it would seem neces-

[2] *Los Angeles Times,* 27 June 1999.

sary to follow the provisions of the law of treaties and consider such matters as rules of interpretation, modification, suspension, termination, etc. so as to make the draft more comprehensive. He fully endorsed the suggestion to refer all the draft articles to the Drafting Committee for detailed consideration.

18. Mr. DUGARD said one of the difficulties facing the Commission was that there was little State practice and few judicial decisions on the subject. He suspected that there might be more evidence of State practice in the archives of States, since it was not unlikely that many unilateral declarations had been made privately in the same way as the Ihlen declaration[3] and that other statements might also come to light. Perhaps the Special Rapporteur could attempt to find more State practice on the subject.

19. Paragraph 28 of the second report stated that unilateral acts could be addressed to another State, several States, the international community as a whole or any other subject of international law. It was a very broad statement, particularly the reference to the international community as a whole, which was repeated in paragraph 57. He wondered whether it was a concept that covered what was increasingly being described as "international civil society". The Commission should be aware of the increasingly important role played by non-governmental organizations in international affairs, as evidenced by their impact on, for example, the Ottawa International Strategy Conference: "Towards a Global Ban on Anti-Personnel Mines", held from 3 to 5 October 1996, that had led to the adoption of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; and the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held at Rome from 15 June to 17 July 1998, that had led to the establishment of the International Criminal Court.[4]

20. The Special Rapporteur stressed in paragraph 54 of the report that the unilateral act must be made publicly. Some members had taken issue with that view, which was difficult to reconcile with, for example, the Ihlen declaration which had been made in private. He suspected that many unilateral declarations were formulated behind closed doors and due regard should be paid to them. According to paragraph 54, the question would be addressed in detail at a later stage. Perhaps the Special Rapporteur would confirm his intention to give greater attention to the issue, possibly in his third report.

21. Some members had criticized the draft articles for adhering too closely to the format of the 1969 Vienna Convention. He was inclined to disagree because he thought the Convention could serve as a helpful guideline. Indeed, his own complaint was that the report did not follow it closely enough.

22. Draft article 7, subparagraph (*c*), said that such an act would be invalid if the expression of a State's consent to be bound had been procured through the corruption of its representative by another State. It was an interesting addition to existing international law, one in which he detected the influence of Latin American jurisprudence, Latin America having taken the lead in adopting international measures to prohibit corruption. It was a necessary provision, but it needed to be explained in greater detail in the article itself and in the commentary. Draft article 7, subparagraph (*g*), stipulated that the invalidity of a unilateral act could be invoked if the expression of a State's consent to be bound had been in clear violation of a norm of fundamental importance to its domestic law. As the commentary indicated, that provision was designed to reflect the principle contained in article 46 of the 1969 Vienna Convention, but it actually went beyond article 46, which specified that a State could invoke the violation of a domestic norm as invalidating its consent only where that violation was manifest and concerned a rule of its internal law of fundamental importance. The rule must thus be manifest and known to the other party. Accordingly, draft article 7, subparagraph (*g*), should be modelled more closely on article 46 of the Convention. Subparagraph (*f*) correctly drew attention to the conflict with a peremptory norm of international law. In that connection, the Special Rapporteur should take into account any reformulation of the term "peremptory norm" in the context of the draft articles on State responsibility. [5]

23. The Commission had looked at the question of coercion of a State representative in its discussion about circumstances precluding wrongfulness in the draft on State responsibility, but had not considered whether the corruption of the representative of a State could preclude wrongfulness. He urged the Special Rapporteur on unilateral acts of States to follow developments in that discussion to ensure that the draft articles were consistent.

24. Again, draft article 7 should include Security Council resolutions among the factors that could be invoked to invalidate a unilateral act. For example, if a State made a declaration that conflicted with a Council resolution, particularly under Chapter VII of the Charter of the United Nations, that called on Members not to recognize a particular entity as a State, it could be argued that such a unilateral act was invalid.

25. The Special Rapporteur had embarked on a difficult and ambitious task. He wished him every success and supported the suggestion to refer the draft articles to a working group.

26. Mr. HAFNER thanked the Special Rapporteur for a wide-ranging report that clearly pinpointed the main issues needing to be addressed. He associated himself with most of the points that had already been raised, especially by Mr. Pellet (2594th meeting).

27. However, he disagreed with Mr. Simma, who saw no need to codify rules on unilateral acts. On the contrary, such acts were the most common means of conducting day-to-day diplomacy and there was uncertainty, both in the literature and in practice, regarding the legal regime that was applicable to them. As it was the function of international law to ensure stability and predictability in international relations, some regime was needed in order

[3] See 2594th meeting, para. 20.

[4] See 2575th meeting, footnote 10.

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

to prevent unilateral acts from becoming a source of disputes or even conflicts.

28. There was a vast quantity of unilateral acts by States. Examples were the statements made at pledging conferences, expressions of willingness to pay financial arrears to the United Nations, declarations on military exclusion zones, protests, declarations of recognition, declarations of war and declarations of cessation of hostilities. The example given in the footnote on State practice in paragraph 23 of the report should therefore be incorporated in the text together with other examples of unilateral acts. Moreover, any effort to categorize them should be based on an inductive rather than a deductive approach, with a view to reaching general conclusions.

29. On the question of what should be regulated—different forms of transactions (*negotia*) or declarations, the content or form of unilateral acts—he would personally opt for the form. However, the Commission was under pressure to take account of the possible content of declarations, and that could be done when they were categorized.

30. Draft article 1 should be brought into line with draft article 2 by the Drafting Committee or the working group. The commentary to draft article 1 said that the other articles followed the 1969 Vienna Convention. He did not share Mr. Dugard's sympathy with that approach because of the major differences between treaties and unilateral acts. A treaty was an expression of common will by at least two States and was usually the result of a compromise. A unilateral act, however, involved only one State. That alone warranted separation from the treaty regime. The outline for the study of unilateral acts of States discussed at the forty-ninth and fiftieth sessions had also differed markedly from the Vienna Convention regime.

31. He had doubts regarding the statement made in paragraph 33 of the report. It was not always the highest-ranking administrative officer of an international organization who was authorized to sign a treaty. For example, under article 24 of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, such authority was vested in the President of the Council of Ministers, who was usually the Minister for Foreign Affairs of the member State that held the presidency of the Union. The officer who was entitled to conclude treaties thus depended on the statutes of individual organizations.

32. Draft article 2 posed drafting problems, especially when compared with the significantly different definition that had formed the basis of the Working Group's discussion at the fiftieth session of the Commission. The new version greatly restricted the scope of the draft articles since the last part of it implied that only promises were to be taken into account. He doubted whether that had been the intention of the General Assembly.

33. It was, of course, necessary to scrutinize the relationship of unilateral acts with international law, which endowed such acts with certain effects. But international law could be general, universal, regional, customary or treaty law, all of which presented different conditions for unilateral acts. In fact, it was not inconceivable that a State could acquire rights through a unilateral act if the particular legal regime governing it so provided. For example, a State was entitled to declare a blockade under international law and acquired certain rights in the process. The same applied to a declaration of neutrality, which must be respected by other States pursuant to the regime governing such declarations. Admittedly, a problem did arise when it came to separating that category of unilateral acts from reservations, which were perhaps merely a specific type of unilateral declaration. Indeed, he wondered whether the discussion of reservations might provide useful pointers for the discussion of unilateral acts.

34. He had doubts about the correctness of draft article 4. In the view of some States, article 7 of the 1969 Vienna Convention, which had served as a model, did not establish a clear-cut rule but only a presumption, a *presumptio juris* rather than a *presumptio juris ac de jure*. That presumption was rebuttable through article 46 of the Convention. He agreed with Mr. Dugard that article 7, subparagraph (*g*), of the present draft established a different regime from the Convention, but it also seemed to contradict draft article 4. Again, he was hesitant about draft article 4, paragraph 3. Negative security guarantees, for example, had been issued by ministers for foreign affairs, regardless of whether they were heads of delegations. And if a head of delegation was not a minister for foreign affairs, his or her declaration might have no legal effect. At the Third United Nations Conference on the Law of the Sea, the head of the United States delegation had declared that he could accept the solution that had been negotiated,[6] yet following elections in the United States the new administration had decided it was unable to go along with the solution and fresh negotiations had proved necessary. The declaration by the head of delegation had thus had no binding effect on the United States. During the United Nations Conference on the Law of Treaties, a proposal to expand article 18 of the 1969 Vienna Convention to cover the negotiation phase had been rejected.[7] That was a further reason why heads of delegations did not necessarily possess full powers. Different kinds of full powers were given to delegations: power to negotiate, to adopt texts, to sign a final act and perhaps even a treaty. But which of those full powers authorized the delegation to make a binding unilateral declaration? It was questionable whether any of them did. The issue must therefore be examined more closely.

35. Draft article 7 should be approached with the utmost care and viewed in the light of the full context of the draft articles. It was too early to assess its full implications and he reserved his position on its content.

36. He fully supported the proposal by the Special Rapporteur to establish a working group to address the extremely difficult issues raised by the study.

[6] See *Official Records of the Third United Nations Conference on the Law of the Sea,* vol. XIII (United Nations publication, Sales No. E.81.V.5), 128th plenary meeting, pp. 43-44; and ibid., vol. XVII (United Nations publication, Sales No. E.84.V.3), 192nd plenary meeting, pp. 116-117.

[7] See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969*, *Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), document A/CONF.39/14, p. 138.

37. Mr. AL-BAHARNA congratulated the Special Rapporteur on the skill he had displayed in addressing the issue of unilateral acts of States. The Special Rapporteur was also convinced that sufficient useful material for the study existed in State practice, jurisprudence and literature.

38. There seemed to be broad agreement in the Commission and in the Sixth Committee that the study should be confined to unilateral acts of States. Unilateral acts by other subjects of international law, such as international organizations, would be excluded. It was a view he supported for the time being in order to avoid adding a further layer of complexity to the topic. He also supported the view that, although international organizations were capable of formulating genuine unilateral acts, their special character and purpose required that separate rules should be applicable to such acts. As stated in paragraph 34 of the report, the lack of a legal regime common to international organizations presented difficulties. He agreed, however, that their exclusion from the study did not affect contemporary practice according to which unilateral acts of States were addressed to States and international organizations without distinction. For the purpose of the study, therefore, while unilateral acts of States could be addressed to international organizations, the capacity of the organizations to formulate such acts was not recognized.

39. As to the relationship with the topic of State responsibility, like others, he thought that, in line with the principal objective of the topic of unilateral acts, which was to provide a strictly limited definition of what was meant by unilateral acts of States, it was necessary to exclude those unilateral acts that gave rise to international responsibility. Such a limited approach would also help the Commission to avoid any possible duplication of the work done on State responsibility. State responsibility dealt with internationally wrongful acts of States that engaged their international responsibility, whereas the present topic was essentially concerned with the regime of autonomous unilateral acts formulated by States with the intention of creating obligations for the declarant States. The Special Rapporteur admitted, in paragraph 6 of his second report, that there was a certain relationship between the unilateral acts by which States engaged their international responsibility and the unilateral acts that were the subject of the current study.

40. Moreover, unilateral acts of States were autonomous and completely independent of any treaty regime. Unlike treaties, they did not require notification or acceptance by the States or other subjects of international law to which they were addressed. The study should deal exclusively with those autonomous unilateral acts of States which were formulated with the intention of creating, by themselves, international legal effects or international obligations for the declarant State. It was generally agreed that unilateral acts whose characteristics and effects were governed by the law of treaties and acts whose normative effect arose from the performance or existence of some other act or treaty should be excluded from the topic.

41. The fourth general point was estoppel. It was doubtful that estoppel arising from a unilateral statement made by an agent of a State during the proceedings of an international court could be considered a unilateral act. It was argued that the characteristic element of estoppel was not the conduct of the State in question but the reliance of another State on that conduct. While a unilateral act of the State produced a positive result with a clear intention on the part of the State to be bound by it, the unilateral statement creating the estoppel produced a negative result which was basically not intended by the author, although the other interested party could seize the opportunity to benefit from it by using the plea of estoppel. Consequently, one aspect of the definition of an autonomous unilateral act of a State, namely the intention of the State to produce international legal effects, was missing in the unilateral statements that gave rise to the plea of estoppel. As stated in paragraph 14 of the second report, in estoppel there was no creation of rights or obligations; rather, it became impossible to avail oneself of already existing rights and obligations in the context of a given proceeding.

42. Paragraph 23 of the second report pointed to the difficulties involved in defining the scope of the topic. Draft article 1 was intended to limit the scope to unilateral acts of States, thus excluding international organizations, and to unilateral legal acts, to the exclusion of other acts which, although unilateral and legal in character, did not produce international legal effects. The wording of the article did not, however, reflect all the elements he had just described. The words "international effects" were qualified by neither "autonomous", "intention" nor "legal", but they were essential aspects of the definition of the scope of the unilateral acts. He would therefore suggest a more comprehensive version of draft article 1 reading: "The present draft articles apply to autonomous unilateral acts of States formulated with the intention of creating international legal effects."

43. The Special Rapporteur tended to justify his proposed definition in draft article 2, which he admitted was incomplete and non-comprehensive, by referring to article 2, on the use of terms, in the 1969 Vienna Convention. The Special Rapporteur also claimed that the definition contained a specific provision which clarified the meaning of the term "unilateral acts" without being an actual definition of it, by analogy with article 2, paragraph 1 (*a*) of the Convention, which was not a definition of the term "treaty". Personally, he did not agree with that analysis. If the Commission followed the practice applied in similar instruments, a comprehensive definition of the topic was essential. It was also necessary to have a clear and definite definition of what was meant by "unilateral acts" in the body of the future instrument. With a view to incorporating one, he proposed the following reformulation of draft article 2:

> "For the purposes of the present draft articles, a 'unilateral legal act' means an unequivocal and autonomous expression of will, formulated unilaterally and publicly by one or more States in relation to one or more States or an international organization or the international community as a whole, with the intention of creating international legal effects."

44. For the purposes of draft article 2, the word "[declaration]" might not have to be used if the Special Rappor-

teur could mention in the commentary that the expression "unilateral act" was the general term used for the autonomous expression of will by a State in the form of a declaration, statement, communiqué or otherwise, it being understood that the form which the unilateral act should take was not an essential matter.

45. Since it was generally recognized that not only States but other subjects of international law such as international organizations had the capacity to formulate unilateral legal acts, it seemed advisable to add, at the beginning of draft article 3, the phrase "For the purposes of the present draft articles ...". By so doing, the Special Rapporteur would be in a better position to explain in the commentary the reason for excluding international organizations.

46. As to draft article 4, paragraph 1 appeared to be the most important, because heads of State, heads of Government and ministers for foreign affairs were the only State officials who were recognized in international practice as being able to commit the State they represented to international obligations and engagements without having to produce an instrument of full powers. Since the eligibility of the categories of State officials mentioned in paragraphs 2 and 3 to formulate unilateral acts on behalf of the State was subject to numerous difficulties, he would suggest that paragraphs 2 and 3 should be deleted.

47. The title of draft article 5 was "Subsequent confirmation of a unilateral act formulated without authorization", but the English text referred to article 7* as it related to a person authorized to represent a State. Draft article 7 dealt with many other matters, including the consent of a State, the invalidity of a unilateral act when formulated on the basis of an error of fact, fraudulent conduct, corruption, coercion, and so on. It was draft article 4, rather than draft article 7, that referred mainly to authorized persons. Perhaps the formulation of those articles should be reviewed in order to remove any confusion between authorization and invalidity.

48. It had been suggested that draft article 6 should be deleted, on the grounds that it was unnecessary. That might be true, except that the article described how consent operated in respect of a treaty as compared with a unilateral act. Consent to a treaty was given by signature, ratification, accession or acceptance by the State concerned, whereas consent to a unilateral act was expressed by the State at the time the act was formulated. The commentary on draft articles 6 and 7, in the second report, should be separated to address each article individually and should be made more consistent with the 1969 Vienna Convention.

49. Lastly, he favoured the re-establishment of the Working Group on unilateral acts of States as suggested earlier and again wished to thank the Special Rapporteur for coping with a rather complex topic.

50. Mr. GOCO, referring to Mr. Al-Baharna's comments on draft article 5, said it was his understanding that when a unilateral act was confirmed, that meant the declaration, although made by an authorized person, was valid, whereas prior to such confirmation, the declaration did not produce legal effects. What happened from the standpoint of repudiation, however? If there were no legal effects prior to confirmation of the declaration, could the declaration also be repudiated during that period on the grounds that the person making the declaration was an unauthorized representative? Article 5 should not limit the scope merely to subsequent confirmation, but should cover repudiation as well. Lack of confirmation might become grounds for estoppel if another State had already relied on the first State's declaration before it had been confirmed. If the declaration was subsequently acknowledged as a treaty, the way the consenting Government was structured would determine whether ratification was required.

51. Mr. Sreenivasa RAO, referring to Mr. Goco's comments, said that draft article 5 referred to a unilateral act which was not considered to have a legal effect in the light of draft article 7. The latter article indicated that the person who formulated the unilateral act might be authorized to do so at the time it was made, but that the act could not have legal effect because of certain conditions. Those conditions—corruption, coercion, etc.—had nothing to do with the status of the person formulating the unilateral act, but related rather to the legal effect of the act. If an act had no legal effect, it could neither be confirmed nor repudiated: it was invalid *ab initio*. He would like to hear the views of the Special Rapporteur and Mr. Al-Baharna on how draft article 7 meshed with draft article 5 in a situation requiring subsequent confirmation of an act because the person making it lacked authorization to do so.

52. Mr. AL-BAHARNA said that Mr. Goco was right: draft article 7 carried some elements of authorization, but not all of them. It presumed that the official had been authorized to perform the act but that other elements such as error, conduct or corruption had vitiated the whole procedure. It was draft article 4 that addressed authorization most directly. His suggestion was to review all the relevant draft articles, 4, 5 and 7, with a view to delineating their respective roles in relation to authorization, confirmation, corruption, and so forth.

53. Mr. KABATSI said it was important to point out that it was not necessary that a State should be entitled to confirm a unilateral act formulated without authorization on the grounds of one or another of the factors listed in draft article 7. For example, in respect of subparagraph (*f*), a State would be incapable of confirming a unilateral act. Other situations, too, might make that impossible for a State, even if it wished to do so.

54. Mr. GOCO, responding to the comments by Mr. Sreenivasa Rao, said that draft article 7 introduced new elements—corruption, coercion and so on—whereas draft article 5, which followed draft article 4 concerning those who had authorization, simply spoke of a representative who made a declaration. The declaration had to be confirmed, because the person who had made it was not the proper party, but it had nevertheless been valid to all intents and purposes: it had simply produced no legal effect.

*The meeting rose at 11.40 a.m.*

* Typographical error in the English text, "article 7" should read "article 4" (see 2593rd meeting, paragraph 24, text of article 5).

## 2596th MEETING

*Friday, 2 July 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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### Closure of the International Law Seminar

1. The CHAIRMAN invited Mr. Von Blumenthal, Director of the International Law Seminar, to address the Commission on the occasion of the closing ceremony of the thirty-fifth session of the seminar.

2. Mr. von BLUMENTHAL (Director of the International Law Seminar) expressed gratitude to all those who had helped to make the Seminar a meaningful event. For 35 years, the Seminar had provided a unique opportunity for young lawyers to acquaint themselves with the techniques of codification of international law. He trusted that the work of the Commission would remain a lasting source of inspiration to the participants in the thirty-fifth session. Like earlier participants, some of them might one day have the privilege of also becoming members of the International Law Commission.

3. Mr. TAAL, speaking on behalf of his fellow participants, thanked all the members of the Commission for their help and advice and for sharing with them their experience and knowledge.

4. Mr. KATEKA requested copies for the members of the Commission of the reports produced by the participants in the Seminar individually and in groups.

5. The CHAIRMAN said he joined in the good wishes addressed by the Director of the Seminar to the participants and thanked them for the interest they had shown in the Commission's work.

*The Chairman presented participants with certificates attesting to their participation in the thirty-fifth session of the International Law Seminar.*

### Unilateral acts of States (*continued*) (A/CN.4/496, sect. C, A/CN.4/500 and Add.1,[1] A/CN.4/L.588)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

6. Mr. AL-KHASAWNEH said that the second report of the Special Rapporteur on unilateral acts of States (A/CN.4/500 and Add.1) was very commendable, although he did not think that the topic was really ready for codification. The Special Rapporteur tried to negotiate his way through a *terra incognita*, not so much because of the absence of a theoretical basis for the question, but because, as the Special Rapporteur pointed out in paragraph 23 of his second report, State practice in that area had never been systematically studied. Such a study was all the more difficult because the sources were often scattered in chancelleries or even non-existent, since States did not always deem it necessary to leave a written, published trace of their unilateral acts. In view of all those difficulties, it might even be asked whether it was feasible to conduct such a study.

7. To be sure, the absence of such a study of State practice had not prevented ICJ from ruling on the question of the nature of unilateral acts in the *Nuclear Tests*, the *Frontier Dispute* or the *Military and Paramilitary Activities in and against Nicaragua* cases, but it had done so ex post facto and taking into account relevant facts. That contextual approach was not available to legislators who, beforehand, wanted to provide an objective yardstick against which the intent of States to assume duties vis-à-vis other States could be ascertained. Formalism was not helpful either, since not all unilateral acts subscribed to formal requirements; in fact, many of them were formulated ambiguously, that being part of the art of diplomacy. Hence, the Special Rapporteur's attempt to draw analogies with the law of treaties was not always convincing. For example, concerning the concept of promise, he might have done better to seek private-law analogies.

8. Following those general observations, he said that he had a number of specific comments to make. First of all, there was no need to deal with unilateral acts by international organizations because that was outside the scope of the topic. However, when unilateral acts of States were addressed to international organizations, there was no reason why the latter should be treated differently from States. When a declaration was made *erga omnes*, it was less clear whether it should also be presumed to include international organizations. The intent of the State making the declaration obviously played an important part in that case. It was difficult to derive a uniform rule from the judgments of ICJ: after having found, in the *Nuclear Tests* cases, that a declaration could be made *erga omnes*, the Court had refused, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, to accept the declaration which the "Junta of the Government of National Reconstruction" in Nicaragua had addressed to OAS as a legal commitment.

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

9. On another point, he disagreed with the Special Rapporteur's assertion in paragraph 55 of his second report that publicity was a defining element of a unilateral act because that was at variance with the practice of States, which by no means systematically published all their declarations.

10. With regard to representatives of States that were empowered to formulate unilateral acts, the Special Rapporteur was trying to strike a balance between a restrictive approach, which might be justified, and the desire to build confidence in international relations by stressing the concept of good faith. There again, it would be useful to examine State practice more systematically.

11. With respect to the validity of unilateral legal acts and, in particular, the expression of consent and causes of invalidity, the Special Rapporteur followed the model provided by the law of treaties, although he was aware of the qualitative differences between the regime of treaties and that of unilateral acts. For example, he argued that fraud or corruption were even more likely to arise in the sphere of unilateral acts than in that of treaties, although it might be asked how that was to be reconciled with the restrictive approach to unilateral acts. Once again, there was a need for more systematic consideration of State practice.

12. Mr. Sreenivasa RAO said that he supported the idea of referring the study of the topic, including the draft articles proposed by the Special Rapporteur in his second report, to a working group. The working group should also study the methodology to be adopted for further deliberations, since the Commission had not yet taken any decision on the matter.

13. With regard to the contents of the text, a sharper distinction should be drawn between acts which produced legal effects and those which did not and between political and legal acts. There were analogies with the topic of reservations to treaties, which might assist the Commission in its review. The second report of the Special Rapporteur had made a useful contribution by identifying acts which did not come within the scope of the study and which could not therefore be deemed unilateral autonomous acts intended to create legal effects.

14. Several references had been made to declarations on or in the context of nuclear disarmament. In his opinion, much thought usually had been given to those statements; they were very earnest and deserved attentive consideration when studying unilateral acts.

15. The very nature of the topic meant that, in all likelihood, it would not be investigated exhaustively and, at all events, should not remain on the Commission's work programme for too long. The Special Rapporteur had defined the scope of the topic and the Commission should draft a declaration on the nature and effects of unilateral acts fairly quickly and submit it to the Sixth Committee for approval.

16. Turning to the draft articles proposed by the Special Rapporteur, he considered that, as Mr. Hafner had noted (2595th meeting) with reference to draft article 2 (Unilateral legal acts of States), unilateral acts could give rise to rights as well as to legal obligations. Perhaps that provision should say so.

17. With regard to draft article 4 (Representatives of a State for the purpose of formulating unilateral acts), the rules applying to the law of treaties might constitute a valuable source of guidance when it came to deciding which representatives of a State might formulate unilateral acts. The limits of its representatives' powers should also be scrutinized. In draft article 5 (Subsequent confirmation of a unilateral act formulated without authorization), it should be made clear that the article 7 in question was article 7 of the 1969 Vienna Convention; it was not sufficient to say so in the commentary. Lastly, the question dealt with in draft article 7 (Invalidity of unilateral acts), subparagraph (*g*), including the compliance of consent with constitutional procedures, should be considered in depth.

18. Mr. GOCO said that it would be overly restrictive to apply the rigorous rules of the law of treaties, as they stood, to unilateral acts.

19. Mr. KATEKA, referring to the question of the circumstances in which the person making a unilateral declaration could be regarded as a representative of a State, recalled that, when the United Nations Convention on the Law of the Sea was being negotiated, the Secretary of State of the United States of America, Mr. Henry Kissinger, had promised that the United States would finance the parallel system in order to persuade some States to accept it,[2] but the Government of the United States had gone back on that declaration.

20. Mr. Sreenivasa RAO said that the context in which a declaration was made also had to be borne in mind. When States were negotiating an agreement, the Governments concerned had to be able to consider the results of negotiations and endorse them, as they knew that any agreement which had been signed would usually have to be ratified by parliament.

21. Other questions also arose such as whether the author of a unilateral act producing legal effects could determine those effects through another unilateral act. In other words, was it possible to undo what had been done with equal ease? That moot point led some people to doubt that unilateral acts could have legal effects.

22. Mr. PAMBOU-TCHIVOUNDA said he agreed with Mr. Sreenivasa Rao that the methodology to be adopted for further consideration of the topic should be defined more precisely. In terms of substance, the autonomous nature of a unilateral act was the main problem. That autonomy had to be considered first in relation to the context, or environment, of the act and, in that respect, it was extremely difficult to say whether or not a unilateral act was a political act. The context might also be that of the domestic jurisdiction of a State, for example when a declaration was made in an isolated piece of internal legislation on which an obligation to inform other States was to be based. Admittedly, the act through which that information was communicated could be regarded as an autono-

[2] See *Official Records of the Third United Nations Conference on the Law of the Sea,* vol. VI (United Nations publication, Sales No. E.77.V.2), p. 132, document A/CONF.62/L.16.

mous act, but it had to be acknowledged that that autonomy was limited. After all, autonomy also had to be appraised in terms of the context of international law itself. For example, when France, a colonial Power, had stated that it was going to grant independence to its African colonies, an act which was a prime example of a political act, its declarations could not be divorced from the debates which had been held on decolonization during the United Nations Conference on International Organization (San Francisco Conference) and in the United Nations itself. With reference to a matter raised by the Special Rapporteur, questions could also be asked about the forms which the publicity of such declarations had to take. The progress achieved in means of communication, to which Mr. Goco had referred (2595th meeting), meant that the concept of publicity must be reconsidered so that its limits could be determined.

23. In conclusion, he thought that the Special Rapporteur and the working group had to discuss in detail how to relativize the scope of the criterion of autonomy and give politics its rightful place.

24. Mr. Sreenivasa RAO, referring to Mr. Kateka's comment on Mr. Kissinger's promise during the lengthy negotiation of the United Nations Convention on the Law of the Sea, said that a distinction should perhaps also be made between the case in which the Government which reneged on an undertaking was the same as that to which the minister of foreign affairs who had made it had belonged and the case in which the promise was retracted by a new administration.

25. Mr. CRAWFORD said he agreed with the comment that the scope of the draft articles was too narrowly cast at the current time. It was not the function of the Commission to point to a problem, to define, so to speak, the least problematic part of it and then to pretend that the rest of the problem did not exist. He feared that the second report did precisely that. The definition of unilateral legal acts excluded the equivocal act, in other words, a public statement which was made by a State with the intention of creating legal obligations, but which was, unfortunately, badly drafted. One of the functions of the draft articles was to propose rules of interpretation with respect to equivocal legal acts, but they were excluded a priori from the scope of the topic by the definition. In fact, one of the rules of interpretation that did exist went back to the *Anglo-Iranian Oil Co.* case in which ICJ had laid down a principle of interpretation that differed from the rules of interpretation of treaties. The definition proposed in the draft articles thus excluded one of the existing rules from the scope of the topic.

26. The difficulty was even greater with respect to estoppel: he agreed with what Mr. Pellet had had to say (2594th meeting) on that subject. It was true that the general principal of estoppel, which seemed to have been recognized in international law, had a scope wider than that of the subject of unilateral legal acts. The reason was that estoppel applied to representations which could be made even by implication or by conduct in certain circumstances and which would not necessarily amount to unilateral legal acts. It was also necessary, however, to look at the range of issues which arose with respect to statements of States. Not all estoppels arose from positive statements. Assuming that the topic was concerned with the subject matter of representations or promises made by States in circumstances in which they intended to be taken seriously, and that it was limited thereto, there were still connections with other sorts of statements, remarks, comments, undertakings, etc. To the extent that the topic was treated as a sort of antechamber of the law of treaties, it failed to reflect the reality. One possibility would be to use the definitions to make up a recipe for States to avoid all unilateral legal acts as defined by the Commission and engage only in other sorts of acts which, although they might have legal consequences, were not obvious cases of unilateral legal acts.

27. There was no doubt that there was some law-making to do, but the Commission could not rely simply on the analogy with the law of treaties, which might indicate some things to include as well as some things to avoid. It would have to rely on the legal traditions of the various legal systems that affected the way in which representations, promises and the like were treated. That had been true in the field of State responsibility, for example, under part one, chapter V, of the draft articles,[3] and it was also true in respect of unilateral legal acts.

28. The civil law legal systems had a substantial tradition of treating unilateral promises as binding and certain legal elements derived from that tradition must be taken into account. The common law legal systems generally did not treat such statements as binding and there was therefore no autonomous category of unilateral legal acts in the common law system, but it had tried to fill that gap and to deal with the problem of good faith arising from the non-binding character of unilateral statements by reason of the doctrine of estoppel. The problem was that both of those traditions were currently reflected in modern international law. The binding effect of a unilateral statement was illustrated in the *Nuclear Tests* cases and the doctrine of estoppel in a series of decisions incorporated in international law.

29. One of the Commission's functions was to rationalize that situation. At the current time, it did not make any sense from the legal point of view because, if a unilateral statement was binding by itself, then there was no need for the doctrine of estoppel. It was not surprising that the doctrine of estoppel had been invented by a system that did not have the other rule. But it was possible that there were elements of the notion of estoppel in the context of representations and promises which could be incorporated in a coherent legal doctrine. For example, it seemed to be a mistake to assume that, because some unilateral statements were like treaties, all unilateral statements were irrevocable except with the consent of the persons to whom they were addressed. Some might be, but not necessarily all. Of course, if another party had relied on a unilateral legal statement to its detriment, the irrevocability of the representation came into question. So there was more to be done on that subject, which was of value only if it was treated sufficiently broadly.

30. Mr. KUSUMA-ATMADJA, replying to the point made by Mr. Goco that, in certain States, the President, Vice-President and minister for foreign affairs normally

[3] See 2593rd meeting, footnote 6.

did not need authorization to conduct relations with other countries, said he wished to share with the Commission his own experience in that regard.

31. In Indonesia, a minister needed authorization from the minister for foreign affairs to conclude agreements with his foreign counterparts, the purpose being to ensure coordination within the various ministries. In the late 1980s, when he had still been in office as minister for foreign affairs, the Indonesian minister of technology had indicated that he wished to make an agreement with his counterpart from the United States. As there was no equivalent in the United States of a minister of science and technology, the Indonesian ambassador to that country at the time had held to the strict instructions he had received from the minister for foreign affairs and had refused to authorize the minister of technology to conclude the agreement on the grounds that the minister of technology was not even able to explain what the agreement would entail and with whom it would be concluded. It was perfectly possible for a minister to conclude an agreement subject to subsequent confirmation by the minister for foreign affairs. The ambassador in office at the time merely had to communicate clearly to the country concerned the content of the contract.

32. The minister for foreign affairs could also repudiate such an agreement, however. In another case,[4] a minister—the Secretary-General of the National Defense Security Council of the Republic of Indonesia (NDSC)—had made promissory notes without the necessary authority because NDSC was not part of the Ministry of Finance nor of the Central Bank. The promissory notes had accordingly been null and void *ab initio.* The Indonesian ambassador to the Syrian Arab Republic had made the mistake of signing the promissory notes, although it was usually consular officers who confirmed that the signature of such documents was valid. The ambassador had been repudiated and the promissory notes had not been honoured, thus creating a great deal of confusion. But he, as Minister for Foreign Affairs, had held firm because it had been a scam aimed at confusing the public and the markets. The repudiation had been published in the newspapers, but not in the *Official Gazette*. As an even more effective alternative, the Central Bank had warned all bankers in the hope that prudent people would not buy promissory notes that would not be honoured. That type of situation had occurred again and again, even in the 1990s.

33. Mr. SIMMA, supported by Mr. AL-BAHARNA, said that the working group should commission the Secretariat to compile State practice in the field of unilateral acts. Of course, that should have been done before the Commission took up the issue.

34. Secondly, the discussion had given him the impression that quite a few members of the Commission who had spoken about State practice with regard to unilateral acts had referred really to the practice of ICJ, citing the *Nuclear Tests* cases, the case concerning *Military and Paramilitary Activities in and against Nicaragua*, etc. There was ample State practice which had not gone before the Court, but which was nevertheless relevant.

35. The working group should also give serious attention to the idea of changing the course of the enterprise by giving the end product the form of an expository study along the lines of the idea advanced by Mr. Sreenivasa Rao. The approach of drafting articles that followed or paralleled the 1969 Vienna Convention should be discontinued.

36. Mr. KATEKA said that he supported the first part of the proposal made by Mr. Simma. A Secretariat study would be welcome, but an expository code at the present stage might be a bit premature. What was clear was that having a convention on unilateral acts was out of the question. The Commission should be open-minded about other forms of lesser instruments. The experience with the codification of the law of treaties did not recommend the drafting of expository codes. The Commission should give itself time before deciding on the form to be taken by the instrument.

37. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), summing up the debate, said that he had gained a number of impressions from the Commission's deliberations. First, its members agreed that the topic was not yet "ripe" enough for codification, if one could use that term. Secondly, on the assumption that the codification work went ahead anyway, some members would prefer to adopt a restrictive standpoint on the topic, while others saw it in broader terms. Thirdly, opinions were divided as to the form that the text being drawn up should take. As had just been said, it was clearly too soon to come to a decision on that point because it was difficult to predict the course that the Commission's considerations would take.

38. He recalled that the topic under discussion already had a certain history. The Commission had decided at its forty-ninth session to establish the Working Group which had produced some broad guidelines,[5] and at its fiftieth session, the first report of the Special Rapporteur[6] on the basic aspects of unilateral acts of States, i.e. on their definition and constituent elements, was submitted. The basic stumbling point was knowing whether to establish specific arrangements for unilateral acts of States in addition to the 1969 Vienna Convention. The fact was that such acts did exist and were not always fully covered by the Convention, and Convention members held varying opinions on the matter. The Convention remained the absolute reference, not only with regard to the codification work, but also in terms of the method to follow. The 1986 Vienna Convention was simply a by-product of the 1969 Vienna Convention, from which it did not differ in scope.

39. The 1969 Vienna Convention nevertheless applied fully to unilateral acts of States considered from the standpoint of their validity. Such acts were also subordinate to the expression of consent and remained subject to the causes of invalidity listed in the Convention (error, fraud, corruption, constraint, etc.). Mr. Dugard had referred to

[4] See *American Journal of International Law* (Washington, D.C.), vol. 91, No. 4 (October 1997), pp. 738-740.

[5] See *Yearbook ...1997,* vol. II (Part Two), chap. IX, sect. B.3, pp. 65-66.

[6] *Yearbook ...1998,* vol. II (Part One), document A/CN.4/486.

another cause of invalidity, namely, conflict between a unilateral act and decisions of the Security Council. Clearly, what was intended were binding decisions of that body. It was an interesting and constructive idea worthy of further examination.

40. Issues which seemed to have been settled at the fiftieth session of the Commission had been brought up again for discussion, in particular that concerning the relationship between a legal unilateral act and the formation of custom. It was precisely in that context that the question of an act's autonomy arose. For him, that autonomy had two aspects: autonomy with regard to rules, and existential autonomy, meaning that an act was actually formulated regardless of the reaction of its addressee. In truth, no act was really autonomous, in that it always came within the realm of the law. On the other hand, it was evident that a unilateral act became "bilateralized", so to speak, once it was recognized by another State. That did not prevent it from existing as soon as it was formulated, independently of such recognition.

41. One member of the Commission had referred to a situation involving silence and assent on the part of the addressee State. Silence was not strictly a legal act, although it produced legal effects. The element of intent was missing. A great deal of jurisprudence existed on the matter. It was an issue that would require further work aimed at excluding from the scope of study everything that did not fall precisely within the definition given at the beginning.

42. Mr. Pambou-Tchivounda had spoken of the difference between a legal act and a political act. He seemed to believe that any act was political and that certain political acts were legal. The classic example involved the negative guarantees given by the nuclear Powers to non-nuclear-weapon States. The topic was vast. Even its delimitation was difficult, as it was impossible to draw a distinction between a legal act and a political act without interpreting the author's intentions. Could it, incidentally, be said that a political act was autonomous? The working group would have to try to define more accurately what was meant by "legal effect" and "autonomous act".

43. For some members, the definition given in draft article 2 was too restrictive because it stated simply that a unilateral act was formulated "with the intention of acquiring international legal obligations". Could it be maintained, for example, that a blockade imposed by State A on State B established obligations for State C? A declaration of neutrality posed a similar problem: it had effects for other States only if they ratified it, either by their conduct or through a formal act. He had already advised against referring in the draft articles to acts by which a State incurred obligations on behalf of a third party State, which were the concern of conventional law.

44. Several drafting proposals had been made. Some members had suggested combining draft articles 1 and 2. There was no doubt that the two provisions, one dealing with the scope of the articles and the other with the definition of unilateral legal acts of States, were of necessity complementary. He preferred to keep the two provisions separate and felt that, in any event, the most important consideration was to maintain the logical connection linking one to the other.

45. A proposal had also been made to include in the draft a provision similar to article 3 of the 1969 Vienna Convention, in order not to deny the existence of other acts having legal effects. That provision was understandable in the Convention, which dealt not with conventional law in general, but specifically with the law of treaties, and thus had to allow for acts which did not come specifically within its scope. In the present case, however, the definition given in draft article 1 covered all unilateral acts having legal effects, meaning all conceivable acts. As to acts of international organizations, they should be excluded, as advised in the commentary to draft article 1, unless a purely formal definition was used.

46. Questions had also been raised about the concepts of publicity and notoriety. He regarded the two terms as virtually synonymous, although notoriety could be referred to in the case of a declaration *erga omnes*. Publicity related more to the State to which the act in question was addressed, which must be aware of the act in order for it to produce effects. The publicity for an act should thus be regarded as containing one of its constituent elements.

47. Concerning Mr. Dugard's question about the use of the term "international community" in draft article 2, he said that international life was evolving towards the establishment of an international society, a phenomenon he regarded as inevitable. As evidence, there were the major areas of common concern which had emerged, such as human rights and the environment, and which no longer came under national jurisdiction. The issue was a sociological one which certainly required further consideration and whose importance was highlighted by the growing influence of multilateralism in the modern world.

48. In conclusion, he said there was a need to set up a working group that would define unilateral acts of States and clarify their constituent elements. For the time being it would be best to keep the draft articles in their current form, which was the one best suited to the Commission's discussions. There was also a need to become better informed about the practice of States and how they viewed, received and responded to unilateral acts. The Secretariat should be asked to carry out a study of State practice and present it in summary form. Perhaps, through the Secretary-General, it could send a questionnaire to the Member States. That, of course, would take a great deal of time.

49. Mr. CRAWFORD said that he endorsed the idea of having the Secretariat analyse State practice in respect of unilateral acts and develop a questionnaire for that purpose. However, his preference would be for a very general study, without restrictions, and for a questionnaire that was not based on any a priori position.

50. The CHAIRMAN announced the composition of the Working Group. In accordance with custom, it would be chaired by the Special Rapporteur.

*The meeting rose at 12.55 p.m.*

# 2597th MEETING

*Tuesday, 6 July 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Tomka, Mr. Yamada.

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## Reservations to treaties[1] (*continued*)* (A/CN.4/491 and Add.1-6,[2] A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,[3] A/CN.4/L.575)

[Agenda item 5]

DRAFT GUIDELINES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft guidelines proposed by the Drafting Committee (A/CN.4/L.575), the titles and texts of which read:

**1.1.1 [1.1.4]**** *Object of reservations*

**A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of specific aspects of the treaty as a whole, in their application to the State or to the international organization which formulates the reservation.**

**1.1.5 [1.1.6]** *Statements purporting to limit the obligations of their author*

**A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.**

**1.1.6** *Statements purporting to discharge an obligation by equivalent means*

**A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.**

**1.2** *Definition of interpretative declarations*

**"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.**

**1.2.1 [1.2.4]** *Conditional interpretative declarations*

**A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subordinates its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.**

**1.2.2 [1.2.1]** *Interpretative declarations formulated jointly*

**The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.**

**1.3 [1.3.1]** *Distinction between reservations and interpretative declarations*

**To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to ascertain the purpose of its author by interpreting the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.**

**1.3.1 [1.2.2]** *Phrasing and name*

**The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce. The phrasing or name given to the statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral declarations in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.**

**1.3.2 [1.2.3]** *Formulation of a unilateral statement when a reservation is prohibited*

**When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it is established that it purports to exclude or modify the legal effect of certain provisions of the treaty or of specific aspects of the treaty as a whole, in their application to its author.**

**1.4** *Unilateral statements other than reservations and interpretative declarations*

**Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.**

**1.4.1 [1.1.5]** *Statements purporting to undertake unilateral commitments*

**A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to**

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* Resumed from the 2586th meeting.

** The numbers in square brackets correspond to the original numbers proposed by the Special Rapporteur in his third report (see footnote 2 below).

[1] For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

[2] See *Yearbook ... 1998*, vol. II (Part One).

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

**undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.**

**1.4.2 [1.1.6]** ***Unilateral statements purporting to add further elements to a treaty***

**A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.**

**1.4.3 [1.1.7]** ***Statements of non-recognition***

**A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize as a State constitutes a statement of non-recognition and is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.**

**1.4.4 [1.2.5]** ***General statements of policy***

**A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy and is outside the scope of the present Guide to Practice.**

**1.4.5 [1.2.6]** ***Statements concerning modalities of implementation of a treaty at the internal level***

**A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect the rights and obligations of the other contracting parties, constitutes a merely informative statement and is outside the scope of the present Guide to Practice.**

**1.5** ***Unilateral statements in respect of bilateral treaties***

**1.5.1 [1.1.9]** ***"Reservations" to bilateral treaties***

**A unilateral statement formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty in respect of which it is subordinating the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice, however phrased or named.**

**1.5.2 [1.2.7]** ***Interpretative declarations in respect of bilateral treaties***

**Guidelines 1.2 and 1.2.1 [1.2.4] are applicable to bilateral treaties.**

**1.5.3 [1.2.8]** ***Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party***

**The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.**

**1.6** ***Scope of definitions***

**The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.**

2. Mr. CANDIOTI (Chairman of the Drafting Committee), introducing the report of the Drafting Committee, said that the Committee had held eight meetings from 3 to 22 June 1999. He wished to thank the Special Rapporteur for his guidance, cooperation and efficiency in assisting the Committee, its members for their constructive attitude and the Secretariat for its valuable assistance.

3. At the fiftieth session of the Commission, the Drafting Committee had considered and completed work on nine draft guidelines dealing primarily with the definition of reservations. The Commission had adopted seven of those guidelines[4] and had referred two back to the Drafting Committee for reconsideration. At the current session, the Commission had referred 10 draft guidelines to the Drafting Committee. He was pleased to report that the Drafting Committee had completed work on all of the draft guidelines referred to it so far.

4. To present the draft guidelines in a more coherent manner, the Drafting Committee had restructured chapter I, on definitions, of the Guide to Practice, breaking it down into six sections: section 1.1 (Definition of reservations), section 1.2 (Definition of interpretative declarations), section 1.3 (Distinction between reservations and interpretative declarations), section 1.4 (Unilateral statements other than reservations and interpretative declarations), section 1.5 (Unilateral statements in respect of bilateral treaties) and section 1.6 (Scope of definitions).

5. Concerning section 1.1, he pointed out that the Commission had decided to review draft guidelines 1.1.1 [1.1.4] (Object of reservations), and 1.1.3 [1.1.8] (Reservations having territorial scope), in the light of the discussion on interpretative declarations. Upon reconsidering the two draft guidelines, the Drafting Committee had decided that no changes were necessary for draft guideline 1.1.3 [1.1.8], but had proposed a new formulation for draft guideline 1.1.1 [1.1.4]. The Drafting Committee had noted that that draft guideline, which concerned the so-called transverse or across-the-board reservations, was useful, especially in view of the very frequent recourse to such reservations, that the field was not really covered by the 1969 Vienna Convention and that the Commission had already done very useful work in identifying and defining it. Three issues had been raised.

6. First, the text was very close to the definition of interpretative declarations, the expression "the way in which a State ... intends to apply the treaty" was a potential source of confusion and the element of intention was lacking from the general definition of reservations in section 1.1. Secondly, the use of the phrase "the treaty as a whole" did not exactly correspond to the situation that draft guideline 1.1.1 [1.1.4] purported to cover, namely transverse or across-the-board reservations, which excluded the application of the entire treaty but only in respect of certain categories of persons, objects, situations, specific circumstances, etc. Thirdly, there was still some uneasiness about the use of the word "may", even though paragraph (11) of the commentary to the draft guideline adopted at the fiftieth session[5] made it clear that the word

[4] See *Yearbook ... 1998*, vol. II (Part Two), pp. 91 and 99, paras. 480 and 540, respectively.

[5] Ibid., p. 102.

should not be interpreted in the permissive sense, i.e. implying that States and international organizations "have the right to".

7. The Drafting Committee had slightly modified the wording of draft guideline 1.1.1 [1.1.4] in view of those considerations. The first part of the new version ("A reservation ... or of") followed closely a phrase already included in the definition of reservations in section 1.1. The next part, the phrase, "specific aspects of the treaty as a whole", rendered more accurately the case of across-the-board reservations, encompassing the phenomenon of exclusion of the application of the treaty as a whole only with regard to certain persons, objects, circumstances, etc. The final phrase "in their application ... formulates the reservation", followed very closely a corresponding phrase in the definition of reservations. The title of the draft guideline remained unchanged. The commentary adopted at the fiftieth session, particularly paragraphs (11) and (12), should be modified to correspond to the new version.

8. The Drafting Committee had included two new draft guidelines in section 1.1: draft guidelines 1.1.5 [1.1.6] (Statements purporting to limit the obligations of their author) and 1.1.6 (Statements purporting to discharge an obligation by equivalent means). Draft guideline 1.1.5 [1.1.6] was one of those left over from the fiftieth session. It had been discussed at length by both the Commission and the Drafting Committee at that session. The text set out an obvious principle: a statement that purported to limit the obligations imposed on its author by a treaty constituted a reservation. The Drafting Committee had found that the draft guideline was undoubtedly useful because it included the words "to limit". The Vienna definition of reservations used only the terms "to exclude or to modify", although in practice they had been construed to have a limitative meaning, in the sense that they always aimed at something less than the treaty. A phrase in the original version referring to the rights of other parties to the treaty had been deleted as it might introduce some confusion. The temporal element incorporated in the original version had been retained, because it was necessary in the case of such statements. Reference had been made during the Drafting Committee's discussions to so-called "late reservations", namely reservations made after a State or international organization expressed consent to be bound by a treaty. Since the temporal element was already included in the Vienna definition of reservations, the Drafting Committee had thought it should be maintained in all definitions of reservations, on the understanding that the next chapter in the Guide to Practice, dealing with the formulation of reservations and interpretative declarations, would address the issue of late reservations in detail. It would be useful to include that understanding in the commentary to draft guideline 1.1.5 [1.1.6] in the interests of clarification. The title of the draft guideline remained practically unchanged, although in English the word "purporting" had been preferred to "designed", for the sake of consistency with other draft guidelines and conformity with the Vienna definition.

9. Draft guideline 1.1.6 was a new text but also originated in draft guideline 1.1.6 proposed by the Special Rapporteur in his third report (A/CN.4/491 and Add.1-6). The Commission's attention had been drawn at the fiftieth session to the very specific practice of Japan[6] when making a reservation to the Food Aid Convention, 1971,[7] by which Japan reserved its right to discharge its obligations under the Convention by providing rice instead of wheat or other cereals as required by the Convention. It was not a "substitution" of an obligation, since the obligation under the treaty remained the same, but the State purported to discharge that obligation by equivalent means. By its very nature, such a statement purported to modify the legal effect of certain provisions of the treaty in their application to the statement's author. Even if it could not take effect without the acceptance of the other parties, especially those directly affected by the discharge of the obligation, such too was the case with other reservations. The temporal element was also essential: it was when such statements were formulated at the time of consent to be bound by a treaty that they undoubtedly pertained to reservations. If they were made subsequent to the consent to be bound, they could at best constitute proposals for subsequent agreements, if not violations of the treaty.

10. The reference to discharging an obligation under a treaty "in a manner different from but equivalent to that imposed by the treaty" established the conditions specific to the draft guideline. If there was a diminishing of the obligation, then draft guideline 1.1.5 [1.1.6] applied. If, on the other hand, the obligation was increased, then the relevant draft guideline was 1.4.1 [1.1.5] (Statements purporting to undertake unilateral commitments). The party formulating such reservations determined whether the alternative way of discharging the obligation was "equivalent" to the one imposed by a treaty. Should the other parties not hold the same view, they could always object to such a reservation.

11. Section 1.2 was headed by draft guideline 1.2 (Definition of interpretative declarations). While the text had been generally supported during the discussion in the Commission at its fiftieth session, a number of issues had been raised. The Drafting Committee had shared the general view that issues relating to the validity of interpretative declarations lay outside the definition of such declarations and were thus unrelated to chapter I.

12. Two general points had been raised in the Drafting Committee with respect to draft guideline 1.2 and others. First, concerning the character of declarations, the Drafting Committee had considered that interpretative declarations were subjective. They expressed the views of the declaring State or international organization about the treaty. The definition did not deal with the legal effect of the interpretative declaration: that was a point that would be explained in the commentary. The Drafting Committee had also noted that interpretative declarations were different from interpretations that States might make from time to time about specific treaties to which they were parties. The difference was the formality by which interpretative declarations, as opposed to other interpretations, were made. The Drafting Committee believed that that should be explained in the commentary to the draft guideline. The second issue was that for reasons of consistency throughout the draft guidelines, the French word *déclaration* had been translated in English as "statement", the

[6] Ibid., p. 96, para. 523.

[7] United Nations, *Treaty Series*, vol. 800, No. 11400, p. 197.

word "declaration" being retained in English only when used as a term of art.

13. Five issues had been considered by the Drafting Committee with respect to the definition of interpretative declarations: (*a*) whether it should be couched not only in positive terms, saying what it included, but also in negative terms, indicating what it did not include; (*b*) whether it should use the word "interpret"; (*c*) whether an interpretative declaration could be addressed only to certain provisions of a treaty or also to the whole of a treaty; (*d*) whether an interpretative declaration could also be addressed to the way in which the treaty would be implemented; and (*e*) whether there was a time limit to making interpretative declarations.

14. On the issue of whether the definition should indicate what was not included in an interpretative declaration, the Drafting Committee believed that a parallel should be drawn with draft guideline 1.1 (Definition of reservations), which was couched in positive terms. On the second issue, the Drafting Committee thought that if the intention was to speak in definitional terms in a single guideline about various types of declarations, such as interpretative, conditional and simple declarations, it would have been useful to include the word "interpret". Now that the text was limited to the definition of interpretative declarations, however, the word would only make the definition tautological and possibly confusing.

15. On the third issue, the Drafting Committee considered that there was nothing in the nature of interpretative declarations to prevent them from applying to the whole of the treaty and, therefore, no reason for ruling out that possibility. One example was a declaration to the effect that an entire treaty was not self-executing, which involved interpretation of the treaty as a whole to see whether it was self-sufficient, clear, etc.

16. The Drafting Committee thought that the fourth issue of whether interpretative declarations could also deal with the implementation of a treaty was covered by other draft guidelines. Although sometimes a State made a statement indicating the manner in which it intended to implement the treaty, such a statement did not interpret the treaty. It explained the attitude of the State to the application of the treaty.

17. As to the fifth issue, of the temporal element in making interpretative declarations, the Drafting Committee was of the view that, as a rule, interpretative declarations were not subject to any time limit, which would unduly restrict the rights of States. The formulation of an interpretative declaration, as distinguished from that of a reservation, should not be limited in time because it did not have the effect of a reservation. If a time limit was placed on making interpretative declarations, that might suggest that such declarations had the kind of effect that a reservation had. However, since the guidelines were not intended to encourage States to make interpretative declarations at any time, the commentary would explain that good practice would suggest that interpretative declarations be made at certain times. It would further address the question of good faith and the effect of late declarations. It could explain that when necessary, the treaty itself should indicate the time within which a party to the treaty could make a declaration and also explain the broader goal of encouraging States to become parties to treaties.

18. Having considered those five issues, the Drafting Committee had found the text of draft guideline 1.2 proposed by the Special Rapporteur in his third report to be well drafted and had made no changes, although two editing corrections had been made to the English text. The phrase "a unilateral declaration" had been replaced by "a unilateral statement" to correspond to section 1.1. The words "specify or", which had been omitted from the English version of the original proposal in French, had been inserted before the word "clarify". The title of the draft guideline remained as proposed by the Special Rapporteur.

19. The Commission and the Drafting Committee had discussed whether, with respect to interpretative declarations, a draft guideline corresponding to draft guideline 1.1.1 [1.1.4] was necessary. The Drafting Committee had thought a comparable guideline unnecessary, since no definition of interpretative declarations was included in the 1969 Vienna Convention and the new definition adopted by the Drafting Committee was all-inclusive.

20. Draft guideline 1.2.1 [1.2.4] (Conditional interpretative declarations), provisionally adopted by the Drafting Committee, followed very closely the draft guideline proposed by the Special Rapporteur in his third report. In the debate in the Commission, the utility of the guideline had not been contested. A drafting suggestion had been made by Mr. He (2582nd meeting) to the effect that the list of methods of consent to be bound should be replaced by a more general expression, such as "when that State or that organization expresses its consent to be bound". The Drafting Committee had decided to maintain the enumeration as originally proposed, even at the expense of elegance, because it had proved the clearest method, bearing in mind especially that such statements might be formulated at the time of signature and reconfirmed at the moment of expression of consent to be bound.

21. The Drafting Committee had discussed at length the words originally in square brackets at the end of draft guideline 1.2.1 [1.2.4], namely "which has legal consequences distinct from those deriving from simple interpretative declarations". One view had been that they should be deleted, since legal consequences had been addressed nowhere else in the Guide to Practice and it would be inconsistent to do so in that particular draft guideline. Instead, such a phrase had its place in the commentary or in a footnote, where it could be clearly specified that the legal effects of conditional interpretative declarations were different from the effects of simple interpretative declarations. Another view had underlined the utility of indicating in the draft guideline itself that it was a special category, in the sense that conditional interpretative declarations could be regarded as being closer to reservations than to simple interpretative declarations. In any event, it seemed to belong to a third category of unilateral statements concerning treaties that were neither reservations nor (simple) interpretative declarations. The Drafting Committee had been unanimous on that point. In addition, the pedagogical and "utilitarian" character of the Guide to Practice argued for a less rigorous, more flexible conception. It had finally been decided to delete the words

between brackets for the sake of uniformity and pure logic, on the understanding that the question of the legal consequences of conditional interpretative declarations would be addressed at the appropriate time and that a guideline on that issue would have its place in the Guide to Practice.

22. The Drafting Committee had aligned the text of draft guideline 1.2.2 [1.2.1] (Interpretative declarations formulated jointly), on that of the corresponding draft guideline, 1.1.7 [1.1.1] (Reservations formulated jointly) simply replacing the word "reservation" by the words "interpretative declaration". As in the case of reservations, the draft guideline confirmed that the joint formulation of interpretative declarations did not affect the unilateral character of an interpretative declaration. It reflected a well-established practice, which might be further extended in view of increasing economic and political integration among States. The draft guideline should not prejudge the fact that interpretative declarations could be made orally, unlike reservations, which were always in writing. The similarities in the drafting of the two guidelines did not mean that the joint formulation of reservations and that of interpretative declarations were governed by the same legal regime.

23. The Drafting Committee had also discussed the possibility of all parties to a treaty formulating an interpretative declaration. The question had been raised in the Commission as to whether the unilateral character of the interpretative declaration was altered and it became a "collective" act, pertaining more to a consensus or even some form of subsequent agreement. It was the Drafting Committee's view that the unilateral character of the act concerned its origin and not its legal effects. That view was compatible with article 31, paragraphs 2 (*a*) and 3 (*a*), of the 1969 Vienna Convention. The reference in the draft guideline to "several" States or international organizations excluded the possibility of concluding that "all" States or international organizations concerned were involved in such an interpretative declaration, a situation in which certain legal consequences could arise, possibly affecting the unilateral character of the interpretative declaration. It would be worth explaining that in the commentary in order to remove any ambiguity. The title of the draft guideline had been revised to parallel that of draft guideline 1.1.7 [1.1.1].

24. Section 1.3 was headed by draft guideline 1.3 [1.3.1] (Distinction between reservations and interpretative declarations). The new title was more in keeping with the substance. In its consideration of the draft guideline, the Drafting Committee had taken note of the judgment of ICJ in the *Fisheries Jurisdiction* case, in which the Court had set out principles for interpretation of declarations or reservations. The original text of the draft guideline had referred to articles 31 and 32 of the 1969 Vienna Convention as setting out a general rule of interpretation of treaties and supplementary means of interpretation, respectively. Taking account of comments made in the Commission, the Drafting Committee had felt that the reference to another legal instrument was not desirable, although to some extent excusable in a guide to practice. It had also found the use of terms like mutatis mutandis inelegant. Although the rules of interpretation embodied in the Convention could be used mutatis mutandis for distinguishing reservations from interpretative declarations, rules primarily designed for treaties could not be directly transposed to unilateral statements. The intention of the author of the unilateral statement was of paramount importance.

25. In order to ascertain that intention, the draft guideline introduced an "objective" criterion, namely the interpretation of the unilateral statement in good faith and in accordance with the ordinary meaning to be given to its terms in the light of the treaty to which it referred. Only in that context was the application by analogy of the rules of interpretation of treaties in the 1969 Vienna Convention useful. It was understood that for the interpretation of the particular treaty in respect of which the unilateral statement was made, articles 31 and 32 of the Convention were applicable. As a supplementary means of interpretation, there was a more "subjective" temporal criterion, namely the intention of the State or the international organization concerned at the time the statement was formulated.

26. The current wording of the first sentence of draft guideline 1.3 [1.3.1] in a sense paraphrased article 31, paragraph 1, of the 1969 Vienna Convention, which stipulated that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The Drafting Committee had retained in the draft guideline those elements relevant to unilateral statements, i.e. the purpose of their author, good faith, which was essential in international law, and the ordinary meaning to be attached to the terms of such unilateral statements. The context was the treaty itself. The second sentence referred to the intention of the author of the unilateral statement. The Drafting Committee was of the view that, for purely practical reasons, no further reference should be made in the draft guideline to any *travaux préparatoires* or documents relating to the unilateral statement. With few exceptions, it was difficult for third parties to have access to the internal papers of States relating to and preceding the formulation of a unilateral statement.

27. As for draft guideline 1.3.1 [1.2.2] (Phrasing and name), the first sentence was a positively worded version of the first sentence as originally proposed by the Special Rapporteur. The Drafting Committee had thought that such drafting offered a useful clarification, because it focused on an important element in the definition of interpretative declarations—and reservations—namely the repudiation of "nominalism". Consequently, the wording or naming of a unilateral declaration had only indicative value as far as its legal qualification was concerned. It had thus been essential for the first sentence to maintain that element, which in fact corresponded to the phrase "however phrased or named" in the definition of reservations (in draft guideline 1.1). In the same spirit, the word "seeks" had been replaced by "purports", which had been used in the draft guidelines already adopted.

28. The second sentence was also useful in that it underlined that the phrasing or naming merely constituted an indication, not a presumption or evidence. Attempts to merge the two sentences, as had also been suggested by Mr. Pambou-Tchivounda (2581st meeting), had been abandoned for the sake of clarity and precision. More-

over, the word "however" in the original proposed by the Special Rapporteur had been deleted, since it had implied a contrast with regard to the first sentence, which might be misleading or confusing.

29. The Drafting Committee had debated at length whether to retain the third sentence or delete it and include it in the commentary. It had been felt that it constituted more a demonstration or illustration of the principle enunciated and that it could therefore be deleted. However, it had been ultimately decided that, in view of the didactic and "functional" role of the Guide to Practice, it would be more appropriate to keep it. For the sake of consistency and uniformity, the Drafting Committee had preferred to use the terms "phrasing and name", which were those employed in the Vienna definition, and it had noted that that fact would be duly reflected in the commentary.

30. Draft guideline 1.3.2 [1.2.3] (Formulation of a unilateral statement when a reservation is prohibited) also addressed the relationship between interpretative declarations and reservations. The Drafting Committee had reformulated it to take account of the comments made in the Commission, where concerns had been expressed about the draft guideline's basic objective and the language employed.

31. Like others in chapter I, draft guideline 1.3.2 [1.2.3] dealt with the question of definitions. It did not touch upon the legal effects of declarations. Its purpose was to consider situations in which a treaty prohibited reservations and a unilateral statement was made by a State with respect to the treaty. The issue was what that unilateral statement should be called in accordance with definitions provided in the Guide to Practice. The Drafting Committee shared the view of most members of the Commission that such a unilateral statement by a State should be "presumed" not to be a "reservation". That presumption, which was based on the principle of good faith, was refutable. The rebuttal was based on the purpose of the unilateral statement. If the statement purported to exclude or modify the legal effects of certain provisions of the treaty or the treaty as a whole in their application to its author, it then fulfilled the definition of a reservation. The words "except when it is established" created the possibility of a rebuttal of the presumption. There again, the text of the draft guidelines was limited to providing definitions. Nevertheless, the commentary would explain that, in circumstances in which a treaty prohibited reservations, such a unilateral statement, when it was established that it had the intended effect of a reservation, became an impermissible reservation.

32. Draft guideline 1.3.2 [1.2.3] had been redrafted to form a single sentence, for the Drafting Committee found the new construction more economical and elegant. The draft guideline spoke of the legal effect of "certain provisions of the treaty or of specific aspects of the treaty as a whole". The same language was used in draft guideline 1.1.1 [1.1.4]. The title had been changed slightly by replacing the words "an interpretative declaration" by the words "a unilateral statement".

33. Section 1.4 was entitled "Unilateral statements other than reservations and interpretative declarations". During the plenary discussion on draft guidelines 1.2.5 (General declarations of policy) and 1.2.6 (Informative declarations) as proposed by the Special Rapporteur in his third report, suggestions had been made to collect in a separate section all the various unilateral statements that were neither reservations nor unilateral declarations and fell outside the scope of the Guide to Practice. The Drafting Committee had at first contemplated the idea of drafting only one guideline, which would include all cases of unilateral statements falling outside the scope of the Guide to Practice, but such a single guideline would have become very long and complicated and would not have been "user-friendly". The Drafting Committee had therefore opted for a separate section comprising six guidelines.

34. Section 1.4 expressed the idea that the Guide to Practice would not cover every possible unilateral statement formulated with regard to treaties, but only reservations and interpretative declarations, which were within the mandate of the Commission. The purpose of the draft guidelines was to elucidate, because many other statements formulated with regard to treaties were often confused with interpretative declarations or reservations. The draft guidelines that followed were examples of such statements, which belonged to the general category of unilateral acts of States but remained outside the framework of the topic. The commentary should include the idea that the types of statements mentioned by the draft guidelines in section 1.4 were only illustrative and that the classification was not exhaustive. The draft guidelines in section 1.4 had no precise temporal element, because although such statements were most often made on the occasion of the expression of consent to be bound by a treaty—hence the risk of being confused with reservations or interpretative declarations—nothing precluded the possibility that they might also be made at any other time.

35. In all the draft guidelines in section 1.4, the last phrase read "which is outside the scope of the present Guide to Practice".

36. Draft guideline 1.4.1 [1.1.5] (Statements purporting to undertake unilateral commitments) had been referred to the Drafting Committee at the fiftieth session. It dealt with statements usually made on the occasion of the expression of consent to be bound by a treaty whereby a State or an international organization purported to "increase" its obligations by undertaking additional commitments which went beyond those imposed by the treaty. The expression "in relation to a treaty" had been added to make it clear that such unilateral statements should be made in connection with a treaty. The term "unilateral commitment" had been felt to give an accurate description without prejudicing the exact legal nature of such statements, which, while usually made on the occasion of the expression of consent to be bound by a treaty, could also be made at other times. The draft guideline defined such statements instead of merely saying that they were not reservations nor interpretative declarations.

37. Draft guideline 1.4.2 [1.1.6] (Unilateral statements purporting to add further elements to a treaty), corresponded to the last phrase of draft guideline 1.1.6 origi-

nally proposed by the Special Rapporteur, which read "unless it adds a new provision to the treaty".

38. Bearing in mind the discussions at the fiftieth session, and to avoid confusion, the Drafting Committee had reformulated the idea contained in the last phrase of draft guideline 1.1.6 as a separate guideline to cover cases in which a State or international organization added a "new provision" to a treaty when expressing its consent to be bound. That addition neither modified nor excluded the legal effect or the provisions of the treaty—in which case it would have been a reservation—nor went beyond the obligations imposed on it by the treaty—which would have fallen under draft guideline 1.4.1 [1.1.5]. It simply took the opportunity to add further elements to a treaty inspired by and along the same lines as some of its provisions. The classic example cited by the Special Rapporteur was the "reservation" by which Israel had tried to add the Red Shield of David to the emblems of the Red Cross and the Red Crescent under the Geneva Conventions of 12 August 1949.[8]

39. The Drafting Committee had also thought that the words "to add further elements to a treaty" were clearer and more appropriate than the original phrase "adds a new provision to the treaty".

40. Draft guideline 1.4.3 [1.1.7] (Statements of non-recognition) had been revised in the fourth report of the Special Rapporteur (A/CN.4/499 and A/CN.4/478/Rev.1), taking into account the views expressed in the Commission at its fiftieth session. The Drafting Committee had worked on the proposed revised text, had adopted it with several modifications and put it in a different place. It dealt with a statement of non-recognition made in the context of a treaty. Since all draft guidelines in chapter I were given a designation, the Drafting Committee had also agreed with the designation of "statements of non-recognition" for that particular practice. However, that designation should be taken only for what it was, without any further general or legal implications in the specific context of a treaty.

41. As worded, the draft guideline covered all kinds of statements of non-recognition, such as "precautionary declarations" or those intended to prevent the application of the treaty as between the author and the non-recognized entity. The last phrase concerned precisely that possibility, so that no doubt could persist on that point. As had emerged from the debate, the issue of exclusion of the application of the treaty as between the declaring State and the non-recognized entity had been deemed confusing. That was particularly the case with respect to draft guideline 1.1.1 [1.1.4] as provisionally adopted by the Commission on first reading at its fiftieth session, which had referred to the possibility of a reservation related to the way in which its author intended to implement the treaty as a whole. The current text sought to dispel any doubt about the fact that statements of non-recognition were not reservations, even if they might seem to be similar to a certain category of "across-the-board" reservations.

42. Draft guideline 1.4.4 [1.2.5] (General statements of policy) was widely debated in the Commission. Several observations had been made with respect to the title and text. Some of the problems raised in the Commission had been addressed by the Drafting Committee's decision to place all the unilateral statements in relation to a treaty, other than reservations or interpretative declarations, in a separate section. The Drafting Committee had replaced the words "without purporting to exclude or to modify the legal effect of its provisions, or to interpret it" by the phrase "without purporting to produce a legal effect on the treaty", which was more precise and accurate.

43. The Drafting Committee was of the view that the new text of the draft guideline was more satisfactory in that it rendered exactly the very nature of such statements, which were made in relation to a treaty but had no legal effect on it whatsoever. In addition, the text was all-encompassing and designed to include all kinds of general policy statements, which did not affect the treaty in any way. The Drafting Committee had retained the original title of the draft guideline, but in English, the word "declarations" had been replaced by "statements".

44. Draft guideline 1.4.5 [1.2.6] (Statements concerning modalities of implementation of the treaty at the internal level) was intended to cover statements by which States or international organizations indicated, without being called upon to do so, the manner in which they would implement a treaty at the internal level only. A typical example, extensively discussed by the Special Rapporteur in his third report, was the "Niagara Reservation" made by the United States of America in respect of the Treaty Relating to the Uses of the Waters of the Niagara River.[9] Bearing that in mind, the Drafting Committee had decided to replace the original phrase "to discharge its obligations at the internal level" by "to implement a treaty at the internal level", which was more general and might include not only the manner in which a State or international organization discharged its obligations at the internal level but also the manner in which it exercised its rights. The Drafting Committee had also debated the appropriateness of the phrase "at the internal level" in connection with an international organization and concluded that it could be used in that context, since the words "internal law" of international organizations had become current with their development.

45. The Special Rapporteur and the Drafting Committee had been aware that statements on modalities of implementation of the treaty at the internal level might spill over into the international level, but the Drafting Committee had not dealt with that case, on the understanding that the Special Rapporteur would address it in his next report.

46. Draft guideline 1.4.5 [1.2.6] defined unilateral statements made by their authors with respect to the manner in which they intended to implement the treaty at the internal level. In the view of the Drafting Committee, while in general such statements might not have any effect on the treaty, they could do so under special circumstances, for example when the statements were followed up by subsequent behaviour of their authors. To exclude the latter

[8] United Nations, *Treaty Series*, vol. 75, No. 973, pp. 436 and 438.

[9] See 2584th meeting, para. 8.

possibility, the Drafting Committee had inserted the words "as such". With that insertion, only international statements which did not affect as such the rights and obligations of the other contracting parties were taken into consideration in the draft guideline.

47. The last sentence of draft guideline 1.4.5 [1.2.6] was reworded in a positive manner to read "constitutes a merely informative statement". The Drafting Committee had felt that the addition of the word "merely" before "informative" was necessary in order to stress the particular character of such statements, which were only informative, thus distinguishing them from all other statements which might also be informative but constituted essentially different categories.

48. With reference to draft guideline 1.5.1 [1.1.9] ("Reservations" to bilateral treaties), in general, the Commission had endorsed the text of the draft guideline as proposed by the Special Rapporteur in his third report. One issue raised both in the Commission and in the Drafting Committee had been whether such statements with respect to bilateral treaties were in fact reservations or counter-proposals. The Drafting Committee had agreed with the view that, in practice, both parties to a treaty looked on such unilateral statements as reservations. The Commission wanted to make it clear that they were not reservations within the meaning of the Guide to Practice. It was not concerned with what else they might be called by parties to the bilateral treaty or by others. Hence, the Drafting Committee had added the words "within the meaning of the present Guide to Practice". For the same reason, it had deleted the last paragraph of the original draft guideline, which had stated that "The express acceptance of the content of that statement by the other party takes the form of an amendment to the treaty". The Drafting Committee thought that issue could be elaborated in the commentary. It had also added the words "initialling or" before "signature", so as to allow for all possible situations. The title had been retained.

49. Draft guideline 1.5.2 [1.2.7] (Interpretative declarations in respect of bilateral treaties) had also been accepted by the Commission. The Drafting Committee had made only a few adjustments to the reference to other guidelines in the light of the new structure and redrafting. The title also remained unchanged.

50. Draft guideline 1.5.3 [1.2.8] (Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party) had also been accepted by the Commission, and the Drafting Committee had not made any changes to the text or title.

51. Section 1.6 was a "without prejudice" clause. At its fiftieth session, the Commission had adopted that provision without a number or title as a "without prejudice" clause applicable to reservations.[10] The Drafting Committee had revised the text to make it applicable to all the definitions in chapter I. The revised text provided that the definitions of unilateral statements included in chapter I of the Guide to Practice were without prejudice to the permissibility and effects of such statements under the rules applicable to them.

52. The CHAIRMAN said that before giving the floor to members to comment on the report of the Drafting Committee, he wished to welcome Judge Alexander Yankov, former member of the Commission, who was currently a member of the International Tribunal for the Law of the Sea.

53. Mr. KABATSI said that the Guide to Practice should be as easy to use as possible. It would be less confusing and cumbersome if the draft guidelines, instead of being itemized "something-point-something-point-something", were numbered consecutively. Perhaps that approach could be taken for future chapters.

54. Mr. KATEKA said he agreed. The draft Guide to Practice was not user-friendly. He therefore endorsed Mr. Kabatsi's proposal.

55. The CHAIRMAN pointed out that several draft guidelines had already been adopted at the fiftieth session on the basis of the Special Rapporteur's numbering system.

56. Mr. KATEKA said that he did not see why the Commission was so conservative. Why wait for the future to make the text clearer?

57. Mr. PELLET (Special Rapporteur) said he, too, wished to voice his thanks to the Chairman and members of the Drafting Committee for their suggestions, which had made some marked improvements in his proposed text. It was rather difficult, however, to see why Mr. Candioti, the Chairman of the Drafting Committee, had made his statement in English, when the report on the draft guidelines had been written in French, and Mr. Candioti not only was a Spanish speaker, but also spoke perfect French.

58. As to the comments by Mr. Kabatsi and Mr. Kateka, he was very much opposed to the Commission proceeding as it usually did with the numbering of draft articles. Just because the Commission had numbered its articles consecutively in the past did not mean that it must continue to do so. The Guide to Practice was a new form of instrument and not a draft treaty. He would not object if, once the draft guidelines were completed, the Commission decided to number them paragraph by paragraph, provided that it did not call them "articles". He wished to keep the current system for the moment because he intended to add a few draft guidelines even to chapter I before he submitted the continuation of his fourth report. While not being radically opposed to the idea of continuous numbering in each section, he thought that it would be even more complicated than the existing system since, when referring to a provision, it would be necessary to specify the paragraph, section and chapter in question. He recommended that the Commission should refrain from adopting a final position at the current session and from displaying overcautious conservatism.

59. The CHAIRMAN said that the Special Rapporteur's suggestion did not prejudge the Commission's final decision. For working purposes, it was advisable to have the provisional numbering which was less confusing than

[10] See *Yearbook ... 1998*, vol. II (Part Two), p. 99, para. 540 and footnote 209.

references to chapters, sections or subsections. A document recapitulating all the draft guidelines would be useful because the text before the Commission contained only the draft guidelines to be adopted or revised at the current session, but not those already adopted at the fiftieth session. He asked the Special Rapporteur to draw up a recapitulatory addendum in the light of deliberations at the current session.

60. He assumed that the Commission wanted to take up each draft guideline in turn and asked if the Commission wished first to adopt draft guideline 1.1.1 [1.1.4] as revised by the Drafting Committee.

GUIDELINE 1.1.1 [1.1.4] (Object of reservations)

61. Mr. PAMBOU-TCHIVOUNDA paid tribute to the work done by the Drafting Committee, but said that he had some difficulty in understanding the substance of the phrase "or of specific aspects of the treaty as a whole". Was the notion of "specific aspects" not already covered by the words "certain provisions"? Even if the wording were amended to read "or of the treaty as a whole, with respect to certain particular aspects", the problem still remained. How could a reservation be made to a treaty if the legal effects of that treaty as a whole were to be excluded or modified? Such a step would not be consonant with the definition of a reservation and would signify an attempt to enjoy both of two mutually exclusive alternatives: to be within the system and to stand aloof from it. Was the phrase not tautological and a departure from the very notion of a reservation? How could one exclude or modify the legal effect of a treaty as a whole with regard to certain aspects? Were those aspects reflected in all or only certain provisions of a treaty? He had similar problems with the words "or of specific aspects of the treaty as a whole, in their application to its author" in draft guideline 1.3.2 [1.2.3]. What did that mean? Perhaps an effort should be made to express the idea more intelligibly.

62. The CHAIRMAN said he understood that the matter had already been discussed in plenary and that the words "specific aspects" had been included so as to make it clear that the reservation did not apply to the whole treaty, which was an impossibility. Personally, he therefore thought that the additional words were justified.

63. Mr. ADDO said that he agreed entirely with Mr. Pambou-Tchivounda and had strong reservations about the phrase "or of specific aspects of the treaty as a whole". Did "specific aspects" refer to some of the terms or provisions of a treaty? If so, that notion had been covered in the earlier phrase, namely "certain provisions of a treaty". If, however, the intention was to exclude or modify specific aspects, why add the words "as a whole"? If the idea was one of excluding or modifying the legal effect of a whole treaty, it was not possible to speak of a reservation; the implication was that there was no wish to become a party to a treaty. The disputed phrase was more likely to confuse than to enlighten users of the Guide to Practice.

64. Mr. MELESCANU said that there was nothing to be gained from reiterating what had been said in earlier debates on the draft guidelines, when general agreement had been reached that there were two main categories of reservations which purported to modify the legal effects of a treaty. As for the numbering to be used in the Guide to Practice, he was, however, of the opinion that an effort should be made to adopt a different, less conservative approach. Again, thought should likewise be given to the presentation of the document. The current version comprised a text and, much later, commentaries and a guide to practice. He proposed a different format, where each provision would be immediately followed by a commentary and a guide to practice, which, he thought, would provide a more precise indication of the procedure to be observed when making reservations.

65. Mr. AL-BAHARNA said that, since the wording of draft guideline 1.1.1 [1.1.4] was confusing, discussion of the matter was useful. If the principle was that a reservation could not modify the treaty as a whole, it would be best to delete "as a whole" and put a full stop after the word "treaty". Alternatively, it might be possible to say "specific aspects of the treaty, not the treaty as a whole", but he preferred the first suggestion.

66. Mr. CANDIOTI (Chairman of the Drafting Committee) explained that the phrase in question in draft guideline 1.1.1 [1.1.4] had been closely scrutinized by the Drafting Committee. The idea was to cover specific categories of reservations which related to the treaty as a whole, but only in respect of specific aspects. The Special Rapporteur had provided a thorough, accurate description of the issue in his third report and the commentary to the draft guideline[11] had likewise dealt with the subject of across-the-board reservations. Such reservations applied to the whole of a treaty but only with regard to certain categories of persons, objects, situations, territories or circumstances. There was no doubt that such reservations existed and both the Special Rapporteur and the Drafting Committee took the view that their existence should be reflected in the Guide to Practice. The conundrum was how to describe them and, after a long discussion, it had been decided to propose the concise formulation "or of specific aspects of the treaty as a whole". He did not think that there were many alternatives to that wording; "certain" could be inserted before "specific" and the commentary could supply examples and clarify the meaning of the terms. The phrase "treaty as a whole" should not be deleted.

67. Mr. Sreenivasa RAO proposed that "of specific aspects of" should be replaced by "with respect to any matter pertaining to the treaty as a whole", in order to remove the apparent contradiction between "specific aspects" and "as a whole".

68. Mr. KABATSI said that, while he entirely agreed that the section dealt with two separate situations, the reference to "the treaty as a whole" remained cryptic, even after the explanations given by the Chairman of the Drafting Committee, since, to the layman, it might appear that reservations could be made to a whole treaty, which was impossible. He urged the Chairman of the Drafting Committee to accept either the wording proposed by Mr. Al-Baharna or that suggested by Mr. Sreenivasa Rao, although he was of the opinion that Mr. Al-Baharna's

[11] Ibid., pp. 101-102.

version provided most enlightenment as to the sense of the draft guideline.

69. Mr. PELLET (Special Rapporteur) said that Mr. Pambou-Tchivounda's question had shown that the formulation of draft guideline 1.1.1 [1.1.4] was indeed a problem. The principle that the Guide to Practice must include the notion of an across-the-board reservation had been agreed at the fiftieth session and he was therefore far from pleased to hear some members of the Commission calling into question a draft guideline which had already been adopted and which reflected abundant practice, many examples of which had been cited in footnotes 225 to 230 of the report of the Commission on the work of its fiftieth session.[12] Nevertheless, one had to admit that draft guideline 1.1.1 [1.1.4] was not felicitously worded in either French or English. In the light of the proposals made by Mr. Al-Baharna and Mr. Sreenivasa Rao, he suggested the phrase "or of the treaty as a whole, with respect to specific aspects". That formulation did not amount to progressive development, but was merely codification of very widespread practice. Almost all the members of the Drafting Committee had been in favour of the wording he had just proposed, but the Chairman had been unable to present the proposal as it had been impossible to contact some of the members.

70. The CHAIRMAN pointed out that the members of the Commission had not objected to the idea of the draft guideline itself, but had merely been trying to improve the wording.

71. Mr. PAMBOU-TCHIVOUNDA said that the Commission was obliged to rule on the version proposed by the Drafting Committee, whose deliberations had taken account of the concerns which had been expressed about across-the-board reservations. Moreover, there was general agreement in the Commission that the problem was one of wording rather than of substance. He could accept that many examples of reservations had been made available, as the Special Rapporteur had just said but, he was unable to recall the relevant part of the Commission's activities at its fiftieth session, owing perhaps to an unavoidable absence.

72. The Commission was faced with a choice between the Special Rapporteur's proposed formula, which should be accepted provided an acceptable rendering could be found in English, and that proposed by Mr. Al-Baharna, which would be acceptable provided it could be made consistent with the concerns expressed about across-the-board reservations.

73. Mr. ROSENSTOCK said that the existing text, though not ideal, constituted the least troublesome version he had seen, in that it was relatively clear and did not stray beyond its objective. The material it contained might conceivably relate more properly to the scope of the treaty, but in the current context it offered useful guidance in an area which on the surface seemed inconsistent with the structure of the 1969 Vienna Convention, but on further examination was not. The concepts of "specific aspects" and "the treaty as a whole" should be retained. To place insufficient emphasis on the former element would disturb the intended balance of the draft guideline.

74. Mr. AL-KHASAWNEH said the Commission was unquestionably dealing with a drafting matter, rather than attempting to change the substance of the draft guideline. He agreed with Mr. Al-Baharna that deletion of "on the whole" would improve matters. The text was concerned with three types of reservation, namely those which purported: to exclude certain provisions of the treaty, to exclude specific aspects of the treaty as a whole; and to modify the legal effects of specific aspects of the treaty, but not the whole treaty. To retain the words "as a whole" would be to exclude the third possibility. He therefore supported the proposal to delete them.

75. Mr. AL-BAHARNA said he agreed that it was not a question of changing the underlying principle of the draft guideline. However, in view of the number of objections raised to the phrase "as a whole", a solution would have to be found.

76. The Special Rapporteur's proposal referring to the "treaty as a whole, with respect to certain specific aspects" did not solve the problem, as it still placed undue emphasis on the idea of the treaty as a whole. Nor would it be helpful to retain "as a whole" if a formulation was used to speak of "across-the-board reservations". There, the only solution would be the one he had proposed, namely to place a full stop after "treaty", delete "as a whole", and introduce a separate commentary which emphasized the fact that it was not possible to formulate a reservation to an entire treaty, but only to some of its aspects.

77. Mr. LUKASHUK said he agreed with the Special Rapporteur that the wording of the provision under discussion did no more than bring it into line with current practice. He sympathized with those who objected to the inclusion of "as a whole", and supported Mr. Al-Baharna's proposal to remedy the situation by means of a commentary. However, he felt that the provision could be adopted by the Commission in its current form.

78. Mr. PAMBOU-TCHIVOUNDA said he could accept Mr. Al-Baharna's proposal to delete the phrase "as a whole". However, the resulting version would not be sufficient to convey the idea that specific aspects of the treaty were in fact covered by the provisions in respect of which the reservation was formulated.

79. He therefore proposed that the phrase "or of specific aspects of the treaty" be amended to read "or of specific aspects in respect of the treaty". The existing version left open the question whether "specific aspects" were found in the provisions themselves or were to be covered by phrases within the provisions. The words "as a whole" would be deleted.

80. Mr. PELLET (Special Rapporteur) said that in English his proposed change read "A reservation purports to exclude or modify the legal effect of certain provisions of a treaty, or of the treaty as a whole, with respect to specific aspects". His proposal was intended to maintain balance between the idea that, on the one hand, across-the-board reservations concerned the treaty as a whole and, on the other hand, that they could not cover the entire treaty,

[12] Ibid.

for in that case they would no longer constitute reservations: they would simply be a refusal to be engaged by the treaty. Accordingly, he did not regard Mr. Al-Baharna's proposal to delete "as a whole" as helpful.

81. He did not agree with Mr. Kabatsi that things were clear. Indeed Mr. Kabatsi's comment itself showed that matters were far from clear, for he had said that the issue was whether a reservation referred to a part of the treaty, and was therefore covered by its provisions, or whether it referred to the treaty as a whole. To delete the idea of the treaty "as a whole" would be to unbalance the meaning of the draft guideline.

82. He was not convinced by Mr. Al-Khasawneh's argument that there were three possible types of reservation. In the context of the draft guideline's objective, there could only be two possibilities—either the reservations addressed certain provisions, including specific aspects of them, or the provisions as a whole. Either one refused to accept an article, or one refused to accept the application of that article as it applied in a particular instance. The idea behind the words "treaty as a whole" was to cover reservations which were not covered in the strict sense meaning by the definition in article 2, paragraph 1 (*d*), of the 1969 Vienna Convention. The third distinction made by Mr. Al-Khasawneh was implicit in the phrase "certain provisions". What was missing was decidedly the "as a whole" phrase. It was precisely to balance that notion that the phrase should be retained.

83. With regard to the separate commentary proposed by Mr. Al-Baharna, he saw no reason to relegate to a commentary an element which could be quite easily included in the draft guideline, and which would amplify its meaning.

84. He could accept Mr. Sreenivasa Rao's proposal to include "certain", so that it should read "... provisions of a treaty or the treaty as a whole, with respect to certain specific aspects", which clarified the meaning still further. He would like to introduce one further change, which could be dealt with immediately by the Chairman of the Drafting Committee. The current wording referred to "provisions of a treaty" and "the treaty as a whole"—the definite or indefinite article should be used in both cases, but they should not be mixed.

85. Mr. CANDIOTI (Chairman of the Drafting Committee) said that the debate had not changed his conviction that the words "as a whole" should be retained, as they had a very specific meaning in the context of the reservations covered by draft guideline 1.1.1 [1.1.4]. There were two possibilities: either a reservation purported to exclude or modify the legal effect of certain provisions, or it purported to exclude or modify the legal effect of the treaty as a whole, but with regard to certain specific aspects. Many relevant examples had been cited in the third report of the Special Rapporteur and in the report of the Commission on the work of its fiftieth session. He agreed with the Special Rapporteur that the phrase "as a whole" must be in the text of the draft guideline and not in a separate commentary and felt that the indefinite article would be more appropriate in the instances the Special Rapporteur had just cited.

86. In English, the text would read "A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation".

87. The inclusion of "or", in "or of the treaty" clearly indicated that the draft guideline was concerned with two alternatives.

88. Mr. AL-KHASAWNEH said he was still not convinced that there were not three possible types of reservation.

89. Mr. GOCO said that, in the beginning, he had been unconvinced of the need to include the phrase "as a whole". However, he could now accept the modified text, especially in the light of the clarification by the Chairman of the Drafting Committee that "or" was intended to have a disjunctive, and not conjunctive, meaning.

90. Mr. ROSENSTOCK said he was still unhappy with the inclusion of "certain" before "specific".

91. Mr. KATEKA said he too regarded it as tautological to include "certain" before "specific".

92. Mr. AL-BAHARNA said he had no objection to the final proposal made by the Special Rapporteur, especially as there seemed to be a general preference to retain "as a whole" in the light of the explanations given by the Special Rapporteur and the Chairman of the Drafting Committee. However, he wondered whether it might be helpful to reword the phrase after "treaty as a whole" so that it read "but with respect to specific aspects of it". Also, he would prefer to use the definite article and speak of "the treaty" and "the treaty as a whole", or to use a formulation which did not repeat the word "treaty".

93. The CHAIRMAN observed that there seemed to be some support for the idea of deleting "certain" from the text. He also wondered whether the Commission thought it might not be better to say "with respect to its specific aspects".

94. Mr. CANDIOTI (Chairman of the Drafting Committee) said that "certain specific aspects" rendered more accurately the idea that it was not the whole of the treaty in all its aspects that was being referred to, and also worked well in English, French and Spanish. He still preferred the indefinite article in both cases before "treaty", and felt that the inclusion of "its" would make the phrase more convoluted, although he had no objection in principle.

95. Mr. ROSENSTOCK said that the word "certain" suggested the idea of "some but not all", and was properly used the first time in the draft guideline. However, the whole thrust of the Commission's efforts in adopting the draft guideline was geared to the concept of "all but not only some" in the text. The word "certain" was thus being used in two different ways, which could have a slightly misleading effect.

96. Mr. KABATSI said he disagreed with Mr. Rosenstock. The inclusion of the second "certain" was very important, as it drew attention away from the idea of

the treaty as a whole. Also, the very fact that "certain provisions" and "certain specific aspects" embodied different notions meant that there was no question of tautological use. Finally, the second "certain" obviated the need to include "but" as Mr. Al-Baharna had proposed.

97. Mr. PELLET (Special Rapporteur) said he also regarded "certain specific" as tautological, but could go along with the Commission's decision. However, he now realized with some regret that the use of the indefinite and definite articles before "treaty" in the current version echoed the wording of article 2, paragraph 1 (*d*), of the 1969 Vienna Convention, and he therefore wondered whether it should be retained after all.

98. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt draft guideline 1.1.1 [1.1.4] as orally revised by the Chairman of the Drafting Committee.

*It was so agreed.*

*Guideline 1.1.1 [1.1.4], as orally revised, was adopted.*

*The meeting rose at 1.05 p.m.*

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## 2598th MEETING

*Wednesday, 7 July 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Tomka, Mr. Yamada.

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### Tribute to the memory of Doudou Thiam, member of the Commission

1. The CHAIRMAN announced the death of Doudou Thiam, member of the Commission since 1970.

2. Doudou Thiam had chaired the Commission at its thirty-third session, in 1981, and had been the Special Rapporteur for the topic of the draft Code of Crimes against the Peace and Security of Mankind from the thirty-fourth session (1982) to the forty-seventh session (1995). He had thus participated in the efforts to establish the International Criminal Court.[1] A distinguished lawyer and active statesman, Doudou Thiam had made a significant contribution to the codification and development of international law, the promotion of international cooperation and greater understanding among nations. He had also rendered invaluable service to his country, Senegal, where he had held a number of important positions and ministerial portfolios, and he had headed the Senegalese delegation to numerous sessions of the General Assembly and the Security Council.

3. On behalf of the Commission, he offered his condolences to Doudou Thiam's widow, present in the conference room, and to his entire family.

*At the invitation of the Chairman, the members of the Commission observed a minute of silence in memory of Doudou Thiam.*

4. Mr. Sreenivasa RAO recalled the man of culture, the statesman, the African sage and the humanist that Doudou Thiam had been. He had marked the history of law through his thoughts on the subject with which the Commission had entrusted him, the draft Code of Crimes against the Peace and Security of Mankind. The Commission would remember him as one of its warmest and most generous members.

5. Mr. PAMBOU-TCHIVOUNDA evoked the happy moments which the members of the Commission had shared with Doudou Thiam. A brilliant lawyer whose theory of African federalism had set a milestone, Thiam had from the outset taken very firm positions at the time of African decolonization. His subsequent contribution to the construction of a modern Senegal attested to his intellectual and human qualities. Africa had lost a herald, law a champion and the Commission one of its most outstanding members.

6. Mr. SEPÚLVEDA, speaking on behalf of the members of the Commission of Latin American origin, saluted the memory of Doudou Thiam. He recalled his human qualities, his cordiality to all and his exceptional generosity as a colleague and a lawyer. Doudou Thiam had been the very example of a man of talent who had dedicated himself to public service, notably during the construction of an independent Senegal. He was mourned not only by his country and Africa, but also by Latin America, with which he had had close affinities.

7. Mr. LUKASHUK, expressing his most heartfelt condolences to Mrs. Thiam and her son, said that the death of Doudou Thiam was also an irreparable loss for the members of the Commission, who for years to come would feel the absence of his wisdom, his practical experience and his humanity. Doudou Thiam had been an extraordinarily lucky man because few people had the chance to make such an important contribution in all their areas of endeavour. Doudou Thiam left behind many models; the history books would not fail to record that it was he who had prepared the Rome Statute of the International Criminal Court.

8. Mr. ROSENSTOCK joined others in expressing his condolences to the family of Doudou Thiam. It had been

[1] See 2575th meeting, para. 30.

an enormous privilege for the members of the Commission to have known such an extraordinary human being, a person of great warmth and friendship and also a man of character. Doudou Thiam had contributed enormously to the draft Code of Crimes against the Peace and Security of Mankind, showing a willingness to compromise if necessary in order to complete the work. He would live in the memories of all those who had known him, in the work he had done and in the wonderful family he had left.

**Reservations to treaties[2] (*continued*) (A/CN.4/491 and Add.1-6,[3] A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,[4] A/CN.4/L.575)**

[Agenda item 5]

DRAFT GUIDELINES PROPOSED BY THE DRAFTING COMMITTEE[5] (*continued*)

9. The CHAIRMAN invited the members of the Commission to continue their consideration of the titles and texts of the draft guidelines proposed by the Drafting Committee (A/CN.4/L.575).

GUIDELINE 1.1.5 [1.1.6] (Statements purporting to limit the obligations of their author)

10. Mr. ADDO said that the phrase "purports to limit the obligations imposed on it by the treaty" should be replaced by "purports to limit some of the obligations imposed on it by the treaty" because, if a State purported to limit all the obligations imposed on it by a treaty, that would be tantamount to undoing the entire instrument, and strictly speaking that would not be a reservation.

11. Mr. PELLET (Special Rapporteur) said that basically he agreed with Mr. Addo that a State could not, by means of a reservation, refuse to accept any of the obligations stemming from a treaty. However, the word "limit" in itself implied that the treaty was not being undone. In fact, the purpose of the draft guideline was to explain the word "modify" in draft guideline 1.1 (Definition of reservations) and in that of the 1969, 1978 and 1986 Vienna Conventions, where, precisely, it was in contrast to the word "exclude". Some of the modifications purported to "limit" the obligations, and the Vienna definition itself did not contain the word "some"; it therefore seemed odd to introduce it in the draft guideline, even though the question deserved to be developed in the commentary.

*Guideline 1.1.5 [1.1.6] was adopted.*

GUIDELINE 1.1.6 (Statements purporting to discharge an obligation by equivalent means)

*Guideline 1.1.6 was adopted.*

GUIDELINE 1.2 (Definition of interpretative declarations)

*Guideline 1.2 was adopted.*

GUIDELINE 1.2.1 [1.2.4] (Conditional interpretative declarations)

12. Mr. PAMBOU-TCHIVOUNDA proposed two changes to the French text to make it easier to read. The Commission should adopt wording that was closer to the one which appeared in draft guideline 1.1.5 [1.1.6], so that the text would read *au moment de la signature, de la ratification*. After the words *un traité*, the comma should be replaced by the word *et*. However, he left it to the Special Rapporteur and the Chairman of the Drafting Committee to decide.

13. Mr. PELLET (Special Rapporteur) explained that, since the text had been purely and simply borrowed from article 2 of the 1969 and 1986 Vienna Conventions, he could not accept that redrafting proposal.

14. Mr. Sreenivasa RAO said that he had no objections to the substance of the draft guideline. However, he proposed that, in the English text, the phrase "subordinates its consent", which was a Gallicism, should be replaced by "subjects its consent".

15. Mr. CANDIOTI (Chairman of the Drafting Committee) said that that wording did seem preferable in the English text.

*It was so agreed.*

*Guideline 1.2.1 [1.2.4] was adopted with a minor drafting change in the English text.*

GUIDELINE 1.2.2 [1.2.1] (Interpretative declarations formulated jointly)

*Guideline 1.2.2 [1.2.1] was adopted.*

GUIDELINE 1.3 [1.3.1] (Distinction between reservations and interpretative declarations)

16. Mr. KABATSI, supported by Mr. GOCO, said that there was a discrepancy between the title of the draft guideline, which seemed to announce a definition of the distinction between reservations and interpretative declarations and the body of the text, which merely indicated a method for drawing that distinction.

17. Mr. GAJA, said he noted that the texts of draft guidelines 1.3 [1.3.1] and 1.3.1 [1.2.2] were littered with references to the purpose of the declaring State and to the intention of that State. In order to better coordinate both texts, he proposed that in draft guideline 1.3 [1.3.1], the phrase "to ascertain the purpose of its author by interpreting" should be replaced by "to interpret", which would not significantly change the substance of the text, but would streamline it and bring it closer to the model of the 1969 Vienna Convention.

18. Mr. PELLET (Special Rapporteur) said that he generally agreed with the comments of Mr. Goco and Mr. Kabatsi, explaining that he had himself proposed two

[2] For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

[3] See *Yearbook ... 1998*, vol. II (Part One).

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

[5] See 2597th meeting, para. 1.

alternative titles, one of which referred to "methods". He left it to the Chairman of the Drafting Committee to make any changes in the title along those lines. He was, however, less sure about Mr. Gaja's proposal. While he did not wish to make an issue of it, he thought that, if that proposal were to be accepted, it would remove most of the substance from the draft guideline, the aim of which was to state that the distinguishing feature was the author's purpose. If the proposed deletion were to be accepted, that criterion would disappear. Having carefully weighed up all aspects of the matter, he thought that the problem was one of content, not one of form. The crucial concern of the draft guideline was to ascertain the author's purpose, and that was consistent with the definition proposed in draft guidelines 1.1 and 1.2. He was therefore against Mr. Gaja's proposal.

19. Mr. PAMBOU-TCHIVOUNDA said he was also of the opinion that the title of draft guideline 1.3 [1.3.1.] should be amended to read either, "Method of distinguishing between reservations and interpretative declarations" or "Criteria for a distinction ...", depending on what the Commission decided. If the word "criteria" were incorporated in the title, only the first part of the first sentence up to "the purpose of its author" should be retained in the text of the draft guideline. In that way, a simple, lucid guideline would be obtained.

20. Mr. TOMKA, referring to the English version, said he thought that the phrase "the purpose of its author" was a solecism and proposed that it should be replaced by the words "the purpose sought by its author", which would be closer to the French version (*le but visé par son auteur*).

21. Mr. HAFNER said he doubted that Mr. Gaja's proposal could be accepted and endorsed Mr. Pellet's arguments. The aim sought had to be the decisive criterion. He agreed with what Mr. Tomka had said about the English version and shared the concerns expressed about the frequent use of the words "purpose" and "intention" in draft guidelines 1.3 [1.3.1] and 1.3.1 [1.2.2]. An attempt should be made to amalgamate them or at least to shorten draft guideline 1.3.1 [1.2.2], so that it would not duplicate draft guideline 1.3 [1.3.1].

22. Mr. GOCO said that draft guideline 1.3 [1.3.1] pertained to interpretation with a view to ascertaining the aims and intentions of the author of the statement so as to determine whether that statement was a reservation or an interpretative declaration. The text itself was flawless and could be accepted as it stood. The title, however, did not "rhyme" with the content of the provision. Perhaps the wording "purpose and intent of the author State" would be more in harmony with the content of the draft guideline.

23. Mr. SEPÚLVEDA noted that two criteria for distinguishing between reservations and interpretative declarations were mentioned in draft guideline 1.3 [1.3.1]: the purpose of the author and the intention of the author. Those subjective notions should preferably be replaced by objective criteria, which, in point of fact were to be found in draft guideline 1.3.1 [1.2.2], where the objective criterion of the legal effect which the statement purported to produce had been introduced. Nevertheless, the last sentence of draft guideline 1.3.1 [1.2.2] was somewhat confusing, in that it stated that the unilateral declaration which had been formulated would be designated as a reservation in some cases and as an interpretative declaration in others. But no institution had been made responsible for deciding the matter. Perhaps the legal effects which the statement purported to produce should therefore be used as the basis for ascertaining whether the declaration in question was an interpretative declaration or a reservation, without endeavouring to establish what the author's intention had been.

24. Mr. PELLET (Special Rapporteur) said that he fundamentally disagreed with Mr. Sepúlveda, as he considered that the distinguishing feature was precisely the aim sought by the author of the statement, but he did not wish to reopen what had been a lengthy debate on the subject.

25. As far as Mr. Hafner's observation was concerned, he thought that there were indeed grounds for wondering whether the reading of draft guideline 1.3 [1.3.1] in conjunction with draft guideline 1.3.1 [1.2.2] did not disclose repetition. An elegant solution might be to make the first sentence of draft guideline 1.3.1 [1.2.2] the text of a new draft guideline 1.3, which would still be entitled "Distinction between reservations and interpretative declarations". A new draft guideline 1.3.1 would comprise the text of draft guideline 1.3 [1.3.1], but it would be entitled "Method of operating the distinction between reservations and interpretative declarations" in order to satisfy Mr. Goco and Mr. Kabatsi and only one amendment would be made to the text, that proposed by Mr. Gaja, which consisted in replacing the phrase "to ascertain the purpose of its author by interpreting" by "to interpret". Draft guideline 1.3.1 [1.2.2] would become a new draft guideline 1.3.2 without any change in its title ("Phrasing and name"). The first sentence of the guideline would be deleted because that sentence would become new draft guideline 1.3 and the only amendment to be made to the text would be to replace the words "the statement" by the words "a statement" in the existing second sentence. He thought that it would be pointless to refer those amendments to the Drafting Committee and that a decision could be taken during the current meeting.

26. Mr. CANDIOTI (Chairman of the Drafting Committee) said that he supported the last proposal by the Special Rapporteur, which was an excellent response to the various issues raised during the discussion. The three new provisions contained rules of interpretation of unilateral statements that needed to be codified because they did not fully coincide with the rules in the 1969 Vienna Convention. What was being interpreted in the present instance was unilateral expressions of will, and that was why the emphasis must be placed on the criterion of intention, which was entirely relevant.

27. Mr. AL-BAHARNA requested that the amendments should be submitted in writing so that they could be considered in more detail.

28. Mr. SEPÚLVEDA said that the new wording met one of his concerns, namely, that the strongest emphasis should be on the legal effect which the statement purported to produce. That objective criterion would be transposed to new draft guideline 1.3. But to do away with the link between that provision, formerly the first sentence of draft guideline 1.3.1 [1.2.2], and the last

sentence of that guideline, which had become the last sentence of new draft guideline 1.3.2, might result in confusion about the meaning of the latter phrase.

29. Mr. PELLET (Special Rapporteur) said that Mr. Sepúlveda's concern was unnecessary, since the idea of the "purported legal effect" was not being removed from the first sentence of new draft guideline 1.3.2. The deletion of the first sentence of draft guideline 1.3.1 [1.2.2] thus changed absolutely nothing in the meaning of the third sentence of that guideline, which had become the second sentence of new draft guideline 1.3.2 and which remained connected to the second sentence of draft guideline 1.3.1 [1.2.2], which had become the first sentence of new draft guideline 1.3.2. There was no need to alter that guideline any further.

30. Mr. KABATSI said that he endorsed the changes made by the Special Rapporteur, but believed that a more audacious approach should be taken and that it should be indicated more firmly that the determining element was not the phrasing or name of the unilateral statement, but the legal effect it purported to produce, without minimizing the importance of the phrasing or name as indicative of the purported legal effect.

31. The CHAIRMAN said he took it that the Commission wished to redraft current draft guidelines 1.3 [1.3.1] and 1.3.1 [1.2.2] on the basis of existing elements in order to create three new guidelines. He suggested that consideration of the matter be postponed in order to give the secretariat time to provide a written text, as proposed by Mr. Al-Baharna, and that, in the meantime, the Commission should take up the consideration of draft guideline 1.3.2 [1.2.3].

GUIDELINE 1.3.2 [1.2.3] (Formulation of a unilateral statement when a reservation is prohibited)

32. Mr. PAMBOU-TCHIVOUNDA recalled that the problem with the last part of draft guideline 1.3.2 [1.2.3] had now been solved by the outcome of the discussion at the preceding meeting on draft guideline 1.1.1 [1.1.4].

33. Mr. CANDIOTI (Chairman of the Drafting Committee) said it was true that, in accordance with what had been decided for draft guideline 1.1.1 [1.1.4], the last part of the last sentence of draft guideline 1.3.2 [1.2.3] should be amended through the replacement of the phrase "or of specific aspects of the treaty as a whole" by the phrase "or of the treaty as a whole with respect to certain specific aspects".

34. Mr. HAFNER said that the wording of draft guideline 1.3.2 [1.2.3] created the problem of the negative presumption inherent in the phrase "shall be presumed not to constitute a reservation". If the unilateral statement was not a reservation, nothing in the text indicated what it was.

35. The phrase "when it is established" gave rise to a second difficulty: it usually meant that a certain procedure had to be followed in order to determine what the reservation purported to exclude or to modify, who was obliged to do so and how that should be done. In draft guideline 1.2.3 as proposed by the Special Rapporteur, there had been no mention of the need to follow such a procedure. He had doubts about the practicability of inserting the phrase and would like to have clarification on what its purpose was and how it should be interpreted.

36. Mr. CANDIOTI (Chairman of the Drafting Committee) said the presumption was that, when a treaty prohibited reservations, a statement made in respect of the treaty was not a reservation. That presumption was nothing more than an application of the principle of good faith. States were presumed to take into account the prohibition contained in the treaty. If, nevertheless, a statement that had the characteristics of a reservation was made, then it was a reservation, even though it was not a legitimate or permissible reservation. It was thus a simple presumption, the idea being that the other State was confronted with an impermissible reservation. As to who would establish that that was so, in the current situation, there was no supranational or other entity. It was for each State, when confronted with such a statement, to establish whether it was a reservation or something else. If it was a reservation and it was prohibited by the treaty, then it was an impermissible reservation.

37. Mr. AL-BAHARNA said he endorsed the remarks made by Mr. Hafner and was not convinced by the explanation given by the Chairman of the Drafting Committee. The draft guideline should not establish a presumption. He therefore proposed that the phrase "shall be presumed not to constitute" be replaced by the words "shall not constitute".

38. Mr. GOCO said the text could indeed be improved and he would not oppose its reformulation.

39. Mr. GAJA said that the draft guideline illustrated the *effet utile* (useful effect) theory. The phrase "it is established that" was used quite frequently in the 1969 Vienna Convention and, in the current context, its purpose was to show that the presumption was rebuttable.

40. Mr. CANDIOTI (Chairman of the Drafting Committee) pointed out that the presumption had to be retained, since what was presumed was the good faith of the State making the statement and the useful effect of the statement. In the current case, the question was not whether a reservation was permissible or not.

41. Mr. ROSENSTOCK said that he endorsed the comments by Mr. Candioti and Mr. Gaja, but had no objection to the deletion of the words "it is established that".

42. Mr. AL-BAHARNA said he feared that those words, like the presumption made in the draft guideline, would cause problems. They would have differing effects depending on whether the treaty prohibited reservations to all of its provisions or only to certain provisions, the latter case being that of a treaty specifically listing the provisions on which reservations were prohibited. It would therefore be preferable to delete the words "shall be presumed" and to redraft the guideline accordingly.

43. Mr. LUKASHUK said that he found the general idea expressed in draft guideline 1.3.2 [1.2.3] to be very clear and fully in line with State practice. Nevertheless, he could understand the doubts expressed by Mr. Al-Baharna and Mr. Hafner and felt that they could be resolved by splitting the guideline into two paragraphs. The first

would end with the word "reservation" and the second would begin "If the statement purports to exclude", the words "except when it is established that it" should be deleted. However, it was important to retain the presumption which was entirely in keeping with State practice.

44. Mr. HAFNER said he feared that the effect of retaining the words "when it is established", would be to encourage States to make statements, with those wishing to formulate reservations to them having to "establish" that they purported to exclude or modify the legal effect of certain provisions of the treaty. That was not what the Commission intended.

45. Mr. GOCO said that it was also possible to reverse the presumption: a statement would be held to constitute a reservation "except when it is established that it does not purport to exclude or modify the legal effect of certain provisions of the treaty".

46. Mr. SEPÚLVEDA said that two questions arose: who should establish that a statement purported to exclude or modify the legal effect of certain provisions of the treaty and, if that was established, what were the consequences? It might be assumed that such a statement would be invalid, but perhaps it would be useful to clarify in the guideline that it should not be accepted.

47. Mr. ROSENSTOCK said that it was not possible to summarize all of the law on reservations in one guideline and, although Mr. Sepúlveda's comment on the consequences of establishing that a statement purported to exclude or modify the legal effect of certain provisions of the treaty was correct, it was inappropriate to say so in the draft guideline under discussion. The latter provided for a reasonable process which began with the presumption that the State was acting in good faith, namely, that it did not intend to formulate a reservation under cover of a statement. As to the words "it is established that", they could certainly be deleted, but, as Mr. Gaja had explained, their retention did not pose a problem either.

48. Mr. TOMKA said he thought that it was important not to reopen the debate on the issue of presumption, which had already been discussed at length. He felt that the last sentence of draft guideline 1.3.2 [1.2.3] should reflect the amendments made to draft guideline 1.1.1 [1.1.4] at the preceding meeting.

49. The CHAIRMAN said that the last sentence of draft guideline 1.3.2 [1.2.3] certainly would be aligned with draft guideline 1.1.1 [1.1.4] as it had been amended. With regard to the presumption, it was his understanding that the majority of members considered that it should be retained. By contrast, the expression "it is established that" had not attracted enthusiastic support and no one seemed disposed to argue against its deletion, which had been requested by several members. It therefore seemed that the Commission was willing to adopt draft guideline 1.3.2 [1.2.3] with the amendments he had mentioned.

50. Mr. AL-BAHARNA said he hoped that the word "thereof" in the draft guideline would not lead to confusion. He would like the Special Rapporteur to explain what that word referred to.

51. The CHAIRMAN said that the Special Rapporteur would include explanations in the commentary to the draft guideline in reply to the comments made by members, in particular by Mr. Al-Baharna.

*Guideline 1.3.2 [1.2.3], as amended, was adopted.*

52. The CHAIRMAN drew the attention of the Commission to the document which had just been distributed containing the Special Rapporteur's proposal concerning draft guidelines 1.3 [1.3.1] and 1.3.1 [1.2.2], the content of which now formed three guidelines, 1.3, 1.3.1 and 1.3.2 [1.2.2], which read:

"1.3 *Distinction between reservations and interpretative declarations*

"The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

"1.3.1 *Method of implementation of the distinction between reservations and interpretative declarations*

"To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

"1.3.2 [1.2.2] *Phrasing and name*

"The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations."

53. He said that, if he heard no objection, he would take it that the Commission wished to adopt draft guidelines 1.3, 1.3.1 and 1.3.2 [1.2.2] and renumber accordingly draft guideline 1.3.2 [1.2.3], which would become draft guideline 1.3.3 [1.2.3].

*It was so agreed.*

*Guidelines 1.3, 1.3.1 and 1.3.2 [1.2.2] were adopted.*

*The meeting rose at 1.10 p.m.*

# 2599th MEETING

*Thursday, 8 July 1999, at 10.05 a.m.*

*Chairman*: *Mr. Zdzislaw GALICKI*

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Tomka, Mr. Yamada.

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**Reservations to treaties[1] (*concluded*) (A/CN.4/491 and Add.1-6,[2] A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,[3] A/CN.4/L.575)**

[Agenda item 5]

DRAFT GUIDELINES PROPOSED BY THE DRAFTING COMMITTEE[4] (*concluded*)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of the titles and texts of the draft guidelines proposed by the Drafting Committee (A/CN.4/L.575).

GUIDELINE 1.4 (Unilateral statements other than reservations and interpretative declarations)

*Guideline 1.4 was adopted.*

GUIDELINE 1.4.1 [1.1.5] (Statements purporting to undertake unilateral commitments)

2. Mr. LUKASHUK said that, as the Commission's discussion was concerned with legal obligations, the word "commitments" did not seem sufficiently specific.

3. Mr. CANDIOTI (Chairman of the Drafting Committee) replied that the word "commitments" in the title was a translation of the term *engagements* in the original French version of draft guideline 1.1.5 proposed by the Special Rapporteur in his third report (A/CN.4/491 and Add.1-6), and that a general meaning was intended. However, in view of the fact that the term "obligations" was used later in the draft guideline, in the different language versions, there was perhaps some justification for using it in the title as well. The article as a whole concerned cases in which a unilateral statement purported to add an obligation which was not in the treaty, i.e. the declaring State wished to assume legal obligations additional to those in the treaty. On that basis, he could accept a further change of wording if members of the Commission so wished.

4. Mr. HAFNER said that confusion might arise if the heading was changed to read "unilateral obligations". In his experience, in the context of international relations the term "commitment" was used to avoid the word "obligation". The sense in which he understood "commitments" in the English title clearly corresponded to the term *engagements* in the French version.

5. Mr. PELLET (Special Rapporteur) said that the point had been to render the idea that unilateral statements were not reservations, but that they still implied a certain type of commitment on the part of their authors. Opinions had differed sharply within the Drafting Committee, where he had proposed a more radical solution, namely, that they were unilateral acts creating legal obligations for their authors. However "commitments" represented a juridically neutral term, one that was sufficiently vague for all members to agree on. He intended to include a note in the commentary. Personally, he agreed with Mr. Lukashuk that a more precise term was required.

6. Mr. LUKASHUK said that, even if "commitments" was retained in the title, the fact remained that it was inconsistent with the use of "obligations" in the draft guideline. What was the difference between the two terms?

7. Mr. GOCO said that the thrust of the guideline was to convey the idea that obligations beyond those imposed on the author by the treaty constituted a commitment which was outside the scope of the Guide to Practice. On that basis, "commitments" in the title and "obligations" in the text had different roles to play, and both should be retained.

8. Mr. ROSENSTOCK suggested that, for the sake of consistency, "obligations" should be replaced by "commitments" in the body of the text.

9. The CHAIRMAN, speaking as a member of the Commission, said he saw no contradiction between the two terms. It was clear that the "unilateral commitments" in the title referred to statements formulated by a State in relation to a treaty, whereas "obligations" related to the assumption of obligations which went beyond those imposed by the treaty and thus constituted a commitment which fell outside the scope of the Guide to Practice.

10. Mr. CANDIOTI (Chairman of the Drafting Committee) suggested replacing "commitment" in the main body of the text by "statement", so that the last part would read "... constitutes a unilateral statement which is outside the scope of the present Guide to Practice".

11. Mr. PAMBOU-TCHIVOUNDA said he disagreed with that proposal. The term "unilateral statement" was already used at the beginning of the draft guideline and it would not be appropriate to equate the two terms as long as no decision had been reached as to what a unilateral commitment actually constituted. Presumably it was a commitment to take on more obligations.

[1] For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

[2] See *Yearbook ... 1998*, vol. II (Part One).

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

[4] See 2597th meeting, para. 1.

12. Mr. KABATSI said he agreed with the views expressed by the Chairman and Mr. Goco. The term "commitment" in the body of the text clearly referred to an undertaking that went beyond treaty obligations. Moreover, the proposal by the Chairman of the Drafting Committee to delete "commitment" from the text would unbalance the overall guideline, as the word would disappear from the body of the text and remain only in the heading.

13. Mr. CANDIOTI (Chairman of the Drafting Committee) said that draft guideline 1.4.1 [1.1.5] came under section 1.4 of the Guide to Practice, which was concerned with the exclusion of unilateral statements that were outside the scope of the Guide. It was not the Commission's task to engage in research on the legal nature of unilateral commitments or undertakings. Rather, its discussions should reflect the intention behind the guideline, which was simply to state that certain such commitments fell outside the scope of the Guide. From the outset, the discussion of the draft guideline had focused on statements that purported to increase obligations, namely legal obligations rather than commitments. Therefore, in order to be consistent, the title should refer to "unilateral obligations", and "obligations" should be retained in the body of the text. Furthermore, the replacement of "unilateral commitment" by "unilateral statement" at the end of the draft guideline would avoid the danger of the Commission becoming involved in a lengthy discussion on the legal difference between commitments and obligations.

14. Mr. SEPÚLVEDA said that the proposal by the Chairman of the Drafting Committee to refer to a "unilateral statement" in two places in the text might lead to confusion in the Spanish version, especially as the distinction between the two uses had not been clarified. Therefore, he proposed that phrase should read "... constitutes a legal unilateral commitment ...". That would emphasize the fact that the commitment in question related to obligations which fell outside the scope of the Guide to Practice, and would avoid the repeated references to "obligations" and "unilateral statement".

15. Mr. ADDO said that he agreed with the Chairman's comments as to why "commitment" should be retained. Clearly, a commitment could be of a legal or non-legal nature. In the present case, the commitment was of the legal kind, but since it fell outside the scope of the Guide to Practice, there was no need to labour the point.

16. Mr. LUKASHUK said he shared the views expressed by the Chairman of the Drafting Committee and supported his well-justified proposal. The topic at hand concerned guidelines on reservations—it was not the time to tackle the thorny problem of what constituted a unilateral act. The proposed replacement of "unilateral commitment" by "unilateral statement" was an attempt to clarify the text and make it more consistent. He felt that at least that part of the proposal should be approved.

17. Mr. YAMADA said that the main problem, as the Chairman of the Drafting Committee had pointed out, concerned whether it was a unilateral commitment or a unilateral statement which fell outside the scope of the present Guide to Practice. If "unilateral statement" was retained, he would like to further amend the end of the sentence to read "constitutes a unilateral statement outside the scope of the present Guide to Practice".

18. Mr. KATEKA said that, in the present context, legal obligations meant those which were binding on the parties to a treaty. Anything else of a unilateral nature formulated by a State was not a legal obligation, but something additional to which the State wished to commit itself, however that notion might be expressed. In order to avoid confusion, the word "obligations" should be replaced by "commitments". Also, he agreed with Mr. Sepúlveda that it would be best to avoid repeating the term "unilateral statement" in the body of the text.

19. Mr. PELLET (Special Rapporteur) said he was radically opposed to the proposal made by the Chairman of the Drafting Committee.

20. Mr. CANDIOTI (Chairman of the Drafting Committee) pointed out that several of the subsequent guidelines concerned with unilateral statements began with an explanation relating to unilateral statements and ended by stating that a statement was "outside the scope of the present Guide to Practice". The general idea behind the guideline was to refer to international legal obligations assumed unilaterally by States in addition to treaty undertakings. That being so, the intention behind his proposal was to replace "commitments" with a more precise term that avoided the danger of overlap with other guidelines.

21. Mr. AL-BAHARNA said that as unilateral commitments were mentioned in the title, there was no need to refer to them again in the text. The guideline was concerned with what fell within the scope of a reservation and what fell outside of it. He proposed deleting the phrase containing "unilateral commitment" in the body of the text so that the relevant part read "to undertake obligations going beyond those imposed on it by the treaty is outside the scope of the present Guide to Practice". The title would then be amended to read "Statements outside the scope of the topic". In that context, the Commission was not concerned by what constituted a unilateral commitment or statement.

22. The CHAIRMAN said it would not be possible to change the title of draft guideline 1.4.1 [1.1.5], as that would also necessitate similar changes to the succeeding guidelines which, although also concerned with statements outside the scope of the Guide to Practice, differed in substance.

23. A full and frank exchange of views had taken place. For the sake of compromise, and bearing in mind the fact that the Special Rapporteur was vigorously opposed to the proposal made by the Chairman of the Drafting Committee, he suggested that the Commission should adopt the text as it stood. It should be remembered that the formulation was the result of thorough discussion in the Drafting Committee and was still only at the stage of first reading.

24. Mr. LUKASHUK asked whether the Special Rapporteur agreed with the deletion proposed by Mr. Al-Baharna.

25. Mr. PELLET (Special Rapporteur) said that he favoured retaining the draft guideline in its present form.

26. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt draft guideline 1.4.1 [1.1.5] as proposed by the Drafting Committee.

*It was so agreed.*

*Guideline 1.4.1 [1.1.5] was adopted.*

GUIDELINE 1.4.2 [1.1.6] (Unilateral statements purporting to add further elements to a treaty)

27. Mr. HAFNER pointed out that the draft guideline bore very little resemblance to the original text proposed by the Special Rapporteur in his third report. He accepted the reasoning put forward in the Drafting Committee for the changes, with one exception. The phrase "a new provision" had been replaced by "further elements", but the change was not advantageous. The new wording lacked clarity, as demonstrated by the fact that a reservation could be considered a further element added to a treaty. He would prefer to revert to the original phrase, "a new provision", which concorded better with the reference to "a proposal" to modify the content of the treaty, in the latter part of the draft guideline. It was also clearer than "further elements" in terms of the intention of the author of the statement.

28. Mr. CANDIOTI (Chairman of the Drafting Committee) said the purpose of the guideline was to cover proposals to add further elements to a treaty that were not in the nature of reservations or interpretative declarations, inasmuch as they were not intended to modify a treaty or to exclude the legal effects of or interpret any of the provisions. That idea could perhaps be explained in the commentary.

29. Mr. PELLET (Special Rapporteur) said he agreed with those remarks. One example of the proposals that the guideline was intended to cover was that of the Israeli "reservation" concerning the addition of the Red Shield of David to the emblems of the Red Cross and the Red Crescent under the Geneva Conventions of 12 August 1949,[5] which had followed on a Turkish declaration proposing the addition of the Red Crescent to the Red Cross under the Convention for the adaptation to maritime warfare of the principles of the Geneva Convention.[6] When a State did something like that, one could not speak of a reservation: the State was seeking to add something to a treaty. Since the matter would be fully explained in the commentary, and although he agreed with Mr. Hafner that the original wording was preferable because it was clearer, he could live with the compromise version adopted after lengthy discussion by the Drafting Committee.

30. Mr. AL-BAHARNA said he had been in favour of Mr. Hafner's proposal, but having heard the explanations given by the Special Rapporteur, he thought that the present formulation was the most appropriate. He assumed that the commentary would explain the reasoning behind that formulation.

31. Mr. GOCO, referring to Mr. Hafner's proposal, said his concern was whether the moment at which the decision was made to add "a new provision" was a material factor. In draft guideline 1.1.6 as proposed by the Special Rapporteur, reference was made to the "time" when the State or international organization expressed its consent to be bound by a treaty. Was the guideline intended to contemplate a situation in which the parties had already consented to a treaty and further elements were added subsequently or was it prior to the consent of the parties that further elements might be submitted?

32. The CHAIRMAN recalled that the problem had already been thoroughly discussed in the Commission and in the Drafting Committee. Lack of a time limitation in the guideline proved that it was not restricted to a specific moment. Whenever the Drafting Committee wished to limit the time frame, wording to that effect had been included, for example, in draft guideline 1.2.1 [1.2.4].

33. Mr. TOMKA asked whether there was any particular reason why the draft guideline spoke of modifying "the content of" the treaty instead of using the standard reference to modification of the treaty. The phrase "the content of" seemed superfluous, for if the treaty was modified, so was its content.

34. Mr. PELLET (Special Rapporteur) said that was true, but it was sometimes useful to spell out what went without saying. The reference to content precluded any inference that it was the legal effects of the treaty that were concerned. Reservations were aimed at legal effects, but in the case covered by the guideline, it was the content itself that was involved. A treaty was both an *instrumentum* and a *negotium*, but the guideline was clearly addressed to the *negotium*.

35. Mr. HAFNER said he assumed that the content of a treaty constituted its provisions, and that a proposal to add a new provision would be a proposal to modify the content of the treaty. He was not very convinced by the explanations concerning the words "further elements", but in view of the thorough discussion in the Drafting Committee and the extensive explanation to be provided in the commentary, he would not press his proposal to change the wording.

36. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt draft guideline 1.4.2 [1.1.6] as proposed by the Drafting Committee.

*It was so agreed.*

*Guideline 1.4.2 [1.1.6] was adopted.*

GUIDELINE 1.4.3 [1.1.7] (Statements of non-recognition)

37. Mr. KABATSI said he was not convinced that statements of non-recognition were outside the scope of the Guide to Practice. He believed that they were, in essence, reservations, and were covered by the definition in draft guideline 1.1.5 [1.1.6]. The phrase "if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity" meant that the

[5] See 2597th meeting, footnote 9.

[6] See J.B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915), pp. 181 and 256.

State would abide by certain obligations in respect of State A but not of State B.

38. Mr. PELLET (Special Rapporteur) said he was of the same view as Mr. Kabatsi but was disturbed by his comments, because they might reopen the substantive discussion on the issue. The Commission had debated it at very great length at its fiftieth session and he had been the only one to maintain that such statements were reservations. Bowing to the views of the vast majority of members, however, he had changed the wording of the draft guideline and, in his fourth report (A/CN.4/499 and A/CN.4/478/Rev.1), he had set out the views that clashed with his own and explained why it was possible to contend that such statements were not reservations. He appealed to members of the Commission to exercise similar discipline and not to reopen debate on the subject.

39. The CHAIRMAN endorsed the Special Rapporteur's appeal not to revert to an issue extensively discussed at the fiftieth session.

40. Mr. HAFNER said he had no problems with the content of the draft guideline but had difficulties with the structure, especially when compared with draft guideline 1.1.7 as proposed by the Special Rapporteur in his third report. Draft guideline 1.4.3 [1.1.7] referred to one statement by which a State indicated that it did not recognize another State and at the same time purported to exclude the application of the treaty. Was it really only one statement, or were there in fact two different ones—one about non-recognition and another about exclusion of application of the treaty in the relations between the two States? Perhaps the Chairman of the Drafting Committee could explain the reason for combining the two issues. It might be preferable to separate them by replacing the words "if it" by the phrase "if it entails a declaration which", before "purports to exclude the application of the treaty between the declaring State and the non-recognized entity".

41. Mr. AL-BAHARNA said he agreed with Mr. Hafner. He had no objection to the draft guideline but had difficulty with the last phrase ("even if ... non-recognized entity"), which should perhaps be deleted. He would like to know from the Special Rapporteur whether that phrase did not implicitly or explicitly give effect or recognition to the unilateral statement made by the declaring State.

42. Mr. KATEKA observed that, hitherto, in State practice statements of non-recognition were regarded as constituting reservations. Before the recent changes in the political world, such statements used to be placed on record by a State, especially from one region, and the party for which they were intended would add that in the substance of the matter, it would treat that State with complete reciprocity. In other words, there were no treaty relations between the two parties.

43. Mr. MELESCANU said that after a long discussion in the Commission it had been agreed that such statements were political declarations whereby a State wished to assert its position regarding another State. In many instances of international practice, despite such statements, multilateral treaties applied perfectly well in the relations between all participating States. The wording of the draft guideline could perhaps be improved. As it stood, however, it could be accepted, as it adequately reflected the basic idea that States sometimes felt the need to make a declaration that was highly political but did not modify the legal effects of a treaty.

44. Mr. CANDIOTI (Chairman of the Drafting Committee) said the draft guideline was derived from draft guideline 1.1.7 bis proposed by the Special Rapporteur in his fourth report. The idea was that the statements in question were neither reservations nor interpretative declarations because they concerned not the treaty itself or its provisions but rather the capacity of the non-recognized entity to be bound by a treaty. It was a useful kind of statement, frequently made by many countries, including his own, concerning an entity which was not recognized as having State capacity to become a party to the treaty. It was a statement of non-recognition.

45. The purpose of the last phrase was to dispel any doubt that all kinds of statements of non-recognition were covered. He experienced no difficulty with the formulation proposed by the Drafting Committee and would prefer to retain it.

46. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt draft guideline 1.4.3 [1.1.7] as proposed by the Drafting Committee, but replace the words "and is outside" by "which is outside".

*It was so agreed.*

*Guideline 1.4.3 [1.1.7], as amended, was adopted.*

GUIDELINE 1.4.4 [1.2.5] (General statements of policy)

47. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the draft guideline, but replace the words "and is outside", by "which is outside".

*It was so agreed.*

*Guideline 1.4.4 [1.2.5], as amended, was adopted.*

GUIDELINE 1.4.5 [1.2.6] (Statements concerning modalities of implementation of a treaty at the internal level)

48. Mr. HAFNER said he had raised a question in the Commission to which he had received no satisfactory answer. The subject covered in the guideline was normative treaties, particularly human rights treaties. The beneficiaries of the obligations under human rights treaties fell in many categories. Why, then, did the draft guideline refer to the obligations only of "the other contracting parties"? That restrictive wording might give rise to confusion and problems. To avoid any difficulties, it might be preferable to replace the phrase "of the other contracting parties" by "under the treaty".

49. Mr. AL-BAHARNA said he had no objection to the draft guideline but thought the word "merely" was awkward and should be deleted.

50. Mr. KABATSI said he agreed, but the word "merely" could be replaced by the word "only".

51. Mr. PAMBOU-TCHIVOUNDA confirmed that, in the French version too, the word *purement* was superfluous.

52. Mr. CANDIOTI (Chairman of the Drafting Committee) said that Mr. Hafner's proposal was also possible, but he would like to hear the views of the Special Rapporteur on that point.

53. As to deleting the world "merely", it was important to bear in mind the words "as such", which underscored that the statements concerned were only of an informative nature, so as to distinguish them from other statements which might be informative but could also have other effects.

54. Mr. PELLET (Special Rapporteur) said that he endorsed the suggestion to delete the word "merely", but he was far from enthusiastic about Mr. Hafner's proposal. For one thing, the problem Mr. Hafner had raised was resolved in part by the words "as such", which clearly referred to the idea that the rights and obligations stemmed from the treaty. But the phrase "the other contracting parties" should not be deleted, because that would mean that their commitments did not purport as such to affect the rights and obligations of the declaring State itself. That was not true, because the declaring State assumed commitments, even if they did not have an international effect. The classic example was that of the Niagara "reservation".[7] At the internal level, the United States of America was certainly bound by a declaration which, in his opinion, it had imprudently made. He was not sure whether it was not bound at international level as well, since there could be a form of estoppel, and that was why the draft guideline said "as such" and the possibility was not excluded that, owing to additional factors, there might be rights and obligations for the other parties, and in the present case, that could only be rights. He was not persuaded that Mr. Hafner's proposal corresponded to a legal reality. The proposal was unwise and, what was more, it was not true as far as the internal level was concerned.

55. Mr. HAFNER said that the consequences under the present formulation of the draft guideline would be that, if a State made a unilateral statement on how it intended to implement the treaty at the internal level, which could imply even a change of its obligations under the treaty, then it was not a reservation. Why? For example, in an environmental treaty stipulating that all parties had to protect their own environment, a State could make a declaration on how to implement that obligation at the internal level in a way that clearly had an effect on the content and scope of the obligation imposed on the State. What, then, were the rights of the other States? It was essential to indicate clearly that a State could make a declaration on implementation at the internal level, but it must not affect the obligations imposed on the State. If it did, it must be treated as a reservation.

56. Mr. MELESCANU said he feared the discussion was getting out of hand. The question under consideration was very simple and practical. The object was not on any account to influence the legal effects of a treaty. It was for a State to say that, at the internal level, one particular body, and not another, would deal with the matter. Members should not try to give the guideline a meaning that was not intended.

57. Mr. HAFNER said that the intention was one thing. The result was another, and it did not seem to correspond to the intention. The reader could go only by the content, not by the intention. As it stood, the draft guideline seemed to invite States to make declarations which were in fact reservations, in particular concerning standard-setting treaties. That should not be the objective.

58. The CHAIRMAN said that the Commission was at an early stage in the proceedings and was merely dealing with definitions, whereas what Mr. Hafner was suggesting went beyond the scope of that part of the Guide to Practice.

59. Mr. GAJA proposed that, to meet Mr. Hafner's concerns, the phrase "the rights and obligations of the other contracting parties" should be replaced by "the rights and obligations towards the other contracting parties".

60. Mr. PELLET (Special Rapporteur) said he failed to see the problem encountered by Mr. Hafner. The purpose of the statement was precisely not to affect the treaty. A statement that purported to exclude or to modify the legal effects would, of course, come under the definition of a reservation. Accordingly, he endorsed Mr. Gaja's proposal, which was a useful clarification. It would be even clearer to say "its rights and obligations towards the other contracting parties".

61. Mr. HAFNER, said that there were now two definitions: one concerned reservations, and the other was under consideration. It was not clear which one had priority. He could go along with Mr. Gaja's proposal on the understanding that it would be explained in the commentary.

62. Mr. ADDO said that Mr. Hafner had a point, but Mr. Gaja's proposal more or less took his concern into account. He therefore endorsed it.

63. The CHAIRMAN said the proposals were that the phrase "the rights and obligations of the other contracting parties" should be replaced by "its rights and obligations towards the other contracting parties"; the word "merely" should be deleted; and the phrase "and is outside the scope" should be changed to "which is outside the scope". If he heard no objection, he would take it that the Commission wished to adopt draft guideline 1.4.5 [1.2.6] as amended.

*It was so agreed.*

*Guideline 1.4.5 [1.2.6], as amended, was adopted.*

SECTION 1.5 (Unilateral statements in respect of bilateral treaties)

GUIDELINE 1.5.1 [1.1.9] ("Reservations" to bilateral treaties)

64. The CHAIRMAN suggested that, for the sake of clarity, the words "however phrased or named" at the end

[7] See 2584th meeting, para. 8.

of the draft guideline should be moved to the beginning and inserted after the words "A unilateral statement".

65. Mr. HAFNER asked whether the word "which", in the phrase "in respect of which", referred to the treaty.

66. Mr. ROSENSTOCK said that that was his understanding.

67. Mr. CANDIOTI (Chairman of the Drafting Committee) said that, in the French original, the word "which" referred to the modification of the provisions, and not the treaty.

68. Mr. PELLET (Special Rapporteur) said that he had no opinion whatsoever on the English version. A State which wanted to make a "reservation" to a bilateral treaty stated that it ratified the treaty, provided that it was modified in a particular manner. Obviously, it was subordinating its consent to the modification of the provisions of the treaty. The French version was perfectly clear, and the English version, which in any case was of no importance because it was not the original text, must be brought into line with the French version.

69. Mr. GAJA suggested that the word "modification" should be added after "which" in order to make the text clear.

70. Mr. CANDIOTI (Chairman of the Drafting Committee) proposed that the words "in respect of which" should be replaced by "to which modification".

71. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt draft guideline 1.5.1 [1.1.9], as amended.

*It was so agreed.*

*Guideline 1.5.1 [1.1.9], as amended, was adopted.*

GUIDELINE 1.5.2 [1.2.7] (Interpretative declarations in respect of bilateral treaties)

72. Mr. TOMKA said that he was afraid the draft guideline might be misinterpreted to mean that only guidelines 1.2 and 1.2.1 [1.2.4] were applicable to bilateral treaties and that all the other guidelines were therefore applicable to multilateral treaties. It was his understanding that guidelines 1.2 and 1.2.1 [1.2.4] were also applicable to multilateral treaties. Perhaps it could be made clearer by adding the word "also" after "are".

73. Mr. PELLET (Special Rapporteur) said that it would be preferable to say that guidelines 1.2 and 1.2.1 [1.2.4] were applicable "to both bilateral treaties and multilateral treaties".

74. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt draft guideline 1.5.2 [1.2.7], as amended.

*It was so agreed.*

*Guideline 1.5.2 [1.2.7], as amended, was adopted.*

GUIDELINE 1.5.3 [1.2.8] (Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party)

*Guideline 1.5.3 [1.2.8] was adopted.*

GUIDELINE 1.6 (Scope of definitions)

75. Mr. Sreenivasa RAO, referring to the phrase "the rules applicable to them", sought clarification on which rules were meant. Presumably that would be explained in the commentary.

76. Mr. CANDIOTI (Chairman of the Drafting Committee) said that "rules applicable to them" were the rules which would be dealt with later on. The question of permissibility and the effects of such statements would be dealt with in later chapters. As to statements which did not fall within the application of the guidelines, they were rules of general international law which had to do with the effects and validity or permissibility of other statements. Draft guideline 1.6 was a general "without prejudice" clause.

77. The CHAIRMAN said that it would be useful to make that clear in the commentary. If he heard no objection, he would take it that the Commission wished to adopt draft guideline 1.6.

*It was so agreed.*

*Guideline 1.6 was adopted.*

## State responsibility[8] (*continued*)* (A/CN.4/492,[9] A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,[10] A/CN.4/L.574 and Corr.1 and 3)

[Agenda item 3]

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

78. Mr. CRAWFORD (Special Rapporteur) said that the purpose of chapter I, section D (Countermeasures as provided for in part one, chapter V and part two, chapter III), of his second report on State responsibility (A/CN.4/498 and Add.1-4), which had been provisionally issued as document ILC(LI)/CRD.1, was not to suggest precise formulations for articles on measures, but to answer the question whether to retain the articles on countermeasures in part two and, if so, what the consequences would be for article 30 (Countermeasures in respect of an internationally wrongful act). Since it had proved virtually impossible to formulate a satisfactory article 30 without knowing whether countermeasures would be covered in more detail in part two, he had undertaken to provide a section of the report on the subject. To that end, it had been necessary to consider two other issues which would require much debate at the next session and on which guidance would be greatly appreciated.

79. The general question went to the heart of the whole issue of dispute settlement in the draft. The provisions on countermeasures in part two rested on an assumption which could not be taken for granted, namely that the

* Resumed from the 2592nd meeting.

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

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

[10] Ibid.

draft articles would deal with dispute settlement in the form normally taken in a convention. Opinions varied on the form the articles should take and even whether, in the form of a convention, the matter of dispute settlement should, in accordance with practice in the Commission, be left to be resolved by a diplomatic conference. The manner in which the articles in part two regulated countermeasures would depend on the decision regarding dispute settlement.

80. A second, more specific point concerned the linkage of dispute settlement and countermeasures in part two, which, he believed, could not be sustained. The Commission could, however, decide that articles on countermeasures should be retained without that linkage yet defer its final position on the form of the articles on dispute settlement.

81. If the Commission agreed to that approach, some members might be in favour of a broader provision pertaining to dispute settlement, which would mean that the subject would have to be debated at a later date. The size of the problem had been illustrated by the first of the cases brought before the International Tribunal on the Law of the Sea, the *M/V "Saiga"* case,[11] which had demonstrated how difficult it was to create a linkage between a key jurisdictional fact and the compulsory jurisdiction of a specific tribunal. He hoped that the Commission could provide guidance on the general question related to part two and clear the way for the Drafting Committee in connection with the formulation of article 30. It should be emphasized that he was not seeking precise views on the content of articles 47 to 50, but was unsure whether they should be included at all. Those articles were discussed at length in chapter I, section D, of his second report. Attention should be drawn to the dramatic difference between the commentaries to parts one and two. The commentaries to part one were learned disquisitions; those to part two resembled mere guidelines whereas they should strike a balance and reflect more of the wisdom and substance of the reports of the former Special Rapporteur, Mr. Gaetano Arangio-Ruiz.[12]

82. He did not consider it necessary to take up the issue raised by article 40 (Meaning of injured State) on the extent to which all injured States were entitled to take countermeasures. Part of the problem was that article 40 treated all injured States in the same way and gave them the same rights, including the right to take countermeasures, a position that was controversial and posed serious consequential questions in the event of "collective countermeasures". A law of collective self-defence was beginning to emerge, but no law of collective countermeasures yet existed. The matter would have to be discussed at the fifty-second session of the Commission.

83. He also referred in paragraphs 374 to 379 of his second report to the comments and observations received from Governments on State responsibility (A/CN.4/492).[13] Some Governments advocated the suppression of the articles on countermeasures, others were strongly in favour of them, while still others wanted substantial amendment, but not elimination, of the articles in part two.

84. It was necessary to examine the key underlying issues. Since the articles on countermeasures had been drafted, ICJ had heard a case concerning that very subject. The Court had clearly been of the opinion that countermeasures had been potentially relevant, but it had concluded that, although some of the preconditions for countermeasures had been met, the diversion of the Danube had not been a justifiable countermeasure under the general heading of proportionality. In paragraph 381, he had quoted the relevant passages of the Court's decision in the *Gabčikovo-Nagymaros Project* case [see paragraphs 82 to 84 of the judgment]. The Court had applied a stricter test of proportionality than that implied in the Commission's draft articles, although the Court had cited them in support of its general approach. It had not, however, relied on them to the same extent as it had done on, for example, article 33 (State of necessity). In a sense, the Court had maintained that the chief requirements in respect of proportionality were that a countermeasure had to be commensurate with the wrong, designed to counter the effects of the wrongful act and be essentially reversible. Although Czechoslovakia had been entitled to adopt countermeasures, having regard to the importance of the area of law concerned, its conduct had not been commensurate. The conditions laid down by the Court as justification for countermeasures under general international law would therefore have to be borne in mind when the articles in part two came to be redrafted. Just as the Court's judgment had provided some assurance that neither the doctrine of necessity nor the doctrine of a fundamental change of circumstance was going to be abused to the instability of legal relations, it had also shown that a relatively strict approach would be adopted to countermeasures. Nonetheless, the institution did exist under general international law.

85. In paragraph 383, he had outlined some of the advances made in respect of countermeasures. Nevertheless, two crucial questions still had to be addressed, the first being the specific link between the countermeasures and dispute settlement. Under the draft articles, if countermeasures were taken, the target State was entitled to force the State taking the countermeasures to go to compulsory arbitration. That was the only compulsory third-party judicial settlement of a dispute provided for in the draft. There was compulsory conciliation, but no compulsory arbitration and conciliation was subject to any other agreement the parties might have reached, or any other procedure to which they might have consented, such as the jurisdiction of ICJ under the optional clause.

[11] Application for prompt release, judgement of 4 December 1997.

[12] Preliminary report: *Yearbook ... 1988*, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1; second report: *Yearbook ... 1989,* vol. II (Part One), p. 1, document A/CN.4/425 and Add.1; third report: *Yearbook ... 1991*, vol. II (Part One), p. 1, document A/CN.4/440 and Add.1; fourth report: *Yearbook ... 1992*, vol. II (Part One), p. 1, document A/CN.4/444 and Add.1-3; fifth report: *Yearbook ... 1993*, vol. II (Part One), p. 1, document A/CN.4/453 and Add.1-3; sixth report: *Yearbook ... 1994*, vol. II (Part One), p. 3, document A/CN.4/461 and Add.1-3; seventh report: *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/469 and Add.1 and 2; eighth report: *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/476 and Add.1.

[13] See 2567th meeting, footnote 5.

86. The draft articles drew a distinction between interim measures of protection and countermeasures. The former were measures that could be initiated immediately against an unlawful act, without even notification and certainly without negotiation, whereas full-scale countermeasures could be set in motion only after negotiations had failed. It was a compromise between the differing views of members of the Commission, but technically it did not work very well. There might be advantages in having a graduated regime of countermeasures, because the only opportunity for taking effective, reversible countermeasures, (which ought not, however, to cause significant, long-term harm) might be when the unlawful act actually occurred. The problem lay in the fact that often such measures had to be adopted straightaway and lengthy prior consultation would defeat their purpose. That was the whole point of interim measures of protection. However, two essential difficulties arose. The first was that the judicial terminology of interim measures of protection was used, i.e. terminology borrowed from third-party settlement, which he deemed inappropriate. New terminology was therefore required. The second problem, which could be remedied, was that the definition of interim measures of protection was incorrect and was in fact another way of defining countermeasures, so there was no clear linguistic distinction between the two different types of measures.

87. The linkage between countermeasures and dispute settlement was a more important issue. The critical point was that the right to go to arbitration was unilateral in that it was vested in the State which had committed the internationally wrongful act. It was very odd to have a unilateral right to refer a matter to third-party compulsory settlement, especially when it was vested in the target State. Furthermore, it was strange to yoke it to the notion of countermeasures, which was difficult to apply. For example, if the injured State, instead of adopting countermeasures, resorted to retortion of dubious legality—in the sense that it might be retortion or countermeasures—and the target State submitted the matter to arbitration, the tribunal would be compelled to find that the action in question did not constitute a countermeasure, which was plainly an unsatisfactory outcome.

88. Moreover, the *M/V "Saiga"* case had shown how difficult it was to pin the jurisdiction of a court on a substantive legal classification [see paragraph 72 of the judgement]. The point at issue had been whether the seizure of a ship had been carried out in pursuance of Guinea's laws on its exclusive economic zone or its customs laws. Guinea had claimed that it was enforcing its customs laws. The International Tribunal on the Law of the Sea had found that, if that was so, Guinea's action had been unlawful, but it had held on the contrary that Guinea was enforcing exclusive economic zone legislation, which might be lawful, and that it therefore had jurisdiction. The Tribunal had gone on to find that Guinea's acts had been unlawful after all. He therefore thought it technically untenable to say that only the target State should have the right to force a matter to arbitration. It would be a positive incentive to injured States to have recourse to countermeasures in order to prompt such a step, but in the context of judicial settlement States should not have to weigh up how much damage to inflict in order to force the hand of the other State. The system as it stood was unworkable. Consequently, if the Commission wished to deal with countermeasures, he would propose provisions that might well require the States to do everything they could to resolve their dispute but which would not tie the taking of countermeasures to judicial settlement.

89. The second general issue was the balance to be struck between injured and target States in the field of countermeasures. Views on that matter clearly differed. The broad view of the international community was that countermeasures could be abused, were the sign of a relatively primitive legal system and played into the hands of the stronger States. On the other hand, it was thought that countermeasures were necessary in a context where there was no centralized law enforcement mechanism and no general system of compulsory adjudication. Those views led to disparate conclusions. Some States considered that countermeasures were so dangerous that they should not be regulated at all, while others might be trying to extend their freedom to take countermeasures by retaining article 30 and deleting articles 47 to 50.

90. The Commission had made progress in the formulation of articles on countermeasures and could make further headway. A thorny legal problem in relation to an existing institution of international law was not further complicated by the Commission's endeavours to strike a balance in formulation. The Court had demonstrated that fact by relying on the Commission's formulations in a variety of contexts in recent decisions, which meant that the Commission had a responsible role to play. Article 30 should not be removed from chapter V. To do so would be to decodify international law. He therefore preferred option 4 in paragraph 389, but if it was rejected, his second preference was for option 2, which would go some part of the way to regulating countermeasures. The worst scenario would be to give a vague licence to States under article 30 to adopt countermeasures, but do nothing whatever to regulate their content.

91. Mr. TOMKA said that he fully supported the proposal to follow option 4. Countermeasures should be listed in chapter V of part one among the circumstances precluding wrongfulness. He was in favour of sending the text proposed by the Special Rapporteur to the Drafting Committee, so that a definition of countermeasures could be submitted to the Commission. Some substantive treatment of countermeasures was needed in part two, and he was against any linkage of countermeasures and dispute settlement. He hoped that the imbalance between the commentaries to parts one and two would be remedied. He wished to point out that in the *Gabčikovo-Nagymaros Project* case, variant C had not been viewed as unlawful. It had been regarded as a unilateral diversion of water and hence not in accordance with the principle of proportionality.

*The meeting rose at 1.05 p.m.*

# 2600th MEETING

*Friday, 9 July 1999, at 10.10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

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

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of chapter I, section D (Countermeasures as provided for in part one, chapter V and part two, chapter III), of the second report of the Special Rapporteur on State responsibility (A/CN.4/498 and Add.1-4), which had been provisionally issued as document ILC(LI)/CRD.1.

2. Mr. ROSENSTOCK said that he was grateful to the Special Rapporteur for drafting such a remarkably clear survey of the very complex issue of countermeasures and that he endorsed many of the conclusions in chapter I, section D. For example, he agreed with the Special Rapporteur and Mr. Tomka that part three (Settlement of disputes) of the draft articles and its linkage to countermeasures were untenable in various respects. Part three had been included as a token of goodwill and because it had been thought that countermeasures constituted a response to the imperfect nature of the international legal order, as demonstrated in particular by the lack of settlement machinery, and that it was therefore necessary to tie countermeasures to their raison d'être.

3. He also agreed with the Special Rapporteur that the institution of countermeasures existed in international law, as had been reflected in the Commission's decision to retain article 30 (Countermeasures in respect of an internationally wrongful act)[4] and in some pronouncements of ICJ. In that respect, he basically agreed with the Special Rapporteur's analysis and summary of the views expressed by the Court in the case concerning the *Gabčíkovo-Nagymaros Project*. There were nevertheless some limits to the conclusions which might be drawn from the lack of any reference to specific articles in a given area.

4. Moreover, like the Special Rapporteur, he thought that articles 47 to 50, as they stood, were fatally flawed. In that respect, it was debatable whether the heroic efforts to save them after the careful results of the Drafting Committee had been wrecked had been well advised or whether it would not have been better to let them founder, instead of trying to salvage what was beyond the point of rescue.

5. He did not wholly agree with the Special Rapporteur's conclusion that the case concerning the *Air Service Agreement of 27 March 1946* and the dictum contained therein did not reflect international law.

6. It was premature to think about the amendment of article 30, as it was first necessary to gain a better understanding of what was possible as far as part two of the draft articles was concerned. In that connection, the Special Rapporteur correctly set out the options available to the Commission. He himself had no substantive objections to option 4 contained in the general conclusions to chapter I, section D, preferred by the Special Rapporteur,[5] and he was ready to give it a try in all good faith, but he hoped that, in exchange, others would be prudent enough not to denigrate options 1 and 2, if the Special Rapporteur's optimism about option 4 were to prove ill-founded.

7. It had been stated on several occasions during the debate that countermeasures were of greater use to the Governments of the most powerful States than to others. In truth, all measures were more effective in the hands of the strong, but they had many other means of exerting pressure, such as measures of retortion or the denial of technical assistance, before turning to countermeasures. In reality, countermeasures were most useful to medium-sized Powers in particular circumstances.

8. Other material in chapter I, section D, could and would be criticized at the appropriate moment; silence did not signify approval. The important point at the current stage was that the Special Rapporteur had fulfilled his responsibilities superbly and had provided the Commission with a sound basis for seeking a generally acceptable solution to the issue of countermeasures. The earlier the Commission started an informal examination of articles 47 to 50, the earlier it would perceive realistically what options were feasible and how they could be achieved. If option 4 could be made to work, so much the better, if not, the others would still be open.

9. Mr. LUKASHUK said that he generally endorsed chapter I, section D, which was plainly the excellent result of very painstaking work. The answer to the question whether a regime of countermeasures should be included in the draft articles depended on the Commission's reply to another question: did it want to make international law

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

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

[3] Ibid.

[4] See 2590th meeting, para. 39.

[5] See 2599th meeting, para. 90.

more effective and countermeasures less arbitrary? He thought that, since countermeasures were a very powerful means of action, they should be regulated precisely and their use strictly limited. In the comments and observations received from Governments (A/CN.4/492),[6] Governments had expressed anxieties on that score, as they thought that the establishment of rules would open the door to abuses of countermeasures. It was, however, the very absence of rules and regulations which made the abuse of countermeasures possible. Moreover, it was not by chance that the fiercest opponents of such a regime were the Governments which frequently used countermeasures.

10. The work on the topic had led to new terminology that he found inappropriate. One now spoke of primary rules and secondary rules in referring to what were normally called substantive rules and procedural rules. For him, the definition of a regime of countermeasures was part of the elaboration of international procedural law. Some fields, such as space law and the law of the sea, had their own procedural rules, but international procedural law generally comprised four categories of norms: norms which regulated the implementation, operation and extinction of substantive rules, i.e. primarily the 1969 and 1986 Vienna Conventions; norms governing international responsibility; norms relating to countermeasures; and norms relating to the settlement of disputes. According to the articles which had been adopted by the Commission on first reading, countermeasures were used when a State did not abide by the substantive rules and could be used only after negotiations had taken place. That being so, there was inevitably a connection, both legal and logical, between the rules relating to State responsibility and countermeasures. The draft must regulate the latter, for, if it did not, they were likely to continue to be arbitrary for a long time. That was well understood by those States that, as the Special Rapporteur indicated, regarded countermeasures as an essential issue in the context of the draft articles. Admittedly, some States saw things differently. For example, the Government of the United States of America believed that the intention was to restrict the use of countermeasures unjustifiably and that the Commission should radically review the proposed restrictions.

11. The question of the settlement of disputes was closely linked to that of responsibility. The difficulty arose from the fact that the drafting of rules on the subject gave rise to problems that were at once political and legal. Thus, in order for provisions on the settlement of disputes to have any real meaning, they had to appear in a convention. The drafting of a convention would take years and, even if the Commission managed to adopt one, there was no knowing if and when the convention in question would enter into force. The international community urgently needed rules on State responsibility, as demonstrated by the fact that ICJ had referred on several occasions to the draft articles now in preparation. The work had to be completed as rapidly as possible.

12. His feeling was that article 30 should be retained in its own place, for reasons that were both logical and legal. Finally, like the Special Rapporteur, he preferred option 4.

[6] See 2567th meeting, footnote 5.

13. Mr. Sreenivasa RAO thanked the Special Rapporteur for his excellent second report, which was all the more remarkable for the complexity of its subject and, in particular, for the clear options he had proposed to the Commission for the continuation of its work. Noting that, in paragraph 363 of the second report, the Special Rapporteur had stated that there was no specific exclusion for conduct implying a breach of the norms of international humanitarian law, he said that it would be wrong to draw the conclusion that countermeasures were not subject to the norms of international humanitarian law. They applied in all cases. The draft articles adopted by the Commission on first reading had not stated that categorically, perhaps because it seemed obvious or because the subject was dealt with elsewhere, but it might be advisable to clarify the point.

14. In paragraph 364 of the second report, the Special Rapporteur gave the impression, in explaining the word "extreme" used in article 50 (Prohibited countermeasures), subparagraph (*b*), that it was the most important word in that provision. In his opinion, whether the measures were extreme or not, they were prohibited once they purported "to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act". Clarifications would be necessary in that regard. Clarifications were also called for in respect of the "obligations of total restraint" mentioned in paragraph 365, particularly in the light of Article 2, paragraph 4, of the Charter of the United Nations.

15. With regard to the settlement of disputes, he did not share the opinion that the articles on that subject adopted on first reading were "fatally flawed". In examining those provisions, it should be borne in mind that countermeasures had been linked to the settlement of disputes in order to take account of the fact that the international community was disorganized. Thus, a powerful State which felt it had been injured could take countermeasures without the need to negotiate or resort to a settlement procedure. To say that the State to which the countermeasures applied had been granted a right in respect of the settlement of disputes which had been denied to the injured State was not exactly correct. The fact that the right had not been conferred on the injured State expressly was not an injustice, but acceptance of the fact that a powerful State which considered itself injured had no recourse to a procedure for settling disputes; nevertheless, if it wished to do so, the draft articles did not prohibit that. In that regard, several members of the Commission had felt that measures such as representations, a request for clarification, negotiations or the use of a dispute settlement procedure should precede countermeasures.

16. The reservations he had always had about the mechanism of countermeasures derived from the fact that its existence constituted an admission that the rule of law had failed and was proof of the absence of higher international institutions, which were the circumstances that obliged a State to take the law into its own justice. It was certainly fully justifiable in theory to establish a regime of countermeasures and to define the circumstances in which it could be used. One could philosophize ad infinitum on that point. However, the system could function only on the assumption that there were no institutions higher than the State itself, which decided unilaterally that

it had been wronged—perhaps in the case of a controversial situation on which opinions in the international community were divided. Moreover, it was the relatively powerful States which were particularly able to make use of countermeasures.

17. Under the topic on State responsibility, the Commission was trying to set up a legal system for the international community to regulate inter-State relations, but the main problem was that it could not base a particular regime such as the one it envisaged for countermeasures on the fact that, although the law of responsibility existed, there was no regime to implement it. States themselves had the power to enforce the law, even outside the framework of the international community.

18. International law was constantly evolving in many areas and was as clear as it could get; there was a sufficient amount of exceptions and qualifications for each principle, especially with regard to the use of force. It would be illusory to project the impression that a State could do whatever it wanted to enforce what it called its rights.

19. In conclusion, he said that he would join in the consensus and go along with whatever the Commission chose to do. He was also prepared to accept option 4, contained in the general conclusions to chapter I, section D, but stressed that, if the Commission wanted to fulfil its task of the progressive development of the law, it would have to devote a part of the draft to dispute settlement. Which part would be up to the Special Rapporteur. The new formulation of article 30 was welcome and it could be referred to the Drafting Committee.

20. Mr. KATEKA said that countermeasures were a reality in international practice. Recent and ample jurisprudence quoted by the Special Rapporteur supported his analysis of various distinct elements. In paragraph 383 of the second report, the Special Rapporteur counselled against obscuring the value of the draft articles as a first attempt to formulate the international law rules governing the practice of countermeasures. The Special Rapporteur seemed to prefer that the fate of countermeasures should be resolved in part two, but the Commission had already agreed that countermeasures had their place in chapter V of part one (Circumstances precluding wrongfulness).

21. Article 30 as proposed by the Special Rapporteur seemed generally acceptable and could be referred to the Drafting Committee.

22. The Special Rapporteur was of the view that the connection between the taking of countermeasures and compulsory arbitration should not be retained. That was why, as he explained in paragraph 387, he preferred option 4. He himself supported option 3, which included such linkage. In that regard, he endorsed the views expressed by Argentina, in the comments and observations received from Governments, that countermeasures and compulsory arbitration should be regarded as two sides of the same coin. The linkage would strike a balance between the interests of the injured State and those of States finding themselves at the receiving end of countermeasures, such States usually being small and vulnerable countries. Hence, the fear that article 58 (Arbitration), paragraph 2, could incite a powerful State to take countermeasures to force another State to accept recourse to arbitration seemed to be misplaced. Countermeasures could be acceptable when coupled with compulsory dispute settlement. But to link countermeasures and compulsory arbitration, the draft articles would logically have to take the form of a convention.

23. The Commission must try to overcome the obstacles rather than proposing delinkage. It must take up issues such as equality of treatment of the injured State and the wrongdoing State. The same applied to problems arising from collective countermeasures in situations where there were many injured States.

24. Mr. ADDO said he preferred option 4 proposed in paragraph 389 of the second report. Dispute settlement mechanisms were too time-consuming to be linked to a system of countermeasures. They might be subject to abuse through delaying tactics by the target State. Dispute settlement was complex enough. There was surely a need to maintain article 30 within chapter V of part one of the draft and he accepted the new formulation of the article.

25. Mr. KABATSI said he thought that countermeasures could not be wished away. They had become a fact of international life. But it was important that they should be regulated and strictly curtailed by appropriate rules so that the danger of excess was minimized. He endorsed the new formulation of article 30 and considered that it could be referred to the Drafting Committee.

26. As to the options proposed in paragraph 389, he thought the Special Rapporteur was only partly correct in emphasizing that linking countermeasures to dispute settlement was impossible because it would favour one party and not the other. The Special Rapporteur should above all try to remove that imbalance. In his own view, the two mechanisms could go hand in hand. Resort to a compulsory dispute settlement mechanism did not necessarily exclude resort to countermeasures. That was why option 3 was preferable, for it preserved the linkage between countermeasures and compulsory arbitration.

27. Mr. GOCO said that, if the two mechanisms were working together, as Mr. Kabatsi suggested, he wondered what place would be held by conservative measures. Could they not be adopted prior to the settlement of the dispute?

28. Mr. KABATSI said that conservative countermeasures could very well be taken by resort to an arbitration institution. As the Special Rapporteur had recalled, all countermeasures were essentially provisional.

29. Mr. CRAWFORD (Special Rapporteur) said he recognized that there was an imbalance in the fact that the wrongdoing State could require recourse to a dispute settlement mechanism, but not the injured State. Obviously, the latter State could not be required to bring the case to court only if it simultaneously took countermeasures: that would be contrary to the Commission's goal of discouraging the adoption of countermeasures. As pointed out by Mr. Kabatsi, it was necessary to seek equality of treatment between the parties.

30. That argued in favour of setting up a general system of dispute settlement in the framework of the draft on

State responsibility. It implied that the draft articles should probably take the form of a convention. He would be perfectly happy to proceed in that manner and would be delighted if a system of universal jurisdiction was introduced in respect of the wrongful acts of States. That would be a big step forward in the rule of law; whether it was realistic would have to be discussed at the fifty-second session of the Commission.

31. Formally associating the adoption of countermeasures, which was a very difficult technical problem to sort out in an actual case, with the right which would be given to wrongdoing States alone to refer the dispute to a court was a system which could not function: one need only take the example of the *M/V "Saiga"* case.[7]

32. Mr. PELLET said that it was difficult to disagree with the Special Rapporteur when he said that he would review the commentary to the draft articles, delete the link between countermeasures and compulsory dispute settlement, restore the balance between the wrongdoing State and the injured State and ensure that the system of countermeasures was strictly incorporated into a legal framework.

33. The main point was that the example of countermeasures must be raised in the draft articles because it was one aspect of the very notion of State responsibility according to the definition given by a former Special Rapporteur on the topic, Mr. Roberto Ago, in his second report,[8] i.e. all the consequences of a breach of the law. In fact, the regime being contemplated should be set out in detail because it was part of the topic, just like, for example, the obligation to pay compensation. That requirement was unique to international law, which did not have a higher order and differed in that way from internal law.

34. As pointed out, countermeasures were a fact of modern international life, although they worked to the advantage of the most powerful countries. The Commission could not bury its head in the sand precisely because of that circumstance, which called for a particularly strict regime. In that connection, he did not understand the position of Mexico, in the comments and observations received from Governments, which thought that it must oppose countermeasures, but refused to provide a legal framework for them. The former Special Rapporteur, Mr. Gaetano Arangio-Ruiz, had taken the same position in his fifth report:[9] countermeasures had to be opposed at all costs. For him the solution had been to introduce complex dispute settlement mechanisms so that States were free to adopt countermeasures, but on the other hand risked finding themselves in court. Mr. Arangio-Ruiz had thought that that should be sufficient, but his reasoning was faulty because a court must have something to rule on, which in the present case was the original wrongful act.

35. The Special Rapporteur was right to want to shift the focus of the topic to the codification of the law and away from the idea of institutions, which had no chance of seeing the light of day, especially since, as indicated by a number of States quoted in paragraph 376 of the second report, that would cause a real upheaval: forcing States to refer their disputes to a court would be tantamount to making international law a matter for the courts—and that would be both absurd and revolutionary. International law was not based on recourse to a judge and the regime of countermeasures would not change that. As pointed out by the Special Rapporteur, there was a danger of arriving at the paradoxical result of encouraging the adoption of countermeasures: a State would adopt countermeasures against another for the sole purpose of forcing it to appear in court.

36. But if the link between countermeasures and the compulsory settlement of disputes was removed, it would then be necessary to be all the more rigorous in delimiting countermeasures and strengthening the doctrinal foundation on which they were based. The idea of consolidating the applicable rules was not so harmless, as could be seen in the fact that the United States, in the comments and observations received from Governments, considered those rules to be unsupported restrictions. He thought precisely the opposite.

37. On that point, the Commission should not confine itself to codifying international law, but should try to develop it progressively within realistic and reasonable limits. Countermeasures were a fact, but one which must be flanked by very strict rules of law. In that connection, of the possible changes that he suggested to the Special Rapporteur, the most desirable related to the replacement in article 49 (Proportionality), as adopted on first reading, of the negative wording "shall not be out of proportion" by the positive formulation "shall be proportional". It also seemed that the Commission should reconsider, and carefully this time, the balance between the obligation to negotiate and the idea of urgent measures: it was not until the very last minute that the Commission had subordinated the adoption of countermeasures to the idea of negotiations and that, in exchange, for the sake of realism, the possibility of urgent measures had been considered because, in some cases, there was not enough time to negotiate and the damage might well be irreparable. Although he recognized that that was a rough-and-ready result, it was necessary to continue in that direction and he trusted that the Special Rapporteur would consider the outline adopted on first reading in greater depth so as to define urgent measures and their limits.

38. On the whole, he agreed with the Special Rapporteur. Of the options which the Special Rapporteur proposed, he preferred option 4 by far, option 3 being the worst. However, he disagreed with the Special Rapporteur on a number of points which were not all questions of detail, but which he would merely draw attention to at the current time.

39. First, on a rather theoretical point, he did not share the Special Rapporteur's view when he said in paragraph 383 that countermeasures were not limited to reciprocal measures in relation to the same or a related obligation, and that enabled a clearer distinction to be drawn between countermeasures and the application of the *exceptio inadimpleti contractus*. He was convinced that the opposite was the case. All that could be said was that reciprocal measures were a particular category of counter-

[7] See 2599th meeting, footnote 12.

[8] See *Yearbook ... 1970*, vol. II, document A/CN.4/233, p. 185, para. 25.

[9] See *Yearbook ... 1993*, vol. II (Part One), p. 1, document A/CN.4/453 and Add.1-3.

measures. On that point, he thought that there was a disagreement on legal thinking between himself and the Special Rapporteur; the fact remained that he did not understand the Special Rapporteur's position on *exceptio inadimpleti contractus*. Secondly, the problem of urgent measures had by no means been resolved by the assertion at the end of paragraph 386 that the injured State must at least have called on the wrongdoing State to comply with the relevant primary rule or to offer a reparation. Lastly, and above all, he thought that it would be impossible for the Commission to settle the problem of countermeasures without dealing with that of crimes because, if there was an area in which the consequences of simple offences were different from the consequences of crimes, it was that of countermeasures. Reactions to an obvious crime, such as genocide, were unlikely to be the same as to the violation of a trade agreement and the problem was whether countermeasures should not be classified as a function of the seriousness of the act. There was a similar problem with regard to the violation of obligations *erga omnes* and norms of *jus cogens*. As long as the Commission was not clear on those problems, it would be impossible and unrealistic to want to adopt a complete system on countermeasures and he would firmly oppose doing so.

40. In conclusion and subject to the inclusion in paragraph 381 of the change suggested by Mr. Tomka, namely, that it was the implementation of Variant C that constituted an internationally wrongful act, he paid tribute to the Special Rapporteur's objectivity in reporting on the case concerning the *Gabčíkovo-Nagymaros Project*.

41. Mr. YAMADA said that the provisions on countermeasures were needed in part two of the draft. Reserving the right to take the floor in the debate at the fifty-second session of the Commission, he simply said that the existence of countermeasures was a fact and that spelling out the limits and procedural conditions applicable to the adoption of countermeasures would contribute to the stability of international relations. However, in his opinion the linkage established in article 58, paragraph 2, as adopted on first reading, between the taking of countermeasures and compulsory arbitration created an imbalance between the wrongdoing State and the injured State and he supported removing the link between the two. But if the Commission decided to retain part three on dispute settlement, the latter should not cover disputes arising out of countermeasures.

42. Accordingly, he endorsed option 4 proposed in paragraph 389 and hoped that the Special Rapporteur would prepare his third report on the basis of that option. As it had been decided in the Commission that countermeasures constituted a circumstance precluding wrongfulness, he supported referring article 30 set out in paragraph 392 to the Drafting Committee.

43. Mr. GAJA said that, by comparison with the text of article 30 adopted on first reading, the text proposed by the Special Rapporteur in paragraph 392 involved only a number of drafting changes. Both texts clearly presupposed that the substantive and procedural conditions to which the lawfulness of countermeasures was subordinated were spelled out in another part of the draft articles. That was made explicit in the proposed text, which referred expressly to draft articles that had not yet been written or numbered. Although he had no objection to the text or the changes proposed, there was little point in referring the text to the Drafting Committee because the question was not so much whether article 30 in square brackets should be replaced by another article 30 in square brackets, but, rather, whether the question of countermeasures could be separated from that of the settlement of disputes. The Special Rapporteur had made a convincing case in criticizing the way in which a linkage had been established between countermeasures and dispute settlement in the draft articles adopted on first reading. Part three seemed to be problematic in a number of respects and it was obvious that it would be necessary to go back to it. Hence, the sole point that the Commission should perhaps settle at the current time, to put the Special Rapporteur's mind at rest, was to say that that linkage was not necessary, but that it was important to consider the general problem of dispute settlement in the area of international responsibility.

44. He shared the view that countermeasures were an essential part of the law of State responsibility, but had doubts about the desirability of regulating them in part two of the draft. Countermeasures were not necessarily to be regarded as one aspect of the "content, forms and degrees of international responsibility", to cite the heading of part two of the draft adopted on first reading. It also emerged from article 47 (Countermeasures by an injured State) adopted on first reading, as well as paragraph 87 of the judgment of ICJ in the case concerning the *Gabčíkovo-Nagymaros Project*, that countermeasures were an instrument which the injured State could employ to obtain cessation of the wrongful act or reparation. Thus, the possibility of taking countermeasures should not be regarded as a consequence of a wrongful act in the same category as reparation or cessation. Rather, they were an instrument which, as pointed out by Mr. Lukashuk, States could use to ensure compliance with an international obligation on the part of another State. In other words, countermeasures were related to the implementation of international responsibility, although they could also incidentally affect compliance with primary obligations if cessation was viewed as only one aspect of compliance with primary obligations. Countermeasures had been given a prominent place in part two of the draft articles adopted on first reading in part because some members of the Commission and some of the Special Rapporteurs had thought that countermeasures were a sort of sanction, i.e. when a wrongful act was committed, on the one hand, there was the possibility of claiming reparation and, on the other, the possibility of inflicting sanctions which, in a society as unorganized as international society, would be imposed individually by States. All those considerations led him to doubt whether countermeasures should be dealt with in part two of the draft; it would be better to deal with them in part two bis, which could include admissibility of claims, countermeasures and collective measures.

45. Mr. HAFNER said that, in order to avoid an endless debate on matters affecting the essence and efficiency of international law, he would focus his statement on the questions raised by the Special Rapporteur, as they related to fundamental issues of international law such as the equality of States and the peaceful settlement of disputes.

46. Taking as his starting point the purpose of countermeasures, which was to induce the wrongdoing State to comply with international law, he entirely shared Mr. Gaja's viewpoint in that respect and therefore supported his proposal that countermeasures should be included in a part two bis as a separate subject. At all events, countermeasures were certainly not a sanction, as had very definitely been confirmed by ICJ in the case concerning the *Gabčíkovo-Nagymaros Project*. Hence there were both substantive and procedural limits to countermeasures. He did not think it advisable to study substantive limits at the current stage and wondered why the Special Rapporteur was tackling them. On the other hand, as far as procedural limitations were concerned, he acknowledged that, despite the best intentions of the Commission, interim measures of protection did not solve the problem because they were not defined and could therefore only be a source of confusion. With regard to the linkage of countermeasures and dispute settlement, he was unable to subscribe to the Special Rapporteur's point of view, as expressed in paragraph 387 of his second report, because, in his opinion, both the State taking countermeasures and the wrongdoing State could always avail themselves of the procedure for the peaceful settlement of disputes. That possibility was not precluded by the draft articles. It would, however, be unacceptable for the taking of countermeasures to be made subject to the exhaustion of dispute settlement procedures, for that would deter States from accepting the compulsory jurisdiction of ICJ, for example, owing to the slowness of the procedure. In his opinion, that was why the Commission had authorized the wrongdoing State to have recourse to the procedure for the peaceful settlement of disputes. Consequently, the real issue in that context was not the right to resort to a procedure for the peaceful settlement of disputes, but the effect of resorting to such a procedure on countermeasures. And in that respect only, there was a loophole or an imbalance in chapter I, section D. On the other hand, if, in pursuance of option 4 proposed by the Special Rapporteur, the Commission avoided the specific linkage between countermeasures and dispute settlement, it should be understood that discussion of that matter was not ruled out.

47. Lastly, the reply to the question whether it was necessary to provide rules on countermeasures in the context of State responsibility might be in the negative, by analogy with the draft articles on self-defence, which merely referred to lawful measures of self-defence, without defining them. There was, however, a basic difference between measures of self-defence and countermeasures in that, on account of their very purpose, countermeasures were closely connected with the issue of State responsibility. It was therefore necessary to include provisions on countermeasures in the draft articles on State responsibility. In conclusion, he thought that option 4 proposed by the Special Rapporteur should be adopted and, despite Mr. Gaja's doubts about article 30, he supported the idea of referring it to the Drafting Committee.

48. Mr. ECONOMIDES pointed out that countermeasures were an archaic institution which reflected the archaic nature of international society in general and international law in particular. Furthermore, it was a rather undemocratic institution which was primarily the prerogative of the great Powers or the strongest States. Nevertheless, since it was impossible to ignore the existence of that institution, it had to be regulated as rigorously and meticulously as possible.

49. The substantive articles already embodied in part two of the draft were a beginning, but they required careful reconsideration so as to clarify them and, possibly, increase the number of limitations.

50. Dispute settlement was essential in the context of countermeasures, for the latter brought into play difficult concepts and raised essential issues which should not be left to the discretion of the most powerful.

51. With regard to the options set forth in paragraph 389 of the second report, he concurred with other members that there was a lack of balance between options 3 and 4. He was personally in favour of option 3, although he recognized that it was necessary to expand and improve the dispute settlement for which it provided in order to establish a procedure which also covered the injured State and would be satisfactory for all parties concerned. He might be able to accept option 4, on condition that in a separate chapter at the end of the draft articles, provision was made for general dispute settlement machinery.

52. Referring to what Mr. Pellet had said about crimes, he was of the opinion that countermeasures might be an appropriate response to delicts, but that collective rather than individual responses were required for crimes in order to achieve international justice and maintain international order. If the Commission's work on codification and, above all, on progressive development were to remain on course, strict limits had to be set for countermeasures and judicial remedies had to be promoted and sought whenever possible. Lastly, article 30 seemed perfectly acceptable and even ready for inclusion in the set of articles which the Drafting Committee had already studied.

53. Mr. SEPÚLVEDA said that some issues were a matter of concern even, though a great effort had obviously been made to identify problems and propose solutions in chapter I, section D.

54. One matter of concern was that the draft articles could have the effect of turning an act which had been recognized as being wrongful and which was not in conformity with one State's obligation towards another, into a lawful measure. That preclusion of wrongfulness appeared to put a seal of approval on a system of self-help and retortion that conflicted with the modern-day legal system, which was not supposed to leave any legal opportunities open for a scenario of reprisals.

55. Similarly, since the purpose of the Charter of the United Nations was to give the Organization a monopoly on the use of force, including the application of measures of constraint of any kind, especially economic sanctions, the spirit of the Charter would be violated if the adoption of unilateral countermeasures were to be permitted.

56. It was also impossible not to be concerned, as the Special Rapporteur had pointed out, by the de facto inequality implied by countermeasures, since, by definition, it was the most powerful States which were really able to adopt such measures.

57. Nevertheless, the new wording of article 30, as proposed by the Special Rapporteur in paragraph 392, defined countermeasures more restrictively and made the preclusion of the wrongfulness of an act subject to more stringent conditions. The replacement of the word "legitimate" by the word "lawful" was therefore to be welcomed.

58. Bearing in mind the need to strengthen the system for dispute settlement, to which Mr. Economides had also drawn attention, he personally preferred option 3 proposed by the Special Rapporteur, including the idea of curbing or eliminating any abuses resulting from the application of countermeasures by establishing a mechanism to prevent or settle disputes between States. The absence of such a mechanism obviously entailed risks because, without it, there were no means of working towards solutions. That was the conclusion reached by the Special Rapporteur, who emphasized, in paragraph 386 that countermeasures envisaged the normalization of relations through the resolution of the underlying dispute. However, that conclusion did not necessarily hold good, for it was quite possible that such normalization might fail to materialize.

59. In conclusion, very strict conditions had to be laid down for the use of countermeasures in truly critical circumstances and, at the same time, provision had to be made for a dispute settlement regime aimed at guarding against the likelihood of their use or, if such critical circumstances arose, at achieving a satisfactory solution to the application of those desperate measures.

60. Mr. AL-KHASAWNEH said that the question of countermeasures was one of the most important ones that the Commission had had before it at the current session. The decision it would adopt would have lasting effects, not only on the shape of the draft articles but also on the efficacy and the very essence of international law in the coming millennium.

61. Despite the fact that countermeasures were capable of innate discrimination against weaker States, they were a fact of life and had to be taken into account and regulated. Unfortunately, the Commission had still not elaborated substantive rules for their effective regulation. True, it had been decided to create a sophisticated regime for the settlement of disputes, but that could not be done at the expense of the development of substantive rules. One of the areas in which there was a need for such rules was proportionality. Proportionality had rightly been described as a false friend in that it gave the impression that there was an objective yardstick against which to measure the actions and counteractions of States. That was not in fact the case, especially since the Commission had abandoned the suggestion made by a former Special Rapporteur, Mr. Willem Riphagen, to distinguish between two types of reactions: on the one hand and in a limited sense, reciprocities, and, on the other, in a more general sense, countermeasures.[10] There was no lack of references to proportionality in writings on countermeasures, of course, and there were precedents going as far back as the eighteenth century. But in those days, international relations had been much more limited and the proportionality of the action and the reaction could be objectively assessed. In the contemporary world, there were so many reactions totally unrelated to the original act that proportionality had become a highly elastic and confusing concept.

62. He would disagree with Mr. Pellet on the fact that a system for regulating the substantive aspects of countermeasures, on the one hand, and a dispute settlement procedure, on the other, were not mutually exclusive, but mutually supportive. The linkage with an effective dispute settlement procedure was essential for the acceptance of countermeasures. The elasticity of the substantive rules was an additional reason for acceptance of such a procedure, on the understanding, of course, that States accepting to be bound by a treaty should, as a matter of good faith, accept that their conduct with regard to that treaty must be open to compulsory third-party dispute settlement. One might disagree on the details of such a system or on how politically feasible it was, but it was indisputable that there had to be a link between the two subjects. Some writers had argued for doing away altogether with proportionality and for increasing the areas in which the taking of countermeasures was absolutely prohibited. That solution, although drastic, was worth exploring. There was room for improvement of the test of proportionality.

63. Interim measures could still be confused with countermeasures and further improvements could be made in that part of the draft.

64. It had been stated that an analogy between internal law and international law might be false. There was no hierarchy of institutions in international law as there was in internal law. International law was not a static system. It was up to the Commission to make it progress towards the establishment of the rule of law at the international level. Acceptance of countermeasures as a fact of life must be tempered by a certain dose of idealism. As Toynbee had written:

> It is a rule—and this rule is inherent in the declines and falls of civilizations—that the demand for codification is greatest at the penultimate stage before some social catastrophe and long after the zenith of the achievements in jurisprudence has past and when the legislators of the day are irretrievably on the run before the forces of destruction.[11]

It was to be hoped that the Commission could prove that that statement was unduly pessimistic and that it would be able to legislate effectively in that area.

65. Mr. MELESCANU said he favoured option 4 proposed by the Special Rapporteur, which was by far the most acceptable. Countermeasures were a fact of international life and could not be passed over in silence. The Commission must not set itself the goal of solving all the questions relating to the permissible use of force in international relations: it should, rather, confine itself to examining countermeasures from the standpoint of State

[10] See 2590th meeting, footnote 6.

[11] A. Toynbee, *A Study of History*, 12 vols. (London, Oxford University Press, 1935-1961).

responsibility or, more precisely, of factors precluding wrongful acts of States.

66. It was not appropriate, however, to link countermeasures with the peaceful settlement of disputes. First, that would complicate the Commission's task, which was to elaborate a set of rules on responsibility. Secondly, if such a hybrid system were created, it might have a deterrent effect and discourage States from becoming parties to the future instrument. Thirdly, such a proposition was of no practical utility. States that did not intend to submit to such a procedure would simply refuse to do so and the matter was accordingly purely theoretical. Like Mr. Pellet, he thought that countermeasures must be very strictly circumscribed in the hopes that a system for the peaceful settlement of disputes would enable States to apply the rules to be formulated by the Commission. The Special Rapporteur should be given guidance on that matter for his future work.

67. Mr. CRAWFORD (Special Rapporteur), summing up the debate, said that even those members—the minority—who had expressed a preference for option 3 had not defended the establishment of a connection between the taking of countermeasures and compulsory dispute settlement. Those who nevertheless favoured close linkage between countermeasures and dispute settlement did so essentially because of the danger of abuse inherent in countermeasures and the need to control it as much as possible.

68. As to the way to proceed, he thought that, first of all, article 30, as proposed in paragraph 392 of his second report, should be referred to the Drafting Committee, which, as Mr. Gaja had proposed, could consider it at the fifty-second session in the context of its discussion of other articles. It would be useful to inform the General Assembly that that draft article had been referred to the Drafting Committee, but that, owing to lack of time, the latter had been unable to discuss it, a situation that now seemed inevitable.

69. At the fifty-second session, the Commission should concentrate on formulating an acceptable version of articles 47 to 50, devoting particular attention to the major problem of collective countermeasures. On that subject, he had been very interested in the argument put forward that countermeasures did not apply in a case of the breach of *erga omnes* obligations and could apply only in the context of bilateral relations between States.

70. He could not, in all conscience, defend the linkage between the taking of countermeasures and dispute settlement, for all the reasons which had been given, and neither did he think that the majority of members would be inclined to do so. At the fifty-second session, the Commission would have to consider the question of the form of the draft articles and that of the dispute settlement mechanism. In that context, he was not suggesting that issues of resort to countermeasures could never be the subject of dispute settlement. Of course they could, and had done so indirectly in the case concerning the *Gabčíkovo-Nagymaros Project*. The existing dispute settlement mechanisms would apply, under their terms of reference, to disputes which had involved resort to countermeasures. To the extent that those mechanisms did apply, it might be appropriate to qualify the capacity of States to resort to countermeasures, directly or indirectly. It seemed to him that the members who supported those mechanisms, Mr. Kabatsi and Mr. Kateka in particular, were in fact arguing for an extended form of dispute settlement which he himself could support if it was realistic.

71. He was extremely interested in Mr. Gaja's proposal to transfer the articles on countermeasures from part one to part two bis. It was clear that the Commission was in the process of planning, or rather replanning, part three. The question whether there would be a separate provision in the form of a separate part or a protocol dealing with dispute settlement depended above all on the question of the form of the draft articles. On another question, the draft articles lacked a part which it had always been intended that it should contain, relating to the implementation of responsibility. Accordingly, he would give very serious consideration to Mr. Gaja's view that countermeasures should be seen as part of the implementation of responsibility rather than as consequences in the field of reparation in the broad sense.

72. The only way forward was to submit, as Mr. Riphagen had done, a complete text of parts two, two bis and three—if there was to be one—in order to provide the Commission with an overview of the issues. At the next session, he would try to do that, perhaps in the form of an annex rather than in the exploratory form which characterized the greater part of his second report.

73. Mr. ROSENSTOCK said that it would be advisable to refer to the Drafting Committee both article 30 as adopted on first reading and the new formulation proposed by the Special Rapporteur in paragraph 392 of his second report. The problem raised by the Special Rapporteur's proposal was that it prejudged the reply to the question of deciding which of the four options should be discussed by the Commission. Article 30 as adopted on first reading worked whichever of the four options was used, whereas the Special Rapporteur's proposal worked with only some of them.

74. Mr. CRAWFORD (Special Rapporteur) said that he saw no objection, as that had been done with many other articles. The appropriate course would be to refer article 30 as adopted on first reading and his proposal as contained in paragraph 392 to the Drafting Committee, for consideration at the next session in the light of the other provisions on countermeasures elicited from the third report and the debate on the issue.

75. The CHAIRMAN said he took it that the Commission wished to refer article 30, as adopted on first reading, together with the new formulation proposed by the Special Rapporteur, to the Drafting Committee, on the understanding that the two texts would be considered by the Drafting Committee at the next session in the light of the debate.

*It was so agreed.*

**International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)[12] (A/CN.4/496, sect. A, A/CN.4/501)[13])**

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

76. Mr. Sreenivasa RAO (Special Rapporteur), introducing his second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (A/CN.4/501), said that the aim of the report was to suggest possible courses of action the Commission could take having adopted the draft articles on first reading and after examining the comments and observations received from Governments, prior to their adoption on second reading. Three options were proposed at the end of the report: (*a*) to proceed with the topic of liability and finalize some recommendations; (*b*) to suspend work on the topic of international liability until the regime of prevention had been finalized on second reading; and (*c*) to terminate the work on international liability. He recommended adopting the second option, namely, to consolidate the work already accomplished and to combine it with proposals made by other bodies in an attempt to finalize a regime in a realm in which many Governments expected the Commission to provide them with guidance. Purely and simply to abandon the draft would amount to a betrayal of the Commission's mandate.

77. The various views on the topic were presented objectively in the second report. Chapter II contained a summary of the views expressed by Governments on the three questions raised in the report of the Commission on the work of its fiftieth session.[14] The question of the kind or form of dispute settlement procedure which might be considered at the next session was not discussed. By contrast, the question of deciding whether the obligation of prevention should always be regarded as an obligation of conduct had been the subject of extensive research, the results of which were described. He had placed particular emphasis on studying the constituent elements of obligations of conduct and of due diligence, as well as on the various possible types of compliance with the obligation of due diligence. In chapter III, section A, the notion of due diligence was discussed in the context of the Commission's work on the topic of State responsibility; in the context of article 7[15] of the draft articles on the law of the non-navigational uses of international watercourses; and in the context of the schematic outline submitted by the Special Rapporteur, Mr. Robert Q. Quentin-Baxter.[16] He also mentioned the commentary to article 4 (Prevention)[17] of the draft articles as recommended by the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law at the forty-eighth session of the Commission, with reference to comments made by Governments on the subject. The notion of due diligence was also discussed in the context of far more extensive spheres, such as the environment. The views of UNEP were also presented.

78. The problems of implementing and encouraging a spirit of compliance with treaties were also examined closely, particularly in chapter III, section B. In that regard, a distinction could be drawn between two categories of State: those which wished to fulfil their obligation of compliance, but did not have the capacity to do so, and those which were capable of complying, but had no intention of doing so. Three strategies of compliance in respect of international environmental agreements were mentioned: the sunshine approach, incentives to comply and sanctions. According to the experts' recommendations, a combination of the sunshine approach and incentives seemed to be the most effective means of obtaining compliance with obligations of due diligence. The work carried out by the Commission until the forty-eighth session and the discussions held in the Sixth Committee of the General Assembly, together with the various opinions of Governments and the views of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law at the forty-ninth session,[18] were discussed in chapter IV, section A. Lastly, the history of the work done in the context of the Antarctic Treaty, the Convention on Biological Diversity and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal was discussed in chapter IV, section B. For each of those instruments, a specific liability regime adapted for implementation of the corresponding obligations was being developed.

79. Mr. KATEKA asked whether the fact that the second report had been submitted meant that it would be discussed at the current session. If the main debate was not due to take place until the next session, he could not see why the report had been submitted.

80. The CHAIRMAN said it had already happened that, even if there remained insufficient time for a thorough discussion, reports had been submitted in order to facilitate preparation by the members of the Commission for the main discussion at the following session. Members would have the possibility of asking additional questions concerning the report at a later meeting.

*The meeting rose at 1.15 p.m.*

[12] 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.

[13] See footnote 2 above.

[14] See *Yearbook ... 1998*, vol. II (Part Two), p. 17, paras. 31-34.

[15] See *Yearbook ... 1994*, vol. II (Part Two), p. 102.

[16] The text of the schematic outline is reproduced in *Yearbook ... 1982*, vol. II (Part Two), p. 83, para. 109. The changes made to the outline by the Special Rapporteur are indicated in *Yearbook ... 1983*, vol. II (Part Two), pp. 84-85, para. 294.

[17] See *Yearbook ... 1996*, vol. II (Part Two), document A/51/10, annex I, pp. 110-111.

[18] See *Yearbook ... 1997*, vol. II (Part Two), p. 59, paras. 165 and 167.

# 2601st MEETING

*Tuesday, 13 July 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Yamada.

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**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.4/496, sect. A, A/CN.4/501[2])**

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. KATEKA said that the duty of prevention was essentially a duty of due diligence and the standard of due diligence could vary from State to State and region to region. Accordingly, the regime of protection had to bear in mind the interests and needs of developing countries. That opinion had been vindicated by advances in international law during the 1990s, especially the United Nations Framework Convention on Climate Change and the Rio Declaration.[3] Eminent scholars also recognized that the due diligence standard had to be viewed in the context of a State's ability.

2. He did not believe the Commission needed to seek a special mandate from the General Assembly in order to prepare a separate protocol on compliance. Compliance was relevant to protection, since compliance regimes dealt with the enforcement of obligations, above all in the environmental sphere, before significant damage occurred and thus helped to prevent harm.

3. The Special Rapporteur and the legal writer, Philippe Sands, postulated that States were unwilling to accept any concept of strict State liability or the elaboration of rules on that subject.[4] For his own part, he supported the Special Rapporteur's choice of option (*b*) set out in chapter V of the second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (A/CN.4/501) because he considered, like Roberto Ago, that prevention and punishment were simply two aspects of the same obligation and he concurred with the Special Rapporteur, Mr. Robert Q. Quentin-Baxter, that prevention and reparation formed a continuum and ought to be treated as a compound obligation.[5] On the other hand, he disagreed with the views of Brownlie[6] and Jiménez de Aréchaga.[7] Rosalyn Higgins had been right to express disappointment about the separation of international liability from State responsibility and to ask why State responsibility should not attach to results from both lawful and unlawful acts.[8] Nevertheless, that approach would raise the thorny issue of primary and secondary rules.

4. He suggested that the Special Rapporteur should refer not only to the draft protocol to the Basel Convention, entitled "Protocol on Liability and Compensation for Damage resulting from the Transboundary Movements of Hazardous Wastes and Their Disposal",[9] but should also cite the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako Convention), since the latter was of great importance to Africa, which was increasingly being used as a receptacle for all kinds of dangerous materials, including nuclear waste. The shifting of burdens and responsibility implicit in the "joint implementation" system instituted in connection with the countries listed in annex I to the United Nations Framework Convention on Climate Change was a very dangerous trend.

5. Mr. ADDO said that he was in favour of option (*a*) set out in chapter V of the second report. Citing the *Trail Smelter* case and the arbitration tribunal's findings, he drew attention to the fact that States' sovereignty over their own territory had long been limited by the obligation not to interfere with the rights of other States. The freedom of States to act was necessarily constrained by the duty to have regard to the rights of other States and to the environment in general. The principle of good neighbourliness also played a role in that context, because it was a feature of international law. Another pertinent principle established in the *Corfu Channel* case, namely that a State had an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States, was embodied in a number of international treaties and indeed extended to the protection of areas of the global commons, as well as areas outside national jurisdiction such as the high seas and the atmosphere.

[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 ... 1999*, vol. II (Part One).

[3] See 2587th meeting, footnote 13.

[4] P. Sands, *Principles of International Environmental Law* (Manchester, Manchester University Press, 1995).

[5] See *Yearbook ... 1983*, vol. II (Part One), pp. 212-213, document A/CN.4/373, para. 40.

[6] I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), p. 50.

[7] E. Jiménez de Aréchaga, "International law in the past third of a century", *Collected Courses of The Hague Academy of International Law, 1978-I* (Alphen aan den Rijn, Sijthoff and Noordhoff, 1978), vol. 159, p. 273.

[8] R. Higgins, *Problems and Process—International Law and How We Use It* (Oxford, Clarendon Press, 1994), pp. 163-164.

[9] UNEP/CHW.1/WG.1/9/2, annex 1.

6. A number of States were of the opinion that principle 21 of the Stockholm Declaration,[10] which reaffirmed the duty incumbent on States to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or areas beyond the limits of national jurisdiction, was declaratory of existing customary international law. The second duty of States was to cooperate in the prevention and mitigation of transboundary environmental harm. The duty to cooperate in the use of shared natural resources had been confirmed in the *Lac Lanoux* case and the principle had been reiterated in the Convention on the Law of the Non-Navigational Uses of International Watercourses. He therefore deduced that liability or responsibility would be incurred by States if they breached or did not perform a duty imposed on them by law. The distinction that the Commission had sought to make between State responsibility for wrongful conduct and international liability for non-wrongful conduct was rather confusing and he agreed with Barbara Kwiatkowska that what was needed was a globalization of environmental obligations.

7. Similarly, it was undesirable to refer in the second report to the civil liability of the operator and he disputed the idea that the State's liability was residual. Very serious, long-term damage had been done to health and the environment by the industrialized nations' habit of dumping their toxic and hazardous waste in Third World countries. Such practices, for example the events which took place in Kokoin, Nigeria, in 1987 and 1988, had been a factor prompting the adoption of the Bamako Convention in 1991. Hence there was a need for draft articles or rules on liability and, contrary to the Special Rapporteur's statement in the last paragraph of chapter IV, section B, of the report, there were plenty of pollution liability treaties from which he could deduce principles providing a basis for draft rules. In that connection, several conventions, starting with the Convention on Third Party Liability in the Field of Nuclear Energy and including the International Convention on Civil Liability for Oil Pollution Damage, would support a liability approach.

8. Moreover, since the *Nuclear Tests* cases, State practice had been considerably refined and expanded through the conclusion of bilateral and multilateral treaties on environmental protection. Furthermore, the draft articles on State responsibility had contributed to the development of thinking on States' obligations towards other States in respect of the environment. The cases he had already mentioned likewise testified to the existence of customary international law on the subject. It was unfortunate that ICJ had not seized the opportunity to develop the law in that respect, although a former President of the Court, Sir Robert Jennings, believed that it was a principal task of the Court to decide whether the provisions of multilateral treaties had turned into rules of general customary international law.

9. Environmental matters, which were frequently the central issue in cases concerning liability, were of global importance and general principles of international law therefore applied to them. Indeed, the issues raised in environmental law were clearly part of international law, in that they related to topics like the law of treaties and the nature of customary international law. In that respect, the Commission had not only to codify existing law but to progressively develop the law to fill lacunae. The Commission therefore had shown that it was determined to look beyond traditional international law.

10. With reference to the issues raised in chapter V of the second report, the activities that should be covered were air and atmospheric pollution, ozone pollution, climate change, pollution from nuclear activities, pollution of the marine environment, oil pollution, dumping of waste at sea, transboundary movements of hazardous waste, protection of biological diversity, protection of forests and desertification. The definition of damage could be distilled from numerous instruments, treaties or declarations.

11. As for the identification of the person against whom claims should be brought, it was axiomatic that it should be the State in whose jurisdiction the injurious activity had been carried out. That principle had been established in the *Trail Smelter* case and since it had never been questioned, it had become a customary rule of international law. The State had to be responsible for both its own activities and those of individuals or private or public corporations under its jurisdiction. It had to enact the requisite legislation to regulate the activities of companies, enforce laws against persons economically active in its territory and take responsibility if it failed to prevent or terminate illegal activities. He therefore disagreed with the position of the United States of America stated in the comments and observations received from Governments,[11] as quoted in chapter IV, section A, of the report and he cited the section of American law on State obligations with respect to the environment of other States and the common environment in support of his thesis. A State could naturally bring a claim, as it had done in the *Trail Smelter* case. He was convinced that it would be a retrograde step to abandon the topic of liability on the threshold of the new millennium.

12. Mr. Sreenivasa RAO (Special Rapporteur) reminded members that he was asking for guidance with regard to the choice of options listed in chapter V of the report.

13. Mr. ECONOMIDES said that the debate should focus on procedure, not substance. In his opinion, the draft articles on prevention of transboundary damage from hazardous activities should be adopted on second reading before the Commission went on to examine liability for injurious consequences arising out of acts not prohibited by international law. He therefore supported option (*b*) proposed by the Special Rapporteur in chapter V of the report, especially as the concept of due diligence was a very fluid notion which was constantly evolving and, moreover, depended on the individual circumstances of each case. He agreed completely with the views of the first Special Rapporteur on the topic of State responsibility, Mr. García Amador, on due diligence,[12] as

[10] See 2569th meeting, footnote 7.

[11] See *Yearbook ... 1997*, vol. II (Part One), document A/CN.4/481 and Add.1, para. 24; and *Official Records of the General Assembly, Fifty-first Session, Sixth Committee*, 39th meeting (A/C.6/51/SR.39), and corrigendum, paras. 31-33.

[12] *Yearbook ... 1961*, vol. II, p. 47, document A/CN.4/134 and Add.1, article 7.

quoted in chapter III, section A, and did not believe the situation had changed in the meanwhile. Hence the topic of international liability for injurious consequences arising out of acts not prohibited by international law should be set aside for the time being, along with the question of finalizing the form of the draft articles on prevention of transboundary damage from hazardous activities.

14. In contrast, the Commission must, in line with the proposal made by the Government of Switzerland in the Sixth Committee,[13] set itself the objective of completing a procedure on the settlement of disputes at its fifty-second session. The draft article that already existed dealt with the subject in a wholly incomplete manner.

15. Mr. HAFNER said that, as the discussion on the Special Rapporteur's second report would not be completed before the next session, he would reserve his position on its merits.

16. It was surprising that the report dealt so extensively with due diligence. Having himself referred to the topic earlier in the session in the context of State responsibility, he was convinced that it should be tied in with the topic of State responsibility. Personally, he preferred option (*a*) proposed by the Special Rapporteur in chapter V of the report, which was not very far removed from option (*b*). The Commission could separate liability and prevention only insofar as it had enough time and opportunity to do so.

17. Mr. AL-BAHARNA said that the Special Rapporteur's second report provided an excellent analysis that concentrated on the essential issues relating to the topic. One particular merit was that the report clarified with great skill many of the complex matters involved in the topic of prevention at the present stage, especially those relating to the interpretation and implementation of the obligation of due diligence as a principle known in international law. Thus, in chapter III, section A, the Special Rapporteur had established a relationship between the duty of prevention and the duty of due diligence, stating that any question concerning implementation or enforcement would necessarily have to deal with the content of the obligation and hence the degree of diligence which should be observed by States. However, as the report went on to note, the notion of due diligence had given rise to different interpretations as regards the standard of care involved.

18. Those statements showed that even the separation of the issue of prevention from that of liability did not seem to help solve the complexities of the topic. To speak of prevention alone still involved the problem of the interpretation of the obligation of due diligence and of its practical implementation, as shown by the summary of the discussions in the Sixth Committee contained in chapter II of the report.

19. The objective of the 17 draft articles adopted by the Commission on first reading at its fiftieth session was to reflect procedures and content in the context of the duty of prevention. The Commission's focusing on the issue of prevention had followed on from its earlier decision to separate prevention from liability, a decision that had attracted general support in the Sixth Committee, which had largely endorsed a proposal to postpone consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law until the Commission had completed its discussion on the topic of prevention of transboundary damage from hazardous activities. However, a number of delegations had emphasized the need for the work on liability to continue in parallel, maintaining that the principles concerning prevention could not be determined in isolation from those concerning liability.

20. In that connection, he considered that the topic of prevention of transboundary damage from hazardous activities would be incomplete without the development of certain rules governing liability arising from the consequences of harm or non-compliance in general. Consequently, it was essential for the Commission to strive, in its future work on the topic, to find a generally accepted definition of the scope of a liability regime for activities not prohibited by international law. In that regard, the elaboration of a number of international instruments and protocols relating to the international liability regime should be considered an encouraging and useful development. However, it could not yet be said that there existed a sufficiently developed set of norms or binding rules relating to the liability regime. It was the opinion expressed by the Special Rapporteur in his review of State practice, for he said at the beginning of chapter IV, section B, of the second report that most of the conventions on transboundary damage or damage to the global environment had only indicated the need for development of suitable protocols on liability and most of those protocols had been under negotiation for a considerable amount of time without any resolution of or consensus on the basic issues involved. Moreover, the general trend appeared to be against the evolution or formulation of the concept of State liability, and even more so, strict liability, even though it was regarded as more suitable to problems of transboundary pollution.

21. Those conclusions should not lead the Commission to reject the topic of international liability for injurious consequences arising out of acts not prohibited by international law and thus to suspend any attempt to deal with it at a more appropriate time in the future. Personally, he regarded the topic as an essential complement to consideration of the regime of protection and therefore endorsed the Special Rapporteur's advice, in chapter V of the second report, on the inappropriateness of rejecting it, namely, that rejection would create more confusion in respect of the applicable law in case of actual damage or harm occurring across international borders or at the global level because of activities pursued or permitted by States within their territory and it would not do justice to the strong sentiment among a large group of States in favour of providing a balance between the interests of the State of origin of hazardous activities and the States likely to be affected.

22. Consequently, he favoured the trend towards preserving the topic of international liability for injurious consequences arising out of acts not prohibited by international law for future treatment and evaluation in the

[13] See *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 13th meeting (A/C.6/53/SR.13), and corrigendum, para. 67.

light of further development of norms and rules formulated in future protocols or conventions relating to the topic. The Special Rapporteur's review of the status of ongoing negotiations on international liability clearly showed that the international community was taking encouraging and positive steps towards the formulation of such norms and rules. Lastly, he preferred option (*b*) and supported the development of a suitable procedure for the settlement of disputes in relation to the regime of prevention.

23. Mr. HE said that the provisional adoption of the 17 draft articles and commentaries by the Commission on first reading at its fiftieth session had been an important achievement. It should be noted that the phraseology used in the draft was "risk of causing transboundary harm", as opposed to "causing transboundary damage" which had been used in principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration. The emphasis was thus placed on preventing or minimizing the risk of causing harm as the first and essential step towards preventing harm itself. It followed that the draft articles should recognize a general obligation for the State of origin to prevent or minimize the risk of causing transboundary harm, which implied that the State must ensure that all adequate precautions were taken or if harm had occurred because of the nature of an activity, that all necessary steps should be taken to minimize the effects.

24. As defined in article 2 (Use of terms), the words "risk of causing transboundary harm" seemed to apply to the low probability of causing disastrous harm and the high probability of causing other significant harm. Thus, disastrous harm seemed to be excluded from the scope of the draft articles.

25. In international practice, States never considered themselves under the obligation of requiring previous consent from neighbouring States or other presumably affected States before permitting a hazardous activity to develop in their territories or other areas under their exclusive jurisdiction and control. There seemed to be no customary rule in that respect. Furthermore, the Experts Group on Environmental Law of the World Commission on Environment and Development (Brundtland Commission) had observed that, if the benefits to the country concerned and human society as a whole created by the hazardous activities outweighed or far outweighed the benefits of eliminating the risk by ending the activity, the activity could be permitted and its unlawfulness lifted.[14]

26. On the other hand, international practice had also provided for certain procedures for the participation of presumably affected States, particularly when the seriousness of the risk had become manifest. Such procedures allowed legal regimes to emerge between the States concerned regarding the activities in question. In some instances, such as the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, an activity had even been prohibited. Thus, the prohibition of a dangerous activity on the basis of a relevant procedure could not be ruled out. To attempt to do so in the present instance would require a sector-by-sector approach.

27. With regard to the concept of due diligence, a key element in the draft articles on prevention of transboundary damage from hazardous activities, chapter III of the second report provided a comprehensive and admirable survey of various viewpoints helpful to the understanding and implementation of the articles. On that crucial issue, it was recognized that the prevention and minimization obligation was one of due diligence, which required States to take all necessary measures to prevent or minimize the risk of significant harm. It was generally accepted that the extent of due diligence should be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. The standard of care could change from time to time in response to scientific and technological advances. Ultra-hazardous activities would require a much higher standard of care. Thus, due diligence required a State to keep abreast of technological and scientific changes. Its discharge of the obligations of due diligence would depend upon the State's capacity and stage of economic growth. Accordingly, the degree of obligation could vary from State to State and over time. The economic level of States was one of the factors to be taken into account in determining the standard of obligation of due diligence in respect of a particular State.

28. Such a view had been articulated by many developing countries in the Sixth Committee. They had further pointed out that the concept of prevention as proposed by the Commission did not place it sufficiently within the broad realm of sustainable development to allow equal and due weight to be given to the consideration of environment and development respectively. The differences between levels of economic and technological development and the shortage of financial resources in the developing countries were cited in support of that position. The relevant part of the commentary to the draft should be expanded to highlight the fact that none of the articles addressed the interests and needs of the developing countries, which both represented the great majority of the world's peoples and faced the greatest burden in attempting to make their societies and economies more viable and environmentally sound.

29. Lastly, with regard to the future course of action on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he favoured option (*b*) proposed by the Special Rapporteur in chapter V of the report.

30. Mr. LUKASHUK commended the Special Rapporteur on a report which was both realistic and juridically sound. Each proposed decision was based on a wide range of material drawn from practice and on analysis of international legal documents. A major feature of the report was its balancing and counterpoising of the various conflicting interests. The approach was one which gave good reason to suppose that the report would attract the support of States. The significance of the report extended far beyond the topic itself—its emphasis on the analysis of practice and the number of progressive features it contained afforded the potential to produce a significant impact on environmental law.

[14] See *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London/Dordrecht/Boston, Graham & Trotman/Martinus Nijhoff, 1987), p. 79.

31. The first of those progressive features was the Special Rapporteur's treatment of the important and difficult concept of due diligence. Other important matters addressed were prevention and the problem of sanctions. The latter was currently a source of great concern worldwide and was of particular significance in the context of environmental law.

32. He agreed with the Special Rapporteur that even in a case of non-observance of obligations, compulsory measures were ineffective and ultimately incompatible with the regime of consent used by States to resolve major problems in society and also shared his belief that sanctions should only be used as extreme measures.

33. Similarly, he concurred with the contention that, in the crucial area of environmental protection, it was important to use "soft" remedial measures as widely as possible. That approach was the correct one, supported by all the practice, and the draft articles had been drawn up on that basis. "Soft" measures presupposed "soft" liability, from which it followed that both liability and countermeasures in many areas of international law could have their own essentially different character and, together with the relevant norms, form the basis of special legal regimes. That was consistent with the focus of Mr. Simma's work on special legal regimes.

34. The approach was also relevant to the procedure on peaceful settlement of disputes in the context of environmental law. The report demonstrated that disputes must be resolved by amicable means, thereby avoiding an abuse of court proceedings.

35. He shared the Special Rapporteur's opinion that matters relating to compliance with environmental protection norms should be considered as outside the scope of the draft articles—the proper view in such a specialized area of law. He also supported the Special Rapporteur's approach to the topic of international liability for injurious consequences arising out of acts not prohibited by international law. However, the fact that the Commission had decided not to tackle that topic at the present stage did not mean that it was to be dispensed with entirely. Clearly, draft articles on liability must be prepared at the next stage.

36. He supported option (*b*) proposed by the Special Rapporteur in chapter V of the report, fully endorsed the report's main conclusions and was convinced that the draft articles would enlist the full support of States.

37. Mr. PELLET said he welcomed the second report, which bore the hallmark of the Special Rapporteur's customary diplomacy. The options outlined in chapter V of the report were opportune and appropriate, for the time had come to take a final position on the fate of a draft on a topic the Commission had been considering for 25 years.

38. His own very clear preference was for option (*c*), on the understanding that if the Commission continued to finesse he would accept option (*b*), in the hope that that would be the end of the matter. He found it hard to see why the Special Rapporteur recommended option (*b*), for at the beginning of chapter V of the report, he made it plain that the situation concerning international liability had not changed in the 25 years the Commission had spent studying the topic, despite the abundance of information it had received and the number of reports prepared by previous Special Rapporteurs. The Special Rapporteur further stated that the majority of States were still against accepting any concept of strict State liability and hence there was no point in continuing the topic for the time being. But what did that mean? Would the situation change at the next session, when attempts at codification had shown so little progress over the past quarter of a century? Why would the Commission then be able to do what it had been unable to do in the past? The same causes would produce the same effects.

39. A number of members, particularly Mr. Addo and Mr. Kateka, had spoken of the large body of supporting precedents available to the Commission. That was true, but despite that material having been examined thoroughly by previous Special Rapporteurs, the Commission had proved itself totally incapable of deriving any firm principles from it. One example was the Commission's attempt to produce acceptable wording for the former principle V by stating in effect that, if harm had occurred, someone was responsible, but without identifying that someone. In fact, there could never have been any question of the Commission adopting a position on the matter, owing to the plethora of attendant political, economic, financial and human problems.

40. The logical conclusion to be drawn from the views expressed by the Special Rapporteur in chapter V of the report was that the Commission was in no better position to adopt principles than it ever had been. The extreme diversity of the same ad hoc texts mentioned by some members had made it impossible, over the years, to isolate a single principle on liability; the texts also testified to States' conviction that no clear general principle on strict State liability existed in international law. On rare occasions, a principle of strict liability emerged, such as the polluter pays principle, but it would hardly be appropriate for the Commission to unite over a single principle simply because it appealed to certain members or seemed progressive or fashionable.

41. The question posed by the Special Rapporteur in his report was whether it was right to codify the topic of international liability for injurious consequences arising out of acts not prohibited by international law. However, a number of members had addressed a different matter, namely whether it was right to codify environmental law. In his opinion, that was an altogether different subject which, if the Commission wished, it should include on the agenda.

42. He firmly believed that such a topic fell outside the Commission's scope. Not only was it in too fluid and unsettled a state, but discussion of it called for expertise that the Commission did not possess. He had always felt that law-making was far too serious a subject for jurists, and the present example was a case in point. Matters of life and death, and even the future of the planet, were at stake. Enormous economic interests were involved. The technical aspects were elusive. In such circumstances, it was beyond the ability of 34 experts, however distinguished, to embark on such a draft voluntarily, when they had not been asked to do so. To take a similar example, the codification of the law of the sea had involved thousands

of experts in all fields. How could the Commission possibly hope to act on its own on a topic that, in many respects, was even more wide-ranging and technical?

43. For once, the Commission would do well to demonstrate modesty and humility. In the codification and progressive development of international law, the Commission was in its element and had no need for humility. But members who had spoken so far had pressed for legislation, not codification, and that was not within the Commission's purview. It was States that had the role of legislators at the international level, and they should be placed before their responsibilities, while the Commission should admit that it was composed neither of biologists nor of environmental experts.

44. Option (*c*) proposed by the Special Rapporteur in chapter V of the report was, accordingly, the only reasonable solution, together with completion of the work on the draft articles on prevention of transboundary damage from hazardous activities, which were on the whole satisfactory and balanced. He did not share Mr. Economides' enthusiasm for drafting an addendum on dispute settlement.

45. Mr. RODRÍGUEZ CEDEÑO said he did not think the Commission could categorically reject consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, as the Special Rapporteur pointed out in chapter V of his report. Option (*b*) appeared to be the best course of action and he endorsed the description in that chapter of how to approach the topic of international liability in the future.

46. Mr. ROSENSTOCK said he found Mr. Pellet's statement to be convincing, though somewhat extreme. The best way to deal with the issue would be to adopt option (*b*), but not to make suspension of the work conditional on finalization of the regime of prevention of transboundary damage from hazardous activities on second reading. That would mean the Commission would not automatically revert to the topic of international liability for injurious consequences arising out of acts not prohibited by international law once the work on prevention was completed, but it would not close the door to that possibility either. That might not satisfy Mr. Addo and other members, but it did represent a reasonable compromise.

47. Mr. HAFNER, responding to Mr. Pellet, suggested that it was already possible to derive certain stabilized patterns and principles from the broad range of international conventions on civil liability. The contention that the Commission was not composed of specialists was refuted by the fact that it had worked in the fields of warfare and sociology when dealing with the right to self-defence and human rights. Finally, progressive development of the law came very close to legislation.

48. Mr. SIMMA said he could accept option (*b*), on the understanding that the reference to suspending work on international liability for injurious consequences arising out of acts not prohibited by international law "at least" until the regime of prevention of transboundary damage from hazardous activities was finalized meant suspending work indefinitely.

49. Mr. LUKASHUK said he agreed with the general thrust of Mr. Pellet's comments but not with the conclusion he had arrived at. Environmental law was so complex a subject that it required highly specialized knowledge. On the other hand, the course of action outlined by the Special Rapporteur was so cautious and carefully balanced that it did not prejudge the solution of the basic problems in the field of the environment. He therefore thought the provisions on prevention of transboundary damage from hazardous activities could be adopted.

50. Mr. KATEKA, responding to Mr. Pellet, said he did not agree that members of the Commission lacked the requisite expertise to discuss international liability in all its aspects: Mr. Pellet's remarks had focused on one aspect alone. In any event, article 16, subparagraph (*e*), of the statute of the Commission authorized it to consult with scientific institutions and individual experts. He was concerned to see that some members envisaged option (*b*) as a tactical manoeuvre to kill the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The manoeuvre could become a boomerang, however, and he himself hoped that the Special Rapporteur would not let the topic die.

51. Mr. CRAWFORD said he did not agree that the Commission was incapable of dealing with new topics. It was also untrue that it could not be progressive, as demonstrated by its efforts for the establishment of an international criminal court. Whether members liked it to be progressive was another matter, however. International lawyers had to grapple with technical issues nowadays. In regard to the high seas, fisheries or global warming, for example, legal issues were involved and a body of information was there for analysis.

52. Despite the best efforts of the Working Group at the forty-eighth session of the Commission, there had been such a lack of clarity in the formulation of the topic of international liability for injurious consequences arising out of acts not prohibited by international law that it had dwindled to prevention of transboundary damage from hazardous activities alone, which was unfortunate and cast a bad light on the Commission. A well-reasoned draft dealing with prevention could sufficiently respond to the mandate given to the Commission by the General Assembly and meet a genuine need. Anything that did not discharge that mandate would be a confession of failure.

53. He agreed with Mr. Rosenstock, for very different reasons than did Mr. Pellet, that the Commission should try to finish the topic of prevention of transboundary damage from hazardous activities with a proper understanding of what was involved: that it was laying down rules of responsibility and that if States, acting in good faith and within the parameters of due diligence obligations, did not prevent pollution, then they could be held responsible therefor, with all the consequences that ensued. He could not accept Mr. Simma's devious solution of killing the topic of international liability for injurious consequences arising out of acts not prohibited by international law by adopting option (*b*).

54. Mr. BAENA SOARES thanked the Special Rapporteur for his work and said he favoured option (*b*), not with the murderous intent of Mr. Simma, but with a view to the

survival of the topic of international liability for injurious consequences arising out of acts not prohibited by international law. He did not agree with the idea of prejudging the outcome of consideration of a topic and agreed with Mr. Crawford that first a clear conception was required. Foretelling a death was all very well for novelists, like Mr. García Márquez, but it was not a suitable activity for the Commission.

55. Mr. SEPÚLVEDA congratulated the Special Rapporteur on his second report and said that his preference was for option (*b*), but that did not mean he thought the Commission should discontinue its consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law. It had an obligation to complete its work on the sub-topic of prevention of transboundary damage from hazardous activities, which did not absolve it of its obligation to deal with international liability.

56. Mr. ECONOMIDES said he favoured option (*b*), but not with a view to burying the topic of international liability for injurious consequences arising out of acts not prohibited by international law. He fully agreed with the comments made by Mr. Baena Soares and Mr. Sepúlveda. To take up the question of international liability after the regime of prevention of transboundary damage from hazardous activities had been finalized would make the Commission's work more orderly and effective.

57. Mr. MELESCANU said he endorsed most of the ideas put forward by Mr. Pellet but thought the wisest solution would be to adopt option (*b*). It should not, however, be viewed from the standpoint of the life or death of the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Rather, it should be regarded as an opportunity for the Commission to reach some conclusions on the issue of prevention.

58. In cases of transboundary pollution, the first victims were civilians, and the main damage was material, so compensation for such damages had to be addressed. Liability was the equivalent in international law of strict or risk liability in domestic law. To transpose to international law the liability arrangements applied domestically would require solidarity, which was much harder to mobilize internationally than at the domestic level. Compensation funds would have to be set up, as they had been shown in most treaty systems to be the most effective solution. Unlike State responsibility, which dealt with moral damage and diplomatic apologies, liability dealt with reparation of harm done to people or their property. If no system for solidarity such as a compensation fund was created, the noble principle of the obligation of prevention would remain a dead letter. To take the example of Chernobyl, could Ukraine really be expected to pay compensation for damage done throughout Europe and even in other regions? To envisage a system of prevention unaccompanied by any provision for compensation through solidarity was unrealistic.

59. Mr. KABATSI said he had originally supported option (*a*) for the reasons outlined by Mr. Addo and Mr. Kateka but had come to the conclusion that, in practical terms, option (*b*) was more feasible. Unlike Mr. Simma, he did not hope that the topic of international liability for injurious consequences arising out of acts not prohibited by international law would eventually die, however, and he could not go along with the adoption of option (*c*).

60. Mr. YAMADA recalled that, at its forty-fourth session, in 1992, the Commission had decided to consider the topic in stages.[15] At its forty-ninth session, in 1997, it had defined the sub-topic of prevention of transboundary damage for hazardous activities.[16] It had been able to complete the first reading of the draft articles on prevention in only one year, which amply justified its decision to deal with the topic stage by stage. He therefore fully endorsed option (*b*). Completion of the second reading of the draft articles—possibly by the fifty-second session—by no means precluded the possibility of dealing with other aspects of the wider topic of international liability for injurious consequences arising out of acts not prohibited by international law afterwards. The decision could be taken once the regime of prevention was finalized.

61. Mr. KUSUMA-ATMADJA said he favoured option *(b)* but had no wish to kill the topic of international liability for injurious consequences arising out of acts not prohibited by international law, which should be given further consideration. He agreed with Mr. Crawford that the Commission should still endeavour to engage in progressive development of international law. In the South-East Asian region, the soft law approach was often used and problems were frequently solved bilaterally and pragmatically.

62. Mr. Sreenivasa RAO (Special Rapporteur) thanked the members of the Commission for their comments and noted that there were 16 in favour of option (*a*) or (*b*) and only one in favour of option (*c*).

63. The CHAIRMAN noted that an overwhelming majority of members supported option (*b*), though with differing expectations. He would therefore take it that, if there was no objection, the Commission wished to adopt that option, namely: to suspend its work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, at least for the time being, until the regime of prevention of transboundary damage from hazardous activities is finalized on second reading. The Commission should further await developments in the negotiation of some of the protocols on liability.

64. Mr. CRAWFORD suggested that the last sentence should be deleted as it might put the Commission in the position of waiting for a lengthy period.

65. Mr. ROSENSTOCK proposed that the phrase "until the regime of prevention of transboundary damage from hazardous activities is finalized on second reading" should likewise be deleted.

66. Mr. HAFNER disagreed with the proposal because the phrase corresponded to the Commission's mandate from the General Assembly.

[15] See *Yearbook ... 1992*, vol. II (Part Two), p. 51, document A/47/10, para. 344.

[16] See *Yearbook ... 1997*, vol. II (Part Two), p. 59, para. 168 (*a*).

67. Mr. GOCO said he agreed with Mr. Hafner: the Commission had to respond to the General Assembly's mandate, and it would be doing so in stages. The work on prevention would come first, but the Commission was committed to dealing with liability later.

68. The CHAIRMAN, noting that there was little support for the proposal to delete the last phrase of the first sentence, said that, if he heard no objection, he would take it that the Commission wished to adopt option (*b*) as amended by Mr. Crawford.

*It was so agreed.*

## Jurisdictional immunities of States and their property (A/CN.4/L.576)

[Agenda item 9]

REPORT OF THE WORKING GROUP

69. The CHAIRMAN invited the Chairman of the Working Group on jurisdictional immunities of States and their property[17] to introduce the report of the Working Group (A/CN.4/L.576).

70. Mr. HAFNER (Chairman of the Working Group), said that draft articles on jurisdictional immunities of States and their property[18] had been submitted to the General Assembly at the forty-third session of the Commission, in 1991.[19] Consultations had then been held in the Sixth Committee of the General Assembly at its forty-seventh, forty-eighth and forty-ninth sessions, under the chairmanship of Mr. Carlos Calero Rodrigues, a former member of the Commission, but had not produced results. The Assembly had set the matter aside until its fifty-third session and ultimately decided to establish at its fifty-fourth session an open-ended working group of the Sixth Committee to consider outstanding substantive issues related to the draft articles, taking into account recent developments in State practice and legislation and any other factors related to the issue since the adoption of the draft articles, as well as the comments submitted by States, and to consider whether there were any issues identified by the working group upon which it would be useful to seek further comments and recommendations of the Commission.[20]

71. In addition to the draft articles adopted by the Commission at its forty-third session, the Working Group had had before it a document containing the conclusions of the Chairman of the informal consultations held pursuant to General Assembly decision 48/413[21] in the Sixth Committee of the Assembly at its forty-ninth session; comments submitted by Governments;[22] the reports of the two working groups established by the Sixth Committee of the General Assembly at its forty-seventh and forty-eighth sessions;[23] a valuable informal document prepared by the Codification Division containing a summary of cases on jurisdictional immunities of States and their property between 1991 and 1999 as well as a number of conclusions regarding those cases; an informal background paper and a number of helpful memoranda prepared by the Rapporteur of the Working Group, Mr. Chusei Yamada, on various related issues; the text of the European Convention on State Immunity; the resolution on "Contemporary problems concerning the immunity of States in relation to questions of jurisdiction and enforcement" adopted by the Institute of International Law at its session held at Basel, Switzerland, in 1991;[24] and the final report of the International Committee on State Immunity of ILA.[25]

72. The Working Group had held ten meetings and focused on the five main areas identified in the conclusions of the Chairman of the informal consultations, namely: concept of a State for purposes of immunity; criteria for determining the commercial character of a contract or transaction; concept of a State enterprise or other entity in relation to commercial transactions; contracts of employment; and measures of constraint against State property.

73. Two small changes needed in the report of the Working Group had no effect on substance: in paragraph 60, the words "i.e. deletion of paragraph 2" should be inserted after "alternative (*f*)"; and the words "about the public service of the forum State", at the end of paragraph 102, should be replaced by "of the employing State". The annex to the report contained a short background paper on a further possible issue, namely, the question of the existence or non-existence of jurisdictional immunity in actions arising, inter alia, out of violations of human rights norms having the character of *jus cogens*. Rather than take up that question directly, the Working Group had preferred to bring it to the attention of the Sixth Committee, which could then decide on how to deal with it.

74. As far as the concept of the State for the purposes of immunity was concerned, which had been discussed in the context of article 2 (Use of terms), the Working Group had deemed it desirable to bring the relevant parts of that article into line with the draft on State responsibility. The expression "sovereign authority" had therefore been replaced by "governmental authority".

75. The suggestions consisted in particular in simplifying the text of article 2, as the words "constituent units of a federal State" had been joined to "political subdivisions of the State" in the current paragraph 1 (*b*) (iii) so that the phrase "which are entitled to perform acts in the exercise of the sovereign authority of the State" would apply to both categories. It was also suggested that the phrase "provided that it was established that that entity was act-

[17] See 2569th meeting, para. 41.

[18] *Yearbook ... 1991*, vol. II (Part Two), p. 13, document A/46/10, para. 28.

[19] Ibid., p. 12, para. 23.

[20] General Assembly resolution 53/98, para. 1.

[21] A/C.6/49/L.2.

[22] A/47/326 and Add.1-5, A/48/313, A/48/464, A/C.6/48/3, A/52/294 and A/53/274 and Add.1.

[23] A/C.6/47/L.10 and A/C.6/48/L.4 and Corr.2.

[24] Institut de droit international, *Tableau des résolutions adoptées (1957-1991)* (Paris, Pedone, 1992), p. 220.

[25] International Law Association, *Report of the Sixty-sixth Conference, held at Buenos Aires, 14 to 20 August 1994* (Buenos Aires, 1994), pp. 452 et seq.

ing in that capacity" should be added to the paragraph, for the time being in square brackets. Those suggestions sought to meet the concerns expressed by some States. They allowed for the immunity of constituent units, but at the same time addressed the criticism that the difference in treatment between constituent units of federal States and the political subdivisions of the State was confusing.

76. As to the criteria for determining the commercial character of a contract or transaction, the Working Group had been well aware of the overall importance of that question for State immunity and had considered a broad variety of possible alternatives. Since it had been felt that the facts of each case differed greatly, as did legal traditions concerning the use of the criteria, the Working Group had considered that the most acceptable solution would be simply to refer in article 2 to "commercial contracts or transactions" without further explanation and that the distinction between the so-called nature and purpose tests might be less significant in practice than the long debate on it might imply. Theory and practice had developed a wide variety of criteria—contained in the annex to the report—which could offer useful guidance to national courts in determining whether immunity should be granted in specific instances.

77. With regard to the concept of State enterprise or other entity in relation to commercial transactions, referred to in article 10 (Commercial transactions), the Working Group had been of the view that paragraph 3 of that article could be made clearer by indicating that the immunity of a State would not apply to liability claims in relation to a commercial transaction entered into by a State or other entity established by that State where: (*a*) the State enterprise or other entity engaged in a commercial transaction as an authorized agent of the State; and (*b*) the State acted as a guarantor of a liability of the State enterprise or other entity. That clarification could be achieved either by calling the acts in (*a*) and (*b*) commercial acts or by a common understanding to that effect at the time of the adoption of the article. However, as to the waiver of immunity in cases where the State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, which had been raised by a number of States in their comments and also during consultations conducted under Mr. Calero Rodrigues, it had been thought that that question went beyond the objective of article 10.

78. The suggestions on contracts of employment, which were dealt with in article 11 (Contracts of employment) had raised a number of problems. The Working Group had reached the conclusion that the State enjoyed immunity if the employee had been recruited to perform functions in the exercise of governmental authority, in particular diplomatic staff and consular officers, as defined in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations; diplomatic staff or permanent missions to international organizations or on special missions; and other persons enjoying diplomatic immunity, such as persons recruited to represent a State in international conferences. The Working Group had noted that there was a distinction between the rights and duties of individual employees and general questions of employment policy, which essentially concerned labour-management issues.

79. The Working Group suggested the deletion of article 11, paragraph 2 (*c*), which made a distinction between nationals or habitual residents of the State of the forum and other persons, as it could not be reconciled with the principle of non-discrimination based on nationality.

80. The question of immunity for measures of constraint against State property was of particular concern for several States from different regions of the world. Basically, the Working Group had concluded that a distinction between pre-judgement and post-judgement measures of constraint might facilitate the search for a solution. The Working Group had been of the view that pre-judgement measures should be possible in the following cases: measures on which the State had expressly consented, either ad hoc or in advance; measures on property designated to satisfy the claim; measures available under internationally accepted provisions; and measures involved in property of an agency enjoying separate legal personality if it was the respondent of the claim.

81. Post-judgement measures should be possible in the following cases: measures on which the State had expressly consented, either ad hoc or in advance; measures on property designated to satisfy the claim. In addition, the Working Group had explored three possible alternatives which the General Assembly might decide to adopt: alternatives I and II would imply recognition of judgement by a State and granting the State a two- or three-month grace period to comply with it as well as freedom to determine property for execution. If the State failed to comply during the grace period, property of the State could be subject to execution in accordance with alternative I, whereas under alternative II, the claim could be brought into the field of inter-State dispute settlement. In alternative III, the Working Group suggested not dealing with that aspect of the draft because of the delicate and complex issues involved. The matter would then be left to State practice, on which there were different views.

82. The annex to the report contained an elaboration of the additional topic presented to the General Assembly which took into account the fact that, in the past decade, a number of civil claims had been brought in municipal courts of individual countries against foreign Governments arising out of acts of torture committed not in the territory of the forum State but in that of the defendant and other States, and one State had even amended its legislation to make such claims possible in cases of torture, extrajudicial killings, aircraft sabotage, hostage-taking and so on. The attention of the General Assembly was also called to the so-called Pinochet case.[26] He stressed that the Working Group had not taken a decision on that issue, but only referred to that practice in order to enable the General Assembly to decide on the best way to deal with it.

83. Mr. Sreenivasa RAO commended the Working Group on an excellent report on what was a very difficult

[26] See United Kingdom of Great Britain and Northern Ireland, House of Lords, *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [1999] 2 WLR 827.

topic. It was a useful contribution to a dialogue that had been going on for a long time in the Sixth Committee.

84. There had been many developments in practice as far as the five substantive issues referred to in the report were concerned. In his view, the subject was not fit for a convention. It had been overtaken by national legislation and would continue to be in the future. Ultimately, it was national jurisdiction that would determine matters, because there was no higher appeal against a court of last decision in a country. National jurisdiction was evolving, and thus it was more difficult to have common international standards in terms of a convention either by way of progressive development or codification.

85. Mr. GAJA said that he had a number of proposals to make, although he realized that it might already be too late and he did not wish to reopen the discussion.

86. Paragraphs 18 et seq. of the report of the Working Group contained a summary of recent relevant case law concerning constituent units. However, the cases mentioned seemed to focus not on constituent units, but on agencies and instrumentalities. Perhaps the heading could be reworded slightly to make it less awkward.

87. With reference to paragraph 30 setting out the reformulation of article 2, paragraph 1 (*b*), he was not happy with the idea that a suggestion by the Commission should include a text in brackets. That kind of addition, although acceptable with regard to immunity from jurisdiction, was not acceptable in the case of immunity to execution, and since a general definition of the State was involved, it would be preferable not to have the addition within the brackets.

88. Perhaps a sentence could be added to paragraph 49 to say that in cases which had used the purpose test, as a supplementary test, reference had not been made to the law of the State concerned, namely the State whose immunity was in question. Since the suggestion was to drop the purpose test, it would add to the argument by saying that the purpose test, within the meaning of what had been suggested early on by the Commission, had not really been accepted in practice.

89. Paragraph 105 was unclear about the status of administrative staff that supported sovereign functions, because the examples given related to diplomatic and consular officers, but in the description of practice, there were also some references to immunity where a high administrative staff member brought a case against a State. A clarification was needed in that regard.

90. Paragraph 106 should be further developed. It spoke of non-discrimination on the basis of nationality, but in fact there were two types of non-discrimination. One was non-discrimination against an employee who was a national of a third State who could not bring a claim against the employing State, and the other was against nationals of the receiving States, because it would naturally be in the interest of the sending State to employ a national of a third State rather than an employee of the local State. Mention should also be made of the fact that the principle of non-discrimination had originated in the European Convention on State Immunity.

91. Paragraph 129 was confusing and it was not clear to what alternatives I and II referred. The important thing was to concentrate on the granting of a grace period, and not imagining a recognition procedure, possibly before the courts of the State whose property would be subject to execution.

*The meeting rose at 1.05 p.m.*

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## 2602nd MEETING

*Wednesday, 14 July 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Yamada.

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### Jurisdictional immunities of States and their property (*concluded*) (A/CN.4/L.576)

[Agenda item 9]

REPORT OF THE WORKING GROUP (*concluded*)

1. Mr. SIMMA, commenting on the report of the Working Group on jurisdictional immunities of States and their property (A/CN.4/L.576), said that the reformulation of article 2 (Use of terms), paragraph 1 (*b*), of the draft articles, as proposed by the Working Group in paragraph 30 of the report, would not be an improvement on the draft articles as adopted by the Commission at its forty-third session, in 1991.[1] The first version had been satisfactory because the status of constituent units of federal States had been defined separately from the particular structure of a federal State. The new wording gave the impression that the constituent units of federal States could enjoy jurisdictional immunity only when they exercised the governmental authority of the central State, something which was not in conformity with the constitutions of many federal States. Within the Federal Republic of Germany, for example, Bavaria, where he came from, exercised a large share of what were considered as basic functions of the State, in, for example, the police, education and justice areas, and it did so entirely autonomously.

[1] See 2601st meeting, footnote 18.

It would be unacceptable for Germany that the Länder could not enjoy immunity for *acta jure imperii* unless such acts had been performed in the exercise of the governmental authority of the federal State. The European Convention on State Immunity proposed a much more satisfactory solution by providing that the immunity of a constituent unit of a federal State could be recognized on the basis of a declaration by that federal State (art. 28). Paragraph 29, in which an attempt was made to justify the new wording, showed that there was some reluctance to recognize all the alternatives to federalism. The Working Group had gone too far in giving satisfaction to States organized along unitary and centralized lines.

2. The commentary in paragraph 21 on the establishment or refutation of immunity was based exclusively, as the footnote showed, on the case law of the United States of America. However, that was not mentioned anywhere in paragraph 21, which was supposed to be a commentary on the provisions applicable internationally. Decisions taken on the basis of a particular act, such as the United States Foreign Sovereign Immunity Act of 1976,[2] might well lay down limits and conditions which went further or less far than what international law might allow in every respect. He would also like to have some clarifications on the meaning of the last sentence of paragraph 21.

3. With regard to the question of commercial transactions, he shared the preference the Working Group had stated in paragraph 60 for alternative *(f)* contained in paragraph 59. In so doing, however, it was evading the controversial question of the choice between the "nature" and the "purpose" of the transaction. That would be acceptable if the Sixth Committee decided that the draft was to become a convention. He personally supported the idea that the draft should remain as it was or, possibly, take the form of a General Assembly declaration. In that case, there would be no problem if the Commission simply listed the various solutions and left it to national courts to choose from among the various possibilities. Not mentioning any of the possible solutions would mean not giving national courts any guidance. Such courts already knew how to make a distinction between a commercial transaction and a transaction resulting from acts performed in the exercise of governmental authority. If the Commission wanted to be helpful, it should at least list the various possible alternatives. He also noted that paragraph 48 gave no indication about the case referred to in the third sentence, whereas the example given in the following sentence was backed up by a footnote. That imbalance should be corrected.

4. On the concept of a State enterprise or other entity in relation to commercial transactions, paragraphs 73 to 77 again contained references to decisions by United States courts based on the Foreign Sovereign Immunity Act of 1976. What those decisions reflected was not international law, but the attitude of the courts of a particular country which were required to base their decisions not on international law, as the German courts were, but on internal law. That section thus proposed an interpretation of internal legislation, but certainly not an interpretation of the implementation of customary law or general provisions of international law as such.

5. With regard to contracts of employment, he agreed in principle with the opinion expressed by Mr. Gaja (2601st meeting) that the list of groups of employees not covered by article 11 (Contracts of employment), paragraph 1, should include administrative staff in addition to diplomatic staff. It could, however, be considered that the words "in particular" in paragraph 105, before the list of categories covered, implied that administrative staff might come under that safeguard clause. The Working Group was also proposing that paragraph 2 (*c*) should be deleted because of the problems of discrimination to which it might give rise as it was currently worded. It could be asked whether paragraph 2 (*d*) did not also give rise to the same problem.

6. On measures of constraint against State property, the words "Measures involved" should be replaced by the words "Measures involving" in paragraph 127 (*d*). He was, moreover, fully in favour of alternative I proposed by the Working Group in paragraph 129 because alternative II would only complicate matters by paving the way for an inter-State dispute settlement procedure in the event of the non-execution of the judgement.

7. As to the annex to the report, he was one of the members who had stated that they were very much in favour of referring to the new problem of the relationship between State immunity and cases of human rights violations. It had not been easy for the Working Group to deal with that problem, as shown by the convoluted style of the annex. He recalled that the first court rulings which had been handed down in connection with torture committed by State agents had related to cases brought not against Governments, but against individuals who had committed acts of torture or caused disappearances in the exercise of governmental authority. The question had been whether they had done so in the exercise of governmental authority or in a private capacity. A distinction should be made between those two types of cases in paragraph 4 of the annex. With regard to paragraph 9, he wondered whether only claimants and victims who were nationals of the United States could institute proceedings under the Anti-terrorism and Effective Death Penalty Act of 1996.[3] That would be surprising, since United States courts were authorized to hear claims filed by foreigners against foreigners or foreign Governments.

8. Mr. MELESCANU suggested that Mr. Simma should read the provisions which he had regarded as being contrary to Bavaria's interests in the light of the provisions of article 2, paragraph 1 (*b*) (ii), which clearly stipulated that the word "State" meant the constituent units of a federal State. In other words, a constituent unit was a State within the meaning of that provision. Paragraph 1 (*b*) (iii) went even further. Moreover, those two provisions went a long way towards meeting Mr. Simma's concerns. The Working Group had tried to strike a balance between the heirs

[2] United States of America, *United States Code*, 1982 edition, vol. 12, title 28, chap. 97 (text reproduced in United Nations Legislative Series, *Materials on Jurisdictional Immunities of States and Their Property* (Sales No. E/F.81.V.10), pp. 55 et seq.).

[3] Ibid., Public Law 104-132, 110 Stat. 1214 (1996) (National Archives and Records Administration, Office of the Federal Register, 1996).

of a long-standing tradition of unitarism and State centralism and the advocates of federalism.

9. Mr. DUGARD, referring to the annex, said that the Working Group's intention had most certainly been to draw attention to that new development, but not to go into details of case law, which was mainly that of courts in the United States and the United Kingdom of Great Britain and Northern Ireland. The Working Group had wanted to focus exclusively on the question of immunity. The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 referred to in paragraph 9 were in fact much more limited than those of other United States acts which allowed foreign victims of torture or crimes committed abroad to institute proceedings in United States territory.

10. Mr. SIMMA said he still thought that the draft articles reflected the typical attitude of officials of centralized States which was shared by the representatives of States in the Sixth Committee, who all came from the ministries of foreign affairs of their Governments, not from a federal entity. That affected the way in which such matters were dealt with in the United Nations.

11. Mr. HE said that the suggestions made by the Working Group on the substantive issues referred to the Commission for its preliminary comments had been carefully thought out and weighed in order to find broadly acceptable solutions. The report of the Working Group and the suggestions it contained should be very helpful to the working group of the Sixth Committee when it came to consider the substantive issues raised in the conclusions of the Chairman of the informal consultations held pursuant to General Assembly decision 48/413.[4] In view of the complexity of those issues, however, it was not surprising that there were still some problems.

12. With regard to the concept of State for the purpose of immunity, the Working Group's suggestion that article 2, paragraph 1 (*b*) (ii), should be deleted and that the words "constituent units of a federal State" should be added to the current paragraph 1 (*b*) (iii), which was apparently unacceptable to Mr. Simma, had nevertheless been regarded by the Working Group as a good basis for a compromise.

13. The Working Group had been aware of the difficulty of the question of criteria for determining the commercial character of a contract or transaction. A contract or transaction made by a State might either be a commercial activity or a manifestation of its sovereign activity. There were thus grounds for taking both the nature and the purpose of the contract as criteria for determining jurisdictional immunity. After having considered the various possible alternatives, the Working Group had decided that alternative (*f*) in paragraph 59 of the report was the most acceptable, as it had been felt that the distinction between the criteria of nature and purpose might be less significant in practice than the lengthy debate about it could imply. On that point, there might be doubts as to whether such an explanation could fully reflect a long-standing practice in international life without giving rise to different and controversial interpretations of the provision in question.

[4] See 2601st meeting, footnote 21.

14. In connection with the concept of a State enterprise or other entity in relation to commercial transactions, it was of great significance to draw a distinction between the legal status of States and that of State-owned enterprises or entities in relation to jurisdictional immunities. State-owned enterprises engaging in commercial activities in the capacity of legal personalities independent of the State could not be considered a component part of the State machinery, either in jurisprudence or in fact. Proceedings arising out of their commercial transactions should therefore not implicate the State of nationality of the enterprises and the jurisdictional immunities of the State must not be affected in any way. In the exceptional cases listed in the conclusions of the Chairman of the informal consultations, where the State enterprise concluded a purely commercial contract on behalf of the Government, moreover, the principle of State immunity did not apply. In the basis for a compromise submitted by the Chairman of the informal consultations and reproduced in footnote 80, he was of the opinion that the question of the liability of the State could arise in situations (*a*) and (*b*), which had been endorsed in the Working Group's suggestions, but not in situation (*c*), where the State enterprise deliberately misrepresented its financial position to avoid satisfying a claim. The Working Group had rightly pointed out that that suggestion by the Chairman of the informal consultations ignored the question whether the State entity, in so acting, had acted on its own, without the knowledge of the Government, or contrary to the Government's instructions. Such a clarification would greatly help to establish a distinction between the legal status of States and that of State enterprises and entities and thus to facilitate the normal development of international relations, including economic and trade relations.

15. With regard to measures of constraint against State property, the immunity of State property from execution was a generally recognized and established principle and an issue that should be dealt with cautiously. Article 18 (State immunity from measures of constraint), paragraph 1, set forth three requirements, which he read out and which must be met for the attachment of State property. The suggestions made in paragraphs 126 to 128 of the report of the Working Group were basically in line with those requirements, but the alternatives contained in paragraph 129 might give rise to problems. In that connection, he recalled the basic principle reflected in article 18, paragraph 2, as adopted by the Commission at its forty-third session, i.e. waiving immunity from jurisdiction did not mean waiving immunity from execution. Execution against the property of a State was possible only with the express consent of that State.

16. Mr. LUKASHUK said that, on the whole, the report of the Working Group was the result of satisfactory work, although its annex called for some comments, and he welcomed the fact that Mr. Simma had drawn the Commission's attention to the wording of the annex, which he also found rather inelegant. The development to which the annex referred was extremely interesting and the ambiguous wording might delay work on the question. The establishment of the International Criminal Court was instructive in that regard. He therefore requested that paragraph 13 of the annex to the report should be amended to indicate that the question with which it dealt

should be a topic for consideration by the Commission in its own right.

17. Mr. ECONOMIDES said he regretted the fact that the French text was not available in time for the consideration of the report of the Working Group. He would like the secretariat to ensure that such a situation did not arise again.

18. As to substance, he had always regarded the draft articles adopted by the Commission at its forty-third session as satisfactory, thanks in particular to the excellent work done by the first Special Rapporteur on the topic, Mr. Sompong Sucharitkul. The treatment which had been given to that draft was not deserved, especially as the Working Group's suggestions were not very different from the provisions it contained. He nonetheless endorsed nearly all of those suggestions.

19. As to the definition of a State for the purpose of jurisdictional immunities, the difference between the draft articles adopted by the Commission at its forty-third session and the Working Group's suggestions was minimal. He would have preferred a more restrictive definition. Immunity was anachronistic, and a necessary evil whose scope practice had gradually tried to reduce. He therefore fully shared the Working Group's position, but would have liked the words "provided that it was established that such entities were acting in that capacity" not to be included in square brackets in article 2, paragraph 1 (*b*) (ii), proposed by the Working Group in paragraph 30 of its report.

20. He also fully agreed with the Working Group on the criteria for determining the commercial character of a contract or transaction; it was better not to broaden the concept and instead to give practice free rein.

21. With regard to contracts of employment, he endorsed Mr. Gaja's comments on the administrative staff of diplomatic and consular missions of States to international organizations, who played a decisive role and should therefore be covered. He did not agree with the Working Group's recommendation that paragraph 2 (*c*) of article 11 should be deleted because he could not find that provision discriminatory: both the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations made the same distinction in respect of nationals of the receiving State employed by diplomatic and consular missions.

22. Mr. ROSENSTOCK noted that, at the fiftieth session of the Commission, he had pointed out that it was probably too optimistic to think that the Commission could succeed where years of efforts by Mr. Calero Rodrigues had failed. He could, of course, associate himself with the report of the Working Group, but, in the light of the discussion, it could, at most, be regarded as a *succès d'estime*. As to substance, he was of the opinion that, in the case of State enterprises and other State entities, the draft had to contain provisions to pierce the corporate veil in connection with cases where the State entities were undercapitalized, reduced their assets to avoid satisfying a claim, misrepresented their financial position and comparable situations. He would like the report to give a more accurate picture of the Working Group's discussions on that point. He therefore proposed that the following sentence should be added at the end of paragraph 83: "Some stressed the importance of the draft dealing with the problem in the appropriate place."

23. Mr. PELLET said that, unlike some members, he was glad that the General Assembly had sent the first set of draft articles back to the Commission. That was an interesting precedent, even though it would have been better if the General Assembly had indicated specifically which points it would like the Commission to deal with in greater detail.

24. In terms of procedure, it was difficult to adopt a relatively complete and technical report without considering it paragraph by paragraph. As that appeared to be impossible, the conclusions contained in the report might simply be approved and it might be annexed to the report of the Commission on the work of its fifty-first session.

25. On the whole and even though the results achieved by the Working Group were generally satisfactory, he still had the same reservations he had always had about the fact that the draft articles which had been prepared by the Commission and whose title clearly indicated that they dealt with the jurisdictional immunities of States and their property encroached on the problem of State immunity from execution—and, what was more, dealt with it too timidly. He therefore thought that the General Assembly should choose alternative III proposed in paragraph 129, subject to the possibility of making immunity from execution a topic in its own right.

26. Mr. GOCO said that the concept of State immunity was not unknown in his country, the Philippines, whose Constitution provided that a State could not be prosecuted without its consent (art. XVI, sect. 3).

27. He was surprised that the draft articles under consideration did not view a "court" as a judicial organ as such. In the Philippines, for example, there was a whole range of administrative mechanisms which ruled on rights and duties and before which State immunity could be pleaded. In his opinion, the definition of a "court" should be extended to organs exercising quasi-judicial functions.

28. He regretted that, in the many cases referred to in the footnotes, there was no reference to a dispute in which he had had to become involved as a result of his previous official functions, namely, the proceedings against the Marcos estate which had been instituted in a Hawaiian court by victims of human rights violations. Although the Philippine Government had not been directly involved, it had been able to invoke provisions of the federal law of the United States known as the Foreign Sovereign Immunity Act of 1976 and a California appeal court had accepted that plea.[5]

29. Ms. Rosalyn Higgins, a member of ICJ, had explained how difficult it was to determine to which category, *de jure imperii* or *de jure gestionis*,[6] State acts belonged, as practice in respect of immunity was becom-

[5] United States, Court of Appeals, Ninth Circuit, In re *Estate of Ferdinand Marcos Human Rights Litigation; Hilao and Others* v. *Estate of Marcos*, *International Law Reports* (Cambridge), vol. 104 (1997), p. 119.

[6] See Higgins, op. cit. (2601st meeting, footnote 8), p. 82.

ing more restrictive. The nature and purpose of the operation in question were the two criteria to be used to decide. In his opinion, however, the personality of the parties involved also had to be considered.

30. Mr. KATEKA said that, like Mr. Pellet, he wondered what should be done with the report under consideration. If it could not be considered paragraph by paragraph, the Commission might simply take note of it, drawing particular attention to the Working Group's suggestions.

31. Mr. HAFNER (Chairman of the Working Group), summing up the debate, said that some of the problems, particularly with regard to translation and procedure, which were being faced currently could be explained by the fact that the Working Group had had to work fast and there had not been much time available to the Commission. The best thing would be formally to adopt the Working Group's suggestions, to take note of the rest of the report and to annex the report of the Working Group to the report of the Commission to the General Assembly on the work of its fifty-first session.

32. He reminded Mr. Gaja and Mr. Simma, who had asked about the many cases which had been referred to as examples in the report and some of which they did not think were relevant, that, in view of the gaps in its case law sources, the Working Group had taken care to start each part of the report on the background to the practice of courts with an introductory paragraph clearly stating that it was drawing on a number of conclusions included in a summary of cases prepared by the Secretariat and covering the period 1991-1999. It had been impossible to find better balanced references and hence to give a more complete picture of State practice.

33. As Mr. Economides and Mr. Simma had pointed out, the case of "employees forming part of the administrative or technical staff of a diplomatic or consular mission" was not referred to in paragraph 105, which listed the categories of employees in respect of whom article 11, paragraph 1, did not apply. It would be noted, however, that paragraph 105 clearly stated that the provision did not apply to certain officials, "in particular". The Working Group had considered that it would be too difficult to make an exhaustive list and had preferred that solution. It had, moreover, not seen any reason why administrative staff, for whom the practice of the courts was still not well established, should be included in one particular category.

34. In his opinion, there was no incompatibility between paragraph 106 relating to article 11, paragraph 2 (*c*), and Mr. Gaja's interpretation of the two possible types of discrimination. With regard to Mr. Economides' comment that there would not necessarily be any discrimination, he wondered whether article 47 of the Vienna Convention on Diplomatic Relations, which prohibited the receiving State from discriminating as between States, did not already justify the deletion of article 11, paragraph 2 (*c*).

35. In respect of Mr. Gaja's comment on recognition of judgement, as referred to in alternatives I and II in paragraph 129, he explained that the Working Group had not had time to review the many conditions to which the recognition of a judgement by the State could be subordinated and had therefore simply mentioned such recognition in order to draw the attention of the General Assembly and the Sixth Committee to the problems which might be involved. It was, however, not opposed to the deletion of that reference in either of the alternatives.

36. Referring to Mr. Simma's comment on the definition of a State reproduced in paragraph 30, he stressed that article 2, paragraph 1 (*b*) (ii), dealt with acts in the exercise of the governmental authority of the State, the State being defined in the draft as including, where appropriate, all the constituent units of a federal State. At least the two levels of the governmental authority of a federal State were thus already included in that concept of "State". Nonetheless, the important element in the phrase "acts in the exercise of the governmental authority of the State" was not the State, but governmental authority. Consequently, if Mr. Simma was bothered by the words "of the State", they could be deleted.

37. Replying to the question whether alternative (*f*) in paragraph 59 was genuinely the most acceptable criterion for determining the commercial character of a transaction, he said that, in any event, in view of the many criteria which were applied in practice, in addition to the nature test, the Working Group had had no other choice than to rely on the courts, which could base their rulings on the list prepared by the Institute of International Law, in particular.

38. In his view, the distinction to which Mr. Simma had drawn attention between cases brought against a State and cases brought against persons exercising governmental functions, but not enjoying immunity was duly taken into consideration in the annex to the report of the Working Group.

39. He noted that Mr. He could accept the Working Group's conclusions, but preferred alternative III as far as measures of constraint were concerned.

40. In reply to Mr. Lukashuk's comment on paragraph 13 of the annex, particularly with regard to the need to amend the text by referring to the possibility of a new mandate, he said that the neutral wording with which the Commission drew the General Assembly's attention to recent developments that were undeniably closely linked to immunity tended to make the problem of a new mandate a moot point.

41. On the question whether the words "[provided that it was established that such entities were acting in that capacity]" should be maintained in square brackets, he said that, since opposing points of view had been expressed, the best thing would be to leave the text as it was.

42. Commenting generally on Mr. Goco's request for a precise definition of courts, he said that, since the Working Group had received a mandate from the General Assembly to focus on five issues, it had done so and had deliberately not dealt with certain problems which would otherwise have warranted more detailed consideration.

43. Subject to the Commission's agreement, he could accept Mr. Rosenstock's proposal for the addition of a sentence at the end of paragraph 83.

44. On the basis of all those comments and the suggestions by Mr. Pellet on the procedure to be followed, he proposed that the Commission should take note of the report and adopt the suggestions, as amended during the debate.

45. Mr. SIMMA said that, if the Commission took note of the report of the Working Group and adopted the suggestions it contained, it would have to revise the text extensively to correct some weaknesses. With regard to paragraph 30 and the definition of "State", he said that he was in favour of the deletion of the words "of the State" in article 2, paragraph 1 (*b*) (ii).

46. Mr. PELLET said that the weaknesses of the report could be easily explained by the fact that it had been prepared in such a rush. His only reservation related to the imbalance in the case law that had been referred to and the way non-English-speaking sources had been cited. He was therefore prepared to take note of the report as it had been submitted, but requested that the Chairman of the Working Group should read out the amendments to the conclusions that the Commission was expected to adopt together with the conclusions.

47. Mr. HAFNER (Chairman of the Working Group) said that the amendments related to paragraphs 30, 83 and 129. In paragraph 30, the words "of the State" would be deleted in article 2, paragraph 1 (*b*) (ii), after the words "governmental authority". In the English text, the word "the" would be deleted before the words "governmental authority". At the end of paragraph 83, it had been proposed that the following sentence should be added: "Some members stressed the importance of the draft dealing with the matter in the appropriate place." In paragraph 129, the words "recognition of judgement by State and" should be deleted in alternatives I and II.

48. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to take note of the report of the Working Group and to adopt the suggestions which it contained and which had been amended on the basis of the proposals read out by the Chairman of the Working Group.

*It was so agreed.*

### Appointment of a special rapporteur

49. The CHAIRMAN announced that the Commission had to choose a new special rapporteur for the topic of diplomatic protection. The candidacy of Mr. Christopher Dugard had been proposed. If he heard no objection, he would take it that the Commission wished to appoint Mr. Dugard Special Rapporteur on that topic.

*It was so agreed.*

*The meeting rose at 1 p.m.*

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## 2603rd MEETING

*Thursday, 15 July 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Yamada.

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### Unilateral acts of States (*concluded*)* (A/CN.4/496, sect. C, A/CN.4/500 and Add.1,[1] A/CN.4/L.588)

[Agenda item 8]

REPORT OF THE WORKING GROUP

1. The CHAIRMAN invited the Chairman of the Working Group on unilateral acts of States to introduce the report of the Working Group (A/CN.4/L.588).

2. Mr. RODRÍGUEZ CEDEÑO (Chairman of the Working Group) said the Working Group had been set up to deal with specific questions on his second report as Special Rapporteur on the topic (A/CN.4/500 and Add.1) and in particular on the definition of a unilateral act. The Working Group's mandate had not been to discuss again the substance of the questions raised on the topic, but to try to prepare a basic text of the definition on the basis of which States could answer a questionnaire prepared by the Working Group, and which was also contained in its report.

3. In paragraphs 5, 6 and 7 of the report of the Working Group, reference was made to the three fundamental elements which had always been felt to be part of the definition of a unilateral act, namely, the legal effect, clarity and publicity. In paragraph 8, mention was made of the international community as a whole, which had been included in the definition presented to the Commission and on which there had been some doubts, in particular as to whether the international community could be considered a subject of international law and could acquire rights through unilateral acts.

4. Paragraph 9 referred to the element "with the intention of acquiring international legal obligations", which had featured in the original definition in draft article 2 (Unilateral legal acts of States). Following the discussion in the Commission and the Working Group, it had been

* Resumed from the 2596th meeting.

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

concluded that the best wording would be "with the intention to produce legal effects on the international plane".

5. There had been some opposition to the idea of the autonomous nature of acts and two trends had been reflected: that autonomy restricted the concept and scope of the unilateral act, and that the acts should be identified as autonomous. In paragraph 11, the term "autonomous" was included in the definition in square brackets because of the differences of opinion.

6. Paragraph 11 contained a basic text, and not a definition in the strict sense, so that States could respond to the questionnaire, which was spelled out in greater detail in paragraph 16 so that States could inform the Commission about their practice. One of the main difficulties was that there was no systematic study and very few publications on State practice. Hence the importance of the questionnaire.

7. Paragraph 16 contained an enumeration which could be improved upon in consultations with the Secretariat if other elements needed to be introduced, but which already included the basic ideas: the capacity of a representative to act on behalf of the State to commit the State internationally by means of a unilateral act, the formalities to which such acts were subjected, their possible contents, legal effects, the importance that States attached to their own and other unilateral acts, which rules of interpretation applied, the duration of unilateral acts and their possible revocability. Other questions could also be added to the questionnaire. For example, States could say whether they thought that the 1969 Vienna Convention should be applied or whether they should have more specific criteria on such acts and also whether the Commission should consider only "autonomous" unilateral acts or all unilateral acts.

8. The final paragraphs of the report referred to the importance of a better understanding by States of the objective of the questionnaire, namely, to analyse State practice. That would be very useful when the Legal Advisers considered the report of the Commission to the General Assembly on the work of the session in the Sixth Committee. The Special Rapporteur might present the topic at that time to explain the problems encountered and the objectives of the questionnaire.

9. Lastly, the Working Group had considered what questions the Special Rapporteur would address in his next reports. It was proposed that some of the draft articles should be reformulated in the light of the comments made in the Commission and the opinion of Governments expressed in the Sixth Committee, that the Special Rapporteur should present new draft articles on interpretation and effects of unilateral legal acts and that a study should be elaborated on certain aspects it had not yet been possible to address, such as on the revocability of unilateral acts of States, as well as on a number of other subjects.

10. Mr. GOCO commended the Working Group on a comprehensive report which reflected the concerns that had been voiced in the Commission. The main issue was the definition, because the understanding of unilateral acts of States would hinge on that. The points which had been touched upon concerning the use of the words "legal" and "unequivocal", the need to introduce the word "publicity" and a reference to those to be affected by unilateral acts, as well as the purpose and intention of such acts were all vital in producing a proper definition.

11. The matters to be brought to the attention of the Sixth Committee included the question of capacity, the formalities required, the distinction between individual and joint acts, the possible contents of unilateral acts and the legal effects the acts purported to achieve. Of particular importance was the point set out in paragraph 16: the extent to which Governments believed that the rules of the 1969 Vienna Convention could be adapted mutatis mutandis to unilateral acts. Another key point was whether unilateral acts should be considered independently of the formalities provided for in the law of treaties.

12. Mr. PELLET said that the work of the Working Group would be useful in helping the Special Rapporteur to hone the proposals.

13. Personally, he still encountered the same problem, namely the "autonomy" element, particularly in the context of paragraph 10. The Special Rapporteur seemed obsessed with autonomy. The issue was not as essential as the reports of the Special Rapporteur or the Working Group suggested. In any case, insofar as he had been able to participate in the work, he had indicated that there was a middle road between addressing everything or dealing solely with autonomous unilateral acts, and the acts that had to be excluded were unilateral acts which were subject to a special legal regime. He wanted his view on that point to be reflected in the report of the Working Group, which was not the case at the current time. After paragraph 10, an insertion should be made to the effect that, according to another proposal, only unilateral acts of States subject to special treaty regimes should be excluded, such as, for example, reservations to treaties, the means of expressing consent to be bound by a treaty or declarations of acceptance of the compulsory jurisdiction of an international court. The problem was not one of autonomy: for those various categories of unilateral acts, a special legal regime existed, and they should therefore be excluded from consideration. However, he was opposed to an exclusion on a basis that was very difficult to pinpoint and was most unsatisfactory intellectually, namely that of autonomy. He would like that view to be reflected. Consequently, in the questionnaire he urged the Special Rapporteur and the Secretariat to indicate that that was a possibility, and not to confine themselves to submerging States under the expression "autonomous unilateral act", which might lead to a negative response, because States would not understand, whereas his own proposal was infinitely clearer.

14. Similarly, regarding paragraph 16, which enumerated questions to be posed to States, the words "or (*c*) acts which are not subject to a special regime" should be inserted at the end of the penultimate question. Concerning item (*a*) in the same question, if the Commission really wished to confine itself to the notion of autonomous unilateral acts, which did meet with his approval, then it was necessary to add the words "or customary" between the words "pre-existing conventional" and "norm". He saw no reason to single out norms which were based on a treaty.

15. As to paragraph 11, the phrase "legal effects in its relations to one or more States or international organizations" was somewhat premature. He would have preferred a wording such as "legal effects in the international sphere" or "legal effects at the international level". An additional advantage of that was that it left open the idea of "international community", which the Working Group had discussed, albeit without reaching a definitive decision.

16. Lastly, in the list of unilateral acts in paragraph 16, another category which should be added to promise, protest, recognition and waiver was that of notification which was very common in international law. It would be useful if examples could be given of State practice in that area.

17. Mr. ROSENSTOCK said it seemed to him that, if an act by a State was unilateral, then the autonomous element was implicit. Presumably Mr. Pellet had in mind situations which could be regarded as unilateral acts, but were not autonomous. It would be helpful if Mr. Pellet could cite a couple of examples hypothetical or not.

18. Mr. LUKASHUK said that he had wanted to ask the same question as Mr. Rosenstock. To his mind, autonomy was an important feature of unilateral acts. Mr. Pellet had spoken about special legal regimes, but that term had a particular meaning. Hence, it would not be useful to employ it in the present case. Also, Mr. Pellet had referred to customary norms, but as he understood it, "customary norms" had been deleted from paragraph 16. Lastly, another question should be included for Governments, namely, what kind of unilateral acts did they formulate in their practice?

19. Mr. PELLET said that there seemed to be a profound misunderstanding as to what was being discussed. The Special Rapporteur's idea was that any unilateral legal act which was the consequence of a pre-existing treaty or customary rule should be excluded, i.e. virtually all legal acts, and that the only acts the Commission should retain were those which the Special Rapporteur had called "autonomous". One example was the French declaration in the *Nuclear Tests* cases—in other words, acts which did not have any direct legal justification in a specific pre-existing rule of international law. When France had entered into the commitment, according to the Court, regardless of whether it really had or not, to stop conducting nuclear tests in the atmosphere, it had acted of its own free will, because it had considered it important to do so. Nothing had compelled France to do so, and that had not been linked to a pre-existing rule, according to the Special Rapporteur. In his view, that analysis was wrong; in reality, the declaration had been based on the principle that States, by virtue of their sovereignty, could commit themselves internationally. He did not see what the difference was between that and the idea that States could unilaterally set the limit of their territorial waters at 12 miles. In his opinion, there was always an international rule to which all unilateral legal acts could be linked. Hence, the idea of autonomy was absurd. Mr. Lukashuk and, to a certain extent, Mr. Rosenstock had said that, on the contrary, it was essential, because ultimately all unilateral legal acts were autonomous. The argument was being advanced that once a State formulated something, that commitment became autonomous. It was the result of the unilateral act that was autonomous. But in his view, that was not very useful for the purposes of the definition. In actual fact, for the purposes of the definition it was the distinction that did not need to be retained. If it was finally kept in the definition, it would create enormous confusion, because it would suggest that there might be unilateral acts which were not autonomous. He would turn the question around and ask Mr. Rosenstock whether he could give an example of a unilateral act which was not autonomous. There were no such examples. That was why he did not like the distinction being drawn and thought the Commission was making matters terribly complicated for States by retaining it. If it was in fact retained, that meant that in the years ahead, the Commission would discuss the *Nuclear Tests* cases endlessly, the only clear precedent, perhaps adding the declaration made by Egypt on the Suez Canal[2] or the Ihlen declaration on Greenland.[3] International practice was, however, rich enough in examples of unilateral acts that were non-autonomous, if one took the meaning employed by the Special Rapporteur. Needless to say, he could not find examples of autonomous unilateral acts, because they did not exist. That distinction was of pedagogical value only; for the purposes of theory or codification, it was pointless.

20. Mr. Lukashuk had the right not to endorse his own distinction between unilateral acts subject to special regimes and others, but he insisted that that possibility be mentioned in the report, because he had defended it with some vigour in the Working Group.

21. Mr. ECONOMIDES said that he had the impression the Commission was going around in circles with the question under discussion and that it was wasting time, because it had made no progress since the previous session. The sole element that he saw in the text was the questionnaire, which could be useful, although he was somewhat sceptical about the effectiveness of such a time-consuming procedure. Everything that had been said at the current meeting had to do with the same problem, namely that the Commission had not yet properly targeted the question which it wanted to consider.

22. Strictly speaking, all internal acts were autonomous, but what mattered was the sphere in which that act took place. If it was in the treaty sphere, the act was autonomous: a ratification was an autonomous act which a State carried out in an entirely sovereign manner. But it was an act which had a pre-existing regime, as Mr. Pellet would say, was provided for under the law of treaties and produced certain effects and thus was an act which was part of treaty-related processes. In the case of an act in the sphere of customary law, for example the decision of a State to extend its territorial seas to 12 miles, that was also a totally autonomous act: the State could choose 10 miles or 8 miles or decide not to do so. But that act came under customary international law, and yet it was still an autonomous act.

23. To take another example: an internal act which fell under institutional international law, i.e. an act undertaken to implement the decision of an international organization, that too could be an autonomous act, although a

[2] See 2594th meeting, footnote 5.

[3] Ibid., para. 20.

directive of the European Union might not be an autonomous act, because it was an act which must be undertaken. The same applied to resolutions of the Security Council. In such cases, the States concerned were required to undertake internal acts, which were autonomous, but they must do so to implement the decisions of the Security Council or the European Union. Those acts were of no concern to the Commission, because the legal regimes were known, whether in the case of institutional international acts, customary acts or treaty-related acts.

24. What was important for the Commission was an act which fell under internal law and was not linked to any other source of law. That was the autonomy of the act, an act that did not simply produce legal effects, but also created rights and obligations, essentially for the State making the declaration, and possibly also in its relations with other States or even the international community as a whole. Hence, the weakness of the definition lay in the words "legal effects". All the acts he had mentioned, whether related to treaty sources, customary sources or international institutional sources, were acts which produced legal effects at the international level, but the Commission wanted to exclude all of them. It was the internal act as a source of autonomous international law that was the subject under consideration. If it was not further delimited, the discussion would continue to go around in circles.

25. Mr. SIMMA said that he was baffled and drew attention to the danger that further deliberation of unilateral acts might rest on barely intelligible notions on which there was no consensus. What did "autonomous" really mean? One possible interpretation was that a statement based on a treaty rule was not an autonomous legal act. Another definition of an autonomous legal act was that it was a unilateral statement which produced the legal effect desired by its author, irrespective of the acceptance or agreement of any other State. Conversely, a statement which required some sort of reaction would not be autonomous. He asked whether the other members agreed?

26. Mr. RODRÍGUEZ CEDEÑO (Chairman of the Working Group) said that the concept of autonomy was of fundamental significance. It was two-fold autonomy—autonomy in relation to a pre-existing rule and the autonomy of the act giving rise to the unilateral act. It was the only means of distinguishing between the various kinds of unilateral acts which existed, only some of which were of interest to the Commission for the purposes of its study. Nevertheless, if the Commission did not pursue its consideration of the topic, it would be necessary to apply the provisions of the 1969 Vienna Convention to all unilateral acts. Autonomy was therefore an essential feature which had to be retained as a criterion forming the basis of the definition.

27. Mr. LUKASHUK said that the Commission seemed to be arguing about terminology, rather than the concept itself. The point at issue was not absolute autonomy, which was as impossible to achieve as absolute sovereignty, but relative autonomy, the aim being to formulate a rule of customary law which would subsequently regulate unilateral acts. The debate also hinged on the two bases on which unilateral obligations could be created: treaties and custom, although custom could also come into existence through the conclusion of agreements between States. The crux of the matter was, however, the autonomous element of a unilateral act whereby a State acquired obligations, an act which plainly did not depend on any treaty and was legally distinct from ratification, reservations or denunciation. He rejected Mr. Simma's thesis that legal effects could arise without there being any need for the agreement of another party. If a State acquired an obligation which the other State refused to recognize on the grounds that it was not legal, then the act in question could not give rise to any legal effects. Reciprocity was essential in that context.

28. Mr. CANDIOTI said that "autonomy" basically signified "self-government" or "self-regulation". He therefore agreed with Mr. Pellet that the notion of autonomy had nothing to do with the definition of a unilateral legal act. The only criteria of any relevance were whether the act was unilateral and whether it produced legal effects in international law. Such an act was not autonomous, but was regulated by law and custom. If a State lodged a protest, it followed certain rules established in existing international law as general principles or customary rules. The same was true of recognition and the assumption of obligations. A body of law existed—for instance, the *Nuclear Tests* cases—and the Commission's task was to formulate it more clearly. Unilateral acts were governed by principles developed in jurisprudence and practice. He therefore suggested that the Special Rapporteur should abandon the concept of autonomy.

29. Mr. GAJA said that paragraph 16 contained a comprehensive list of acts, but notification could be added to it, as Mr. Pellet had suggested. He believed that there was general agreement that the Commission did not wish to deal with acts which might well be unilateral although linked to the law of treaties, or with unilateral acceptance of the compulsory jurisdiction of ICJ. The area which might require further discussion was that in which a customary rule existed or where there was a treaty providing for a certain type of act formulated by a State, the effects of which were already defined, when structurally that act was still unilateral. The problems which might occur were those of capacity, competence, interpretation, and so on. Two examples had been discussed in the Working Group: unilateral declarations to extend territorial seas and assurances that capital punishment would not be imposed on persons if they were extradited. The only question which required an immediate decision was whether to include such acts in the ambit of the Commission's study. He therefore suggested that the Commission should postpone consideration of autonomy until its fifty-second session.

30. Mr. ECONOMIDES said that, if the Commission accepted Mr. Candioti's view that the two pertinent elements of the acts which were of interest to them were the unilateral nature of the act and the fact that it produced legal effects, the Commission would have to study all unilateral acts. But that had not been its aim and so the term "autonomous" had been introduced. According to the Special Rapporteur, "autonomous" meant an act not subordinated or linked to other sources of international law. What remained was an exclusively domestic act which created rights and obligations. The question therefore was whether a unilateral act could be a source of international

law and, if so, under what conditions. What procedure should be followed? What legal regime applied to that act? What legal effects did it have? Nevertheless, he would point out that, if the study were to encompass all unilateral acts, the Commission would waste an unconscionable amount of time.

31. Mr. GOCO said that the debate was complicating the issue and he agreed with Mr. Simma's definition of the term "autonomous". Agreement had been reached on the distinction to be drawn between unilateral and political acts, but there had already been prolonged discussion of the definition of the unilateral acts of States. Mr. Candioti had just focused on the question of the intention to produce legal effects and reference had been made to the *Nuclear Tests* cases. His own view was that the French President's announcement that tests were to be halted had indeed created an international legal obligation. Although he was puzzled about the meaning of a "non-autonomous act" and by the wording of paragraph 17, in other respects he considered that the report had covered the subject comprehensively.

32. Mr. ADDO said that he entirely agreed with Mr. Candioti. The crucial point was whether the unilateral act produced legal effects. The autonomous or non-autonomous nature of an act was of secondary importance.

33. Mr. SIMMA asked whether "autonomous" signified an act not based on a treaty. Or did it mean that statements produced legal effects without requiring acceptance by others? Was he right in thinking that the Special Rapporteur agreed with the first definition? Nevertheless, as the term "autonomous" was extremely misleading, he endorsed Mr. Candioti's proposal that the term be eliminated. He also agreed with Mr. Gaja's practical suggestions regarding the content of the questionnaire.

34. Mr. CANDIOTI said he wished to reply to Mr. Economides' argument about the need to include the concept of autonomy in order to define unilateral acts and that everything regulated by treaty law should be excluded from the Commission's study. In order to study unilateral legal acts, they first had to be defined, but the concept of autonomy had no place in that definition. The Commission should then, as the second step, study only those unilateral legal acts which were not regulated by specific regimes and which needed clarification. A general definition was, however, required for that purpose.

35. Mr. PELLET said that he concurred with Messrs Addo, Candioti, Gaja and Simma that the notion of autonomy was highly ambiguous and problematical, since everyone had his own definition of it. He had merely wished to propose that the report should be amended to reflect what he considered to be an important aspect, but reactions to his suggestion had shown that there was a major obstacle, in that no one knew what "autonomy" meant. He therefore proposed the radical solution of getting rid of the term from the report of the Working Group. The practical approach outlined by Mr. Gaja was correct and States should be asked what practice they followed when they made unilateral statements of all kinds. The Special Rapporteur could subsequently select examples of what appeared to be good practice. He therefore supported Mr. Simma's proposal to delete any references to autonomy from the report.

36. Mr. ECONOMIDES said that he fully agreed with Mr. Candioti. The debate had brought to light a difference of opinion regarding methodology. In Mr. Candioti's view, it was necessary to proceed in two stages: first define unilateral acts in general, then delimit those of interest to the Commission. Nevertheless, he thought that the same result could be achieved in one step.

37. Mr. DUGARD said that he supported Mr. Pellet's view that the word "autonomy" ought to be deleted from the report, as it would only confuse the Sixth Committee and hamper progress on the subject in the future.

38. Mr. MELESCANU said that he was also in favour of deleting the word "autonomy", provided Mr. Candioti's proposal was also accepted, namely that the Commission would not concern itself with unilateral acts covered by treaties or customary law, in order to ensure that the scope of the subject was clearly delimited and would not give rise to repeated discussion in the future.

39. Mr. GAJA said he wished to clarify his previous comment concerning discussion of the matter of autonomy at the next session. He had meant to say that it seemed very unlikely that given his views on the concept of autonomy, the Special Rapporteur would not wish to include it in his next report, and so it seemed inevitable that the Commission would revert to the topic. In order to reflect the views of the Special Rapporteur and other members of the Commission, and in view of the time constraints, the important consideration at the current time was to leave aside the discussion on autonomy without, so to speak, killing it off. Accordingly, he proposed that the last two questions of the proposed questionnaire in paragraph 16 should be deleted, that the word "notification" should be inserted after "waiver", as suggested by Mr. Pellet, and that paragraph 10 should be revised to make it clear that the Commission was not seeking information on unilateral acts relating to the law of treaties. The Commission might also wish to indicate in the text whether it wished to exclude from its study other acts such as unilateral declarations of acceptance of compulsory jurisdiction, declarations concerning an extension of an economic zone or assurances on extradition treaties. At the current information-gathering stage of the study, he would rule out only questions relating to the law of treaties. The acts with which the study was concerned were of the simplest kind, and he did not believe that States would provide much information on them. However, it was best to cast the net as widely as possible so as not to rule out any valuable information.

40. Mr. BAENA SOARES said that the Commission was losing sight of the Working Group's purpose, which had been to propose material which would serve as a starting point for obtaining information from States regarding their practice, rather than to impose definitions. The Special Rapporteur had strong reasons for defending his point of view, but the Commission should take care not to complicate the answers to be provided by States. Mr. Melescanu was correct in making a proposal that would help resolve the issue as it stood. As Mr. Gaja had mentioned, the Commission would revert to fuller discussion

of the topic of autonomy in the near future. The important thing was to make progress by organizing consultations with States as soon as possible, providing them with a clear concept to use as a point of departure and limiting the questionnaire by stating the types of reply that were not required. The Commission could discuss autonomy in greater depth at a later stage.

41. The CHAIRMAN said he agreed with Mr. Baena Soares that it was not the Commission's task to undo the work of the Working Group. However, Mr. Pellet's position was somewhat different, in that he could justifiably say that his opinion expressed during the Working Group's deliberations had not been reflected in the report of the Working Group. The amendments proposed for paragraph 16 were appropriate, since they related to the objective necessity of asking States to respond to a number of specific questions. He could thus accept Mr. Pellet's proposal to include the word "notification" and felt it was correct to discuss the deletion of the last two questions on the list in paragraph 16, as many members had proposed.

42. The discussion on "autonomy" was still open. The Working Group's deliberations on the matter must be reflected to some extent in the report—it could hardly be maintained that nothing had been said about it. However, it seemed that the actual term "autonomy" would have to be omitted, since it clearly caused problems for an overwhelming majority of members. The Commission should bear in mind that its main task was to adopt a report that reflected the work of the Working Group; also, it would be well advised to agree on the questions to be addressed to States, since the replies could greatly facilitate the Commission's future work.

43. Mr. RODRÍGUEZ CEDEÑO (Chairman of the Working Group) said that the debate had been an interesting and enriching one. In particular, he agreed with Mr. Baena Soares that the main purpose was to provide a guide for States, and he welcomed Mr. Gaja's comments and proposals. He supported Mr. Pellet's proposal concerning paragraph 10 and agreed with those who felt that the last two questions on the list in paragraph 16 should be deleted in order to avoid misunderstandings. It was not appropriate to include "notification" in the list of unilateral acts given in paragraph 16, as the term did not seem to denote a legal act in the sense intended. In contrast, Mr. Melescanu's proposal was particularly interesting. The concept of autonomy was important in the present context, and his ideas might help to define a more restricted form of autonomy that separated the acts in question from special legal regimes.

*The meeting was suspended at 11.30 a.m. and resumed at 12.05 p.m.*

44. Mr. RODRÍGUEZ CEDEÑO (Chairman of the Working Group) said that on the basis of the Commission's discussion and the consultations held during the suspension, he wished to submit a number of proposals. First, the fourth sentence of paragraph 10 would be altered to read: "Acts which could reasonably be excluded from the Commission's study were those subject to a specific legal regime." In addition, the last sentence of the paragraph would be replaced by "It was agreed to exclude from the study unilateral acts that were subject to a special treaty regime, such as those in the sphere of conventional law, reservations to treaties and declarations of acceptance of the jurisdiction of the International Court of Justice, inter alia."

45. In paragraph 11, the word "autonomous" would be deleted from the basic text to be sent to States. In paragraph 16, the word "notification" would be inserted after "waiver". Furthermore, the last two questions in paragraph 16 would be deleted. He believed those changes accurately reflected the general feeling of the Commission. The Special Rapporteur, perhaps in detriment to the independence he normally enjoyed in writing his report, would accept the members' proposals, including the amendments just made during the rapid consultations.

46. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the report of the Working Group on unilateral acts of States with the amendments read out by the Chairman of the Working Group.

*It was so agreed.*

## Draft report of the Commission on the work of its fifty-first session

47. The CHAIRMAN invited the Commission to consider its draft report, starting with chapter IV, on nationality in relation to the succession of States.

**CHAPTER IV. *Nationality in relation to the succession of States* (A/CN.4/L.581 and Add.1)**

### E. Text of the draft articles on nationality of natural persons in relation to the succession of States adopted by the Commission on second reading (A/CN.4/L.581/Add.1)

#### 1. TEXT OF THE DRAFT ARTICLES

48. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the text of the draft articles.

*It was so agreed.*

*Section E.1 was adopted.*

#### 2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO

49. The CHAIRMAN invited the Commission to consider the commentaries to the draft articles and suggested that the Commission should proceed commentary by commentary, starting with the commentary to the draft articles as a whole.

*General commentary*

50. Mr. PELLET said he wished to record his regret that the Commission had not seen fit to deal with the problem of decolonization. The problem concerned not so much to regulate instances that might occur in the future, as to indicate the rules in respect of the cases which had occurred in the past.

51. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the general commentary.

*It was so agreed.*

*The general commentary was adopted.*

*Commentary to the preamble*

*The commentary to the preamble was adopted.*

*Commentary to article 1*

*The commentary to article 1 was adopted.*

*Commentary to article 2*

52. Mr. ECONOMIDES said he was disappointed to see that an opinion he had expressed about the term "person concerned" in article 2, subparagraph (*f*), did not appear in the report, although it had been included in the report of the Commission on the work of its forty-ninth session.[4] Though the opinion had not attracted the support of the majority, he felt that it enriched the text and would like to see it included in the final commentary to article 2. The relevant entry in the report of the Commission on the work of its forty-ninth session had amounted to some six or seven lines, but even if that was cut by half it could still make a useful contribution to the report of the Commission on the work of its fifty-first session.

53. Mr. PELLET pointed out that it was not the Commission's custom to reflect individual members' positions during the second reading of the draft, i.e. at the current stage. They were normally reflected on first reading. While it was appropriate to record members' positions in the summary records of the proceedings, he felt that the custom should be respected.

54. In his opinion, the reader would benefit greatly if the different rules that applied to the individual instances mentioned in paragraphs (8) and (9), were more closely cross-referenced to various categories of "succession of States", as described in Part II.

55. The CHAIRMAN agreed with Mr. Pellet's first point. It would be wise to continue with the custom in order to avoid additional misunderstanding. Minority opinions would, in any case, be appropriately reflected in the summary records. He found Mr. Pellet's proposal on cross-referencing a reasonable one, but it would be a matter for the Rapporteur to decide.

56. Mr. CRAWFORD said he entirely agreed with Mr. Pellet on his first point. Sometimes it was possible to reflect the content of what turned out to be a dissenting view in the commentary, simply by referring to it as a material element. That, however, was a matter of judgement for the person writing the commentary.

57. Secondly, he was not very satisfied with paragraph (11) of the commentary, which stated that "The Commission decided not to define the term 'nationality' in article 2, given the very different meanings attributable to it". If so many meanings existed, he would have thought that a definition was called for. He appreciated the thinking behind the paragraph, but felt that a different reason should have been given for not defining the term. In any case, the notion of nationality was central to international law. He therefore proposed that the paragraph be deleted.

58. Mr. ROSENSTOCK (Rapporteur) said he agreed with Mr. Pellet's comments on the need for cross-references and would undertake to include them in the text, in consultation with the secretariat. He supported the proposal to delete paragraph (11).

59. Mr. ECONOMIDES said it was his impression that in the final report it was often thought appropriate to include even a minority opinion, provided it improved the text. He felt that the opinion he had referred to made the provision clearer. However, if it was the Commission's custom not to include minority opinions, he would withdraw his proposal.

60. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the commentary to article 2 as amended.

*It was so agreed.*

*The commentary to article 2, as amended, was adopted.*

*Commentary to article 3*

61. Mr. PELLET proposed that the words "military occupation or" in the last sentence of paragraph (2) should be deleted. Article 3 stipulated that the draft articles applied only to cases of lawful succession of States and paragraph (2) of the commentary explained that the Commission had declined to study nationality questions arising in connection with military occupation. But military occupation could be lawful in certain instances, and it could never result in succession of States, by virtue of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949. The reference to military occupation was thus ambiguous and superfluous.

62. As to paragraph (3), the phrase "and article 1 of the present draft" should be inserted at the end, since article 1 echoed the wording of article 15 of the Universal Declaration of Human Rights,[5] which was cited in paragraph (3), and enunciated the right of everyone to a nationality.

63. Mr. ECONOMIDES said that, when discussing article 3, which had at the time been part of article 27, the Working Group had considered the phrase "without prejudice to the 'right of everyone to a nationality'" to be ambiguous and potentially misleading, and had deleted it. He was surprised to see that it had resurfaced in para-

[4] See *Yearbook ... 1997*, vol. II (Part Two), p. 21, commentary to article 2, para. (12).

[5] General Assembly resolution 217 A (III) of 10 December 1948.

graph (3) of the commentary and proposed that the entire paragraph be deleted.

64. The CHAIRMAN pointed out that if Mr. Pellet's proposed amendment to paragraph (2) was adopted, the corresponding footnote, which applied to the phrase "military occupation", would likewise be deleted. If he heard no objection, he would take it that the Commission agreed to that amendment.

*It was so agreed.*

65. The CHAIRMAN, speaking as Chairman of the Working Group, said that, as he recalled the discussion, the Working Group had wished to preserve the reference to protection of the right to a nationality, if not in the draft article, at least in the commentary. Paragraph (3), moreover, was the product of a compromise.

66. Mr. ROSENSTOCK (Rapporteur) said it would be both useful and appropriate to retain the reference to the right to a nationality in paragraph (3) of the commentary. Mr. Pellet's proposed addition to that paragraph posed a problem of logic and consistency. The paragraph stated that, while the draft articles did not apply to cases of unlawful succession, that did not affect the application of the basic right to a nationality as embodied in other instruments. If a reference to article 1 of the draft was added, that would amount to saying that the right to nationality mentioned in that article applied, while the draft articles as a whole did not.

67. Mr. ECONOMIDES said that article 3 prohibited an aggressor State from giving its nationality to the inhabitants of the territory it had acquired by unlawful means, and paragraph (3) of the commentary added that that was without prejudice to the right to a nationality. To take into account Mr. Rosenstock's point, the phrase might be supplemented by the words "provided that such nationality was not acquired in a manner that was not in conformity with the principles of international law incorporated in the Charter of the United Nations, as required by article 3". That would protect the right to nationality, not only in general, but also in the specific case when it was given by an aggressor State.

68. Mr. PELLET said he could not go along with that proposal, which completely distorted the draft article. The whole purpose of the text was to ensure that individuals were not deprived of a nationality, even if their country was illegally annexed. He would prefer to retain the text as it stood, but if Mr. Economides pressed for his proposal, perhaps the best solution would be to delete the paragraph altogether.

69. Mr. ROSENSTOCK (Rapporteur) said he fully endorsed those remarks. He would greatly prefer to retain the paragraph, because it made a useful point. He did not see it as in any way condoning illegal occupation or even addressing the legal aspects of such an action.

70. Mr. KABATSI said he agreed that the paragraph made a very useful point and should not be deleted. Like Mr. Pellet, he thought the objective was to prevent people from becoming stateless in the wake of illegal occupation.

71. Mr. ECONOMIDES said he would like to put a question to Mr. Pellet and Mr. Rosenstock. Did an aggressor State that infringed international law and illegally occupied a territory have the right to give its nationality to the inhabitants of that territory? Article 3 said it did not, but paragraph (3) of the commentary took the reverse stance.

72. The CHAIRMAN said that paragraph (3) did not go any further than to say that article 3 was "without prejudice" to the right of everyone to a nationality.

73. He invited the Commission to indicate, by a show of hands, whether it wished to retain paragraph (3) of the commentary as originally drafted or to delete it.

*By 10 votes to five, the Commission decided to retain paragraph (3) as originally drafted.*

*The commentary to article 3, as amended, was adopted.*

*Commentaries to articles 4 and 5*

*The commentaries to articles 4 and 5 were adopted.*

*Commentary to article 6*

74. Mr. PELLET said that, as in the case of paragraphs (8) and (9) of the commentary to article 2, cross-references to the relevant portions of Part II should be inserted.

75. Mr. ROSENSTOCK (Rapporteur) said that would be done, with the assistance of the secretariat.

*The commentary to article 6, as amended, was adopted.*

*Commentary to article 7*

76. Mr. PELLET said that, in the French version of paragraph (1), the reference to *principes généraux* must be followed by the words *de droit*, not *du droit*.

*It was so agreed.*

77. Mr. PELLET proposed that, after the third sentence in paragraph (3), further explanation should be given as to why the Commission had preferred the term "attribution" to "granting". A phrase along the lines of "and shows that this attribution is the result of a voluntary action by the State" could be added.

78. Mr. ROSENSTOCK (Rapporteur) said he would undertake to add a sentence to that effect.

*The commentary to article 7, as amended, was adopted on that understanding.*

*Commentary to article 8*

79. The CHAIRMAN drew attention to a technical error in the numbering of the English version.

80. Mr. ECONOMIDES proposed that, in paragraph (4), the third to sixth sentences inclusive should be deleted. They set out a hypothesis that went well beyond the terms of article 8, paragraph 2, which indicated that, other than in cases of statelessness, a successor State could not attribute its nationality to persons residing abroad against their will. The third to sixth sentences of paragraph (4) described how States could determine whether such persons desired to acquire their nationality, and even referred to the need to avoid placing a "heavy administrative burden" on the successor State. It implied that the State, to save time and money, could automatically and arbitrarily grant its nationality to persons living abroad, subject to their rejection of that nationality within a reasonable period of time. But what if such persons resided on the opposite side of the globe from the successor State? Would they not be seriously inconvenienced by having to travel to the successor State to decline its nationality? How would illiterate persons be informed of their new nationality? Was such an arrangement really in consonance with basic human rights? States were entirely capable of setting up an administrative system to give effect to article 8, paragraph 2, and there was no need for the Commission to give them the advice contained in the third to sixth sentences of paragraph (4) of the commentary.

81. The CHAIRMAN, speaking as Chairman of the Working Group, said he agreed that the paragraph introduced certain presumptions regarding the consent of the person concerned and had the potential to deprive certain persons of their human right to a nationality if, for example, they were not informed in good time that they had the right to reject the nationality of the successor State. On the other hand, the paragraph represented a final formula arrived at after serious consideration and appeared in the text adopted on first reading.

82. Mr. PELLET said that, while he was not insensitive to Mr. Economides' arguments, if the third to sixth sentences were deleted, paragraph (4) of the commentary would end in an abrupt manner and lack any elucidation whatsoever of paragraph 2. It should at least be made clear that it was for each State to determine the modalities for implementing the principle set out in article 8, paragraph 2.

83. Mr. ROSENSTOCK (Rapporteur) said that he, too, understood the concerns expressed by Mr. Economides and proposed that, to take them into account, the word "rebuttable" should be inserted in the fifth sentence, before the words "presumption of consent".

*It was so agreed.*

*The commentary to article 8, as amended, was adopted.*

*The meeting rose at 1.05 p.m.*

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# 2604th MEETING

*Friday, 16 July 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

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## Cooperation with other bodies (*concluded*)*

[Agenda item 11]

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

1. The CHAIRMAN invited the Observer for the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe to inform the Commission of the new developments of the Council of Europe that had taken place since the fiftieth session of the Commission.

2. Mr. BENÍTEZ (Observer for the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe) said that, in 1999, the year of the celebration of its fiftieth anniversary, the Council of Europe had welcomed its forty-first member State, Georgia. The Committee of Wise Persons, presided over by Mr. Mário Soares, had been requested to review the Council's structures and activities and, on completing its work, it had prepared a report entitled "Building Greater Europe without dividing lines",[1] which stressed how valuable an asset legal cooperation activities were.

3. In the field of reservations to treaties, its primary activity, CAHDI had decided at its meeting in Paris in September 1998 to set itself up as the European observatory of reservations to international treaties.[2] CAHDI was being helped in its work by the Group of Specialists on Reservations to International Treaties, in whose meetings Mr. Hafner and Mr. Pellet had taken part. The main result of the Group's work had been the adoption by the Committee of Ministers of the Council of Europe of recommendation No. R (99) 13 on responses to inadmissible reservations to international treaties.[3] The recommenda-

* Resumed from the 2585th meeting.

[1] Council of Europe (Strasbourg, 1998).

[2] Ibid., Committee of Ministers, document CM(98)172, appendix VI.

[3] Ibid., 670th meeting of the Ministers' Deputies (18 May 1999).

tion took account of the fact that the legal departments of the ministries of foreign affairs of the member countries of the Council of Europe did not always have the necessary resources to evaluate the complexity of all reservations formulated in respect of international treaties. In the recommendation, the Committee of Ministers recognized that, although the 1969 Vienna Convention was the main reference in that regard, subsequent developments, in particular the formulation of reservations of a general character and the increasing role of the monitoring bodies provided for by certain treaties, had not been envisaged when the Convention had been adopted. On the basis of that finding and taking account of what was known as the "Strasbourg approach", the Committee of Ministers had appended to its recommendation a set of model response clauses to reservations, which States could use when they had doubts about the admissibility of reservations. It contained a whole range of responses, from the acknowledgement of a reservation to an objection to a reservation regarded as inadmissible, together with a statement either that the reserving State was bound by all the provisions of the treaty or that there could be no treaty relationship between the reserving State and the objecting State. One point worth mentioning was the fact that the Committee of Ministers had also proposed the solution of the establishment of a dialogue with the reserving State in order to determine the underlying reasons for the reservation. In that connection, it should be noted that a number of non-member States of the Council of Europe were taking part in CAHDI activities. During one of its meetings, for example, the Group of Specialists on Reservations to International Treaties had had an exchange of views with an observer from Canada on a reservation by Canada[4] to the Convention on Environmental Impact Assessment in a Transboundary Context and, more generally, on the question of the consent of federal States to be bound by treaties. In the exercise of its functions as the European observatory of reservations to international treaties, CAHDI focused on reservations formulated by States to multilateral treaties which included human rights elements in the broad sense, as well as on reservations to Council of Europe instruments. During a meeting of the Group of Specialists on Reservations to International Treaties, it had been found that some reservations formulated by the State of Bahrain to several multilateral human rights conventions could give rise to doubts as to their admissibility. The Group had requested the German delegation to establish a dialogue with the authorities of Bahrain in order to determine the underlying reasons for those reservations. CAHDI had also begun considering the document submitted by the Netherlands delegation on "Key elements regarding reservations at the various stages of the process of concluding treaties (negotiation, signature and ratification) and at the post-ratification stage". That text should be adopted by CAHDI in early September 1999.

4. Another CAHDI activity related to the Pilot Project of the Council of Europe on State practice relating to State succession and issues of recognition. On the basis of information collected as part of that project, CAHDI was working with three research institutes on a report which would be submitted to the Secretary-General of the Council of Europe in September 1999 and then transmitted to the Secretary-General of the United Nations together with recommendation No. R (99) 13 on responses to reservations as part of the Council of Europe contribution to the United Nations Decade for International Law. [5] In a third area of activity which related to the consent of States to be bound by treaties, CAHDI had published a report in 1996 describing the relevant practice and legislation of 23 member States. It had begun updating that report to take account, on the one hand, of changes in the situation in some member States and, on the other, of the increase in the number of member States of the Council of Europe. At its meeting in Vienna in March 1999, CAHDI had joined in the celebration of the centennial of the first International Peace Conference.

5. The Council of Europe's human rights activities had been marked by the start of the work of the new European Court of Human Rights, which still had only 40 judges, since the judge from the Russian Federation had not yet been elected. Paradoxically, the restructuring of the Court had been the result of the increase in the number of cases, but that increase had become even greater since the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby establishing the Court. In late June 1999, the Court had had before it nearly 10,000 registered complaints. The President of the Court had therefore conducted an analysis of its operations in order to make it more effective. Moreover, in resolution (99) 50, adopted on 7 May 1999, the Committee of Ministers had decided to establish the Office of the Council of Europe Commissioner for Human Rights, which would be a non-judicial body to promote education in, awareness of and respect for human rights, as provided for in Council of Europe instruments. Since the competence of that body complemented that of the existing human rights monitoring bodies, it would not be authorized to hear individual complaints. The Commissioner was to be elected by late 1999 by the Parliamentary Assembly of the Council of Europe from a list of three candidates drawn up by the Committee of Ministers. The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, which had been opened for signature in Oviedo, Spain, in April 1997, had been signed by 28 member States of the Council of Europe and ratified by four, but had not yet entered into force, since five ratifications were necessary. The Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings had also been adopted, but had not entered into force either.

6. With regard to the fight against corruption in which the Council of Europe was interested less because of the need to protect fair international trade than because of the threat corruption posed to the basic principles for which it stood, the new developments which had taken place in the past year included the Criminal Law Convention on

[4] *Multilateral Treaties Deposited with the Secretary-General* (United Nations publication (Sales No. E.99.V.5), document ST/LEG/SER.E/17), p. 895.

[5] See 2575th meeting, footnote 4.

Corruption, which had been adopted by the Committee of Ministers on 5 November 1998, opened for signature on 27 January 1999 and signed by 27 States. On 5 May 1998, the Committee of Ministers adopted resolution (98) 7 on Authorizing the Partial and Enlarged Agreement establishing the "Group of States against Corruption—GRECO". According to articles 1 and 2 of its statute, the aim of GRECO was to improve the capacity of its members to fight corruption by monitoring the implementation, through a dynamic process of mutual evaluation and peer pressure, of the guiding principles for the fight against corruption adopted by the Committee of Ministers of the Council of Europe on 6 November 1997, as well as legal instruments to be adopted in pursuance of the Programme of Action against Corruption. Those instruments were the Criminal Law Convention on Corruption and the draft Civil Law Convention on Corruption,[6] which was to be adopted by late 1999. A code of conduct for public officials was also to be adopted by the end of the year. GRECO had started operating in 1999.

7. Mr. LUKASHUK said that he was puzzled by the titles "Criminal Law Convention on Corruption" and "draft Civil Law Convention on Corruption", which implied that there were two branches of international law, namely, international criminal law and international civil law. On the basis of that approach, perhaps a "convention on constitutional law" would one day be drafted. He would like to hear the explanations of the Observer for CAHDI on that point.

8. Since the provisions of the Criminal Law Convention on Corruption were not directly applicable in States, but had to be implemented by internal criminal law, he asked whether that corresponded to a general principle and whether the maxim *nullum crimen sine lege* referred to a *lex* which was national only.

9. According to article 18, paragraph 1, and article 19, paragraph 2, of the Criminal Law Convention on Corruption, the new concept of the criminal responsibility of legal persons which had thus far existed only in United States law, was being introduced in European law. On that point as well, he would like to hear the opinion of the Observer for CAHDI.

10. Mr. SIMMA said that he had been struck by two of the model alternative concluding statements in response to non-specific and specific reservations contained in the appendix to recommendation No. R (99) 13. In alternative (*c*), the Government of State X objected to the reservations formulated by the Government of State Y, but that objection did not hinder the entry into force of the Convention as between State Y and State X. The same was true in alternative (*d*). The Convention was thus in force between State X and State Y, but it was indicated that State Y could not benefit from those reservations. The possibility, and even the admissibility, of such responses was very controversial. He wished to know whether those questions had been discussed by CAHDI, whether there had been opposing views or whether the text of the recommendation had been adopted unanimously.

11. Mr. AL-KHASAWNEH said that both article 18 of the draft Civil Law Convention on Corruption and article 34 of the Criminal Law Convention on Corruption provided for partial territorial application limited to the territories designated by the parties. He wished to know whether that was simply a legal device, as well as whether those two instruments would apply to States outside the Council of Europe.

12. Mr. GOCO welcomed the fact that there was increasing recognition of the international dimension of corruption and recalled that work on the question had already been done by the United Nations, OAS and non-governmental organizations such as the International Bar Association and Transparency International. Although a great deal of progress had been made in combating corruption by public servants, there was one area which had not yet been dealt with, that of the theft of a nation's wealth by an unscrupulous leader. No preventive measure could be taken to combat that problem, which could nevertheless destroy a country. Punitive measures could, however, be envisaged. While it was very important for a code of conduct to define the obligations of officials, it must also be ensured that such a code was respected and any instrument to fight corruption had to be accompanied by the establishment of a monitoring body, for, otherwise, it would remain a dead letter.

13. Mr. DUGARD, referring to the collective action that the Council of Europe was planning to take to ensure that reservations to treaties were not too general and therefore inadmissible, said that he would like to know more about the measures adopted in respect of the reservations formulated by the State of Bahrain and, in particular, whether such measures had taken the form of negotiations or of a declaration. In any event, that showed that progress was being made on the rejection of inadmissible reservations.

14. Mr. ECONOMIDES said that he had taken note with great interest of recommendation No. R (99) 13, which contained a graduated list of possible responses of States to inadmissible reservations. He did not know whether the purpose of that recommendation was to promote joint action by the member States of the Council of Europe, but it was in any event extremely useful to the legal departments of ministries of foreign affairs, which could use it as a basis for responding to reservations that came close to being inadmissible. He nevertheless regretted that the Observer for CAHDI had not referred to the activities of the European Commission for Democracy through Law (Venice Commission), which had recently conducted a study on the legal foundations of foreign policy[7] and sent a questionnaire to the member States on the capacity of federated entities to conclude international agreements with third States and the relationship between federal Governments and federated entities as far as the implementation of international agreements was concerned.[8]

15. Mr. BENÍTEZ (Observer for the Ad Hoc Committee of Legal Advisers on Public International Law of the

[6] Council of Europe, Parliamentary Assembly, document 8341.

[7] Ibid., Report on the legal foundation for foreign policy (Strasbourg, 1998), document CDL-INF(1998)013.

[8] Ibid., Federal and regional States (Strasbourg, 1997), document CDL-INF(1997)005.

Council of Europe), replying to Mr. Lukashuk, said that, in choosing the titles "Criminal Law Convention on Corruption" and "Civil Law Convention on Corruption", the Multidisciplinary Group on Corruption had certainly not intended to create new categories of public international law. It had simply meant to give those texts titles that were as general as possible, while providing an accurate idea of their content and scope. Their scope was very ambitious and went well beyond that of all other international instruments already adopted in that regard. The problems that national authorities would inevitably encounter in translating and explaining those titles would have to be mitigated by the explanations accompanying the text of those instruments.

16. As to whether the provisions of the Criminal Law Convention on Corruption were directly applicable, Mr. Lukashuk was right: in all cases, the Convention left it to the national authorities of the States parties to criminalize the offences it was designed to punish. It must, however, be stressed that, by agreeing to establish GRECO, which was open to participation on an equal footing by member and non-member States of the Council of Europe, the Committee of Ministers had established monitoring machinery which would help guarantee the effectiveness of and respect for that Convention. GRECO met the concerns expressed by Mr. Goco in that regard.

17. The concept of responsibility of legal persons to which Mr. Lukashuk had referred in the context of the Criminal Law Convention on Corruption was new to most continental European systems. It had been included in the Convention because several non-member States of the Council of Europe, more and more of which were taking an interest in its work, had participated actively in its drafting.

18. With regard to Mr. Simma's comments on alternatives (*c*) and (*d*) of the model concluding statement contained in the appendix to recommendation No. R (99) 13, he indicated that those provisions had been discussed at length at all levels, including in the Committee of Ministers. It had been asked, in particular, whether two nearly identical provisions should be retained. Alternative (*d*) differed from alternative (*c*) only in its last sentence, the aim of which was to make it slightly more specific, but it thus served an instructive purpose.

19. The negative impact of inadmissible reservations on the effectiveness of international conventions, particularly those relating to human rights, was a matter of constant concern to the Committee of Ministers. CAHDI had, moreover, begun its work in that field with a study of the joint "Strasbourg approach", the principle of which was referred to in the ninth preambular paragraph of recommendation No. R (99) 13. That approach had already been the subject of far-reaching working group discussions.

20. In reply to Mr. Al-Khasawneh's questions, he said that the possibility of partial territorial application provided for in the article common to the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption was a standard treaty drafting technique. Although the characteristic features of the territories of the member States of the Council of Europe could not be a pretext for not combating money laundering and corruption, it must not be forgotten that those texts were the outcome of negotiations in which account had been taken of real situations. Council of Europe instruments, particularly those relating to the fight against corruption were, moreover, open to voluntary accession by non-member States, as was GRECO.

21. Referring to Mr. Dugard's comments on the principle of collective action against inadmissible reservations, he described a discussion on the consent of federal States to be bound by a treaty which had taken place in the CAHDI Group of Specialists on Reservations to International Treaties in March 1999 and in which the observer for Canada had stated that, in his country, the provinces had legislative jurisdiction and that the federal State could not guarantee the implementation of the Criminal Law Convention on Corruption in their territory. Some delegations had expressed the view that federal States whose federated entities had legislative jurisdiction had to try to ensure in advance that those entities would consent to be bound by a treaty, so that, at the time of accession to the treaty, the consent of the federal State would also be valid for all its constituent units. The discussion was still going on and some members of the Council of Europe had already indicated that it was not to be ruled out that their Governments might formulate reservations of that kind. Any collective action that might be envisaged to deter them could be only of an unofficial nature, the idea being to establish a dialogue with the reserving State to determine the underlying reasons which had prompted it to formulate an inadmissible or nearly inadmissible reservation. It could not be said that that practice had always been successful, but it had proved useful and that was why it was covered in alternative (*f*) of the model concluding statements contained in recommendation No. R (99) 13. CAHDI was now holding discussions of that kind with Bahrain through the representative of one of its member States. Those were, of course, informal consultations, since States were not obliged to give up the slightest bit of sovereignty—although they could do so—to respond to individual reservations. That method simply made it possible to obtain additional information.

22. With regard to Mr. Goco's question about the possibility of prosecuting leaders for corruption, he said that article 1 of the Criminal Law Convention on Corruption contained a definition of a public official which would, if interpreted broadly, cover the prime minister, i.e. the head of Government. The question of the prosecution of a head of State was, however, an entirely different matter. Although it warranted consideration, it had not been dealt with in the Convention because of the very sensitive issues it raised. The future could not be predicted, however, and there was nothing to indicate that progress could not be made in that regard.

23. Replying to Mr. Economides' comment, he said that the recommendation in question did not aim to promote collective action, but to help the legal departments of ministries of foreign affairs. He also requested the Commission to forgive him for not having referred to the Venice Commission, which was one of the most important bodies and it was doing remarkable work in the field of constitutional law. He would see to it that the documents it adopted were transmitted to the International Law Commission.

24. Mr. PELLET, referring to Mr. Dugard's question and the reply by the Observer for CAHDI, asked the Observer whether there were cases in which collective action had been successful and had prompted the reserving State to change its position.

25. Mr. BENÍTEZ (Observer for the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe) said that there had been cases in which such action had led the reserving State to change its position, but he could not think of any at the moment. He would stress, however, that the success of such action should not be judged on the basis of whether or not it led the reserving State to amend or withdraw its reservation. The dialogue in question was valuable especially because it gave the other States parties information which they had not had before and on the basis of which they could decide not to formulate objections to reservations.

26. The CHAIRMAN said that, in his excellent statement, the Observer for CAHDI had perhaps not placed enough emphasis on the similarity of the topics which the Council of Europe and the Commission considered and which enabled the two bodies to benefit from each other's work. For example, the chapter of the European Convention on Nationality relating to State succession had been very useful to the Commission in its work on nationality in relation to the succession of States.

27. In conclusion, he once again thanked the Observer for CAHDI and expressed the hope that its cooperation with the Commission would continue.

## Draft report of the Commission on the work of its fifty-first session (*continued*)

**CHAPTER IV.** ***Nationality in relation to the succession of States*** **(continued) (A/CN.4/L.581 and Add.1)**

**E. Text of the draft articles on nationality of natural persons in relation to the succession of States adopted by the Commission on second reading (*continued*) (A/CN.4/L.581/Add.1)**

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*)

*Commentaries to articles 9 and 10*

*The commentaries to articles 9 and 10 were adopted.*

*Commentary to article 11*

28. Mr. PELLET said that the use of the words "grey area" in the last sentence of paragraph (6) was unfortunate because the jurisdictions of States concerned were well established in such a case. He would prefer that sentence to end with the words "to persons concerned within competing jurisdictions of States concerned".

29. Referring to the amendment which he had proposed (2603rd meeting) to paragraph (3) of the commentary to article 7 and which the Commission had adopted, he said that he had suggested that the term "attribution" should be used instead of the term "granting" because it meant a voluntary act by the State. In fact, quite the opposite should be stated, namely, that the Commission had preferred to use the word "attribution" in order to show that the acquisition of the new nationality was not always the result of an explicit decision by the State. In general, moreover, he continued to regret the fact that the words "effective link" had been replaced by the words "appropriate link".

30. The CHAIRMAN thanked Mr. Pellet for referring back to paragraph (3) of the commentary to article 7. Although his original proposal had been adopted, it had been causing the secretariat problems. The sentence as he had just amended was the one that would be included in the commentary.

31. Mr. ROSENSTOCK (Rapporteur), supported by Mr. KABATSI, said that, in the last sentence of paragraph (6) of the commentary to article 11, it would be better to refer to "overlapping" jurisdictions rather than "competing" jurisdictions.

32. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the commentary to article 11, as amended by Mr. Pellet and the Rapporteur. The last part of the last sentence of paragraph (6) would thus read: "in resolving problems of attribution of nationality to persons concerned falling within an area of overlapping jurisdictions of States concerned."

*It was so agreed.*

*The commentary to article 11, as amended, was adopted.*

*Commentary to article 12*

33. Mr. PELLET said that, in view of the very lengthy discussion of the question, it would be going too far to say that "the said problem did not arise" at the end of paragraph (6).

34. Mr. ROSENSTOCK (Rapporteur), referring to the comment by Mr. Pellet, proposed that the end of paragraph (6) should read: "the said problem would not arise with frequency."

35. Mr. CRAWFORD said that the particular features of the family concerned in each case must be taken into consideration. He could nevertheless support the amendment proposed by the Rapporteur.

36. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the commentary to article 12, with the amendment to paragraph (6) proposed by the Rapporteur.

*It was so agreed.*

*The commentary to article 12, as amended, was adopted.*

*Commentary to article 13*

*The commentary to article 13 was adopted.*

*Commentary to article 14*

37. Mr. PELLET, supported by Mr. CRAWFORD, said that he disagreed with the excessive and entirely political

caution which seemed to have prevailed during the drafting of the commentary to article 14, and particularly its paragraph (2). Two or three examples must be given of "recent experience", as referred to in the last sentence, possibly in a footnote.

38. Mr. ROSENSTOCK (Rapporteur) said that he was prepared to work with the Secretary of the Commission to draft a footnote along the lines indicated by Mr. Pellet.

39. Mr. TOMKA, supported by Mr. SIMMA, proposed that the consideration of the commentary to article 14 should be suspended until the footnote had been prepared.

40. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the commentary to article 14 on the understanding that the necessary changes would be made by the secretariat.

*It was so agreed.*

*The commentary to article 14 was adopted on that understanding.*

*Commentaries to articles 15 to 18*

*The commentaries to articles 15 to 18 were adopted.*

*Commentary to article 19*

41. Mr. PELLET said that he had a problem with the last sentence of paragraph (1), and especially with the words "negative role", which were not clear enough. The words "from the standpoint of general principles and custom" were also awkward, since the principles in question derived from custom and there should be no opposition between the two.

42. Mr. ROSENSTOCK (Rapporteur) said that the decision of States to grant their nationality to certain persons depended on their internal law. International law came into play only when that decision gave rise to a problem, for example, when it created cases of statelessness or prevented family reunion. The wording in question was therefore intended to indicate that there was a point where internal law ended and the international law of nationality began. That was how the "negative role" of international law was to be understood.

43. Mr. CRAWFORD recalled that the Commission had had a lengthy substantive debate on that point at the forty-ninth session, in 1997.[9] It had been shown, for example, that, when State A invaded State B, it could not try to impose its nationality on the inhabitants of State B. The words "In the final analysis" at the beginning of the sentence were not appropriate. They should be replaced by the words "In most cases".

44. Mr. SIMMA said that he agreed with the Rapporteur's interpretation of the words "negative role". With regard to Mr. Pellet's second comment, if "general principles" meant the principles referred to in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, they should be referred to separately.

45. Mr. PELLET said that, in his opinion, the principles in question were the customary principles of international law, not the general principles of law referred to in the Statute of the Court. He would like the last sentence to be replaced by wording which would show that "In the final analysis, the general principles of international law concerning nationality are limitations on the exercise of the discretionary power of States".

46. Mr. ROSENSTOCK (Rapporteur) said that that wording missed the point of the sentence. It had to be made clear that, although the attribution of nationality was primarily an internal law matter, it was not so in all cases.

47. Mr. PELLET proposed that the last sentence should be amended to read: "In the final analysis, although nationality pertains essentially to the internal law of States, the general principles of the international law of nationality constitute limits to the discretionary power of States."

48. The CHAIRMAN said that that wording solved the problem and that, if he heard no objection, he would take it that the Commission agreed to that proposal.

*It was so agreed.*

49. Mr. GAJA said that, in paragraph (3), the words "the successor State may be limited in its discretion to extend its nationality to persons who lack an effective link with the territory concerned" might give the impression that States could refuse their nationality and thus create cases of statelessness, whereas that was exactly what the draft articles were trying to prevent. In order to avoid that impression, he proposed that the following sentence should be added at the end of paragraph (3): "Moreover, the judgment in the *Nottebohm* case dealt only with the admissibility of a claim for diplomatic protection and did not imply that a person could be generally treated as stateless."

50. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to that proposal.

*It was so agreed.*

*The commentary to article 19, as amended, was adopted.*

*Commentary to Part II*

51. The CHAIRMAN, replying to a question by Mr. KUSUMA-ATMADJA, said that the Commission had already included some paragraphs of a general nature as a commentary to the draft articles as a whole. The same procedure was being followed at the beginning of part II. The solution was an excellent one.

52. Mr. PELLET, replying to a comment by Mr. KATEKA, proposed that paragraph (1) should be split in two and that paragraph (2) should begin with the words: "As regards the criteria used ...". That was the point at

[9] See *Yearbook ... 1997*, vol. I, 2486th meeting, paras. 8 et seq., and 2499th meeting, paras. 50-64.

which the commentary went from general considerations to detailed explanations.

*The commentary to Part II, as amended, was adopted.*

*Commentary to article 20*

53. Mr. PELLET said that he had doubts about several footnotes. In his opinion, it was a bad idea, in a final commentary, to refer the reader to earlier reports, which either provided important information and should be reproduced or were not relevant and should be passed over in silence. The commentary must be a text that could stand on its own. Perhaps the Rapporteur could make some changes along those lines.

54. Mr. SIMMA said that Mr. Pellet's point was well taken, but some footnotes referred to over 25 paragraphs. It would be very difficult to summarize, much less reproduce, such lengthy passages of earlier reports. Using "op. cit." was also open to criticism because it was not always easy to know which work was being referred to.

55. Following an exchange of views on the presentation of footnotes and bibliographical references in which Mr. CRAWFORD, Mr. KATEKA and Mr. SIMMA took part, the CHAIRMAN said that the system used in the United Nations was well established and practically impossible to change.

56. Mr. PELLET said that, although it was understandable that the Commission should condense its commentaries as much as possible, they might be less helpful for those in the practice of international law. In any event, referring to lengthy passages of earlier reports was not the usual procedure, since that was tantamount to endorsing paragraphs which had not been reconsidered and on which some members might have reservations to formulate.

57. Mr. ROSENSTOCK (Rapporteur) said that, in his view, the commentary must be easy to use and therefore as concise as possible. Footnotes provided guidance for readers who wanted to go into greater detail on particular points.

58. Mr. SIMMA said that all the footnotes which referred to old reports dealt with paragraphs describing State practice. If every example of such practice was to be included, the commentary would double in volume and would be much less easy to use, as Mr. Rosenstock had pointed out.

59. The CHAIRMAN said that the Commission might adopt the commentary under consideration, on the understanding that the footnotes referring to some passages of earlier reports meant not that it endorsed the contents of those reports, but that it simply wanted to refer to examples illustrating the recent practice of States.

*The commentary to article 20 was adopted.*

*The meeting rose at 1.15 p.m.*

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# 2605th MEETING

*Monday, 19 July 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

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

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. Mr. CANDIOTI (Chairman of the Drafting Committee), introducing the report of the Drafting Committee on the draft articles on State responsibility (A/CN.4/L.574 and Corr.1 and 3), said that the Committee had held 26 meetings at the current session of the Commission and that 13 of them had been devoted to State responsibility.

2. At the fiftieth session, the Drafting Committee had begun the second reading of the draft articles on State responsibility and had been able to complete work on all the articles referred to it at that session.[4] It was the Commission's practice not to take action on articles received from the Committee in the absence of commentaries and also to defer the adoption of articles on second reading until the Committee had considered all the articles on the topic. The Committee was thus able to make changes in earlier articles, if necessary, in the light of subsequent articles. It was transmitting the articles to the Commission on that understanding, and recommending that it should take note of its report.

3. At the current session the Drafting Committee had had before it the articles in chapters III (Breach of an international obligation), IV (Responsibility of a State in respect of the act of another State) and V (Circumstances precluding wrongfulness) of part one of the draft. The Commission had discussed those chapters extensively and, in preparing the articles, the Committee had taken account of the comments and decisions made.

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* Resumed from the 2600th meeting.

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

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

[3] Ibid.

[4] For the text of the draft articles, see *Yearbook ... 1998*, vol. I, 2562nd meeting, p. 287, para. 72.

4. The titles and texts of the draft articles adopted by the Drafting Committee at the fifty-first session read:

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

*Article 16. Existence of a breach of an international obligation*

**There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.**

*Article 17*

**[Deleted]**

*Article 18. International obligation in force for the State*

**An act of a State shall not be considered a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.**

*Article 19*

**1. [Deleted]**

. . .

*Article 20*

**[Deleted]**

*Article 21*

**[Deleted]**

*Article 22*

**[See article 26 bis]**

*Article 23*

**[Deleted]**

*Article 24. Extension in time of the breach of an international obligation*

**1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.**

**2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.**

**3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with what is required by that obligation.**

*Article 25. Breach consisting of a composite act*

**1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.**

**2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.**

*Article 26*

**[Deleted]**

*Article 26 bis*

. . .

CHAPTER IV

RESPONSIBILITY OF A STATE IN RESPECT OF THE ACT OF ANOTHER STATE

*Article 27. Aid or assistance in the commission of an internationally wrongful act*

**A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:**

**(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and**

**(*b*) The act would be internationally wrongful if committed by that State.**

*Article 27* **bis.** *Direction and control exercised over the commission of an internationally wrongful act*

**A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:**

**(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and**

**(*b*) The act would be internationally wrongful if committed by that State.**

*Article 28. Coercion of another State*

**A State which coerces another State to commit an act is internationally responsible for that act if:**

**(*a*) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and**

**(*b*) The coercing State does so with knowledge of the circumstances of the act.**

*Article 28* **bis.** *Effect of this Chapter*

**This Chapter is without prejudice to the international responsibility, under other provisions of the present articles, of the State which commits the act in question, or of any other State.**

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

*Article 29. Consent*

**Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.**

*Article 29* **bis.** *Compliance with peremptory norms*

**The wrongfulness of an act of a State is precluded if the act is required in the circumstances by a peremptory norm of general international law.**

*Article 29* **ter.** *Self-defence*

**The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.**

*Article 30*

**[Countermeasures in respect of an internationally wrongful act]**

**. . .**

*Article 31. Force majeure*

**1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.**

**2. Paragraph 1 does not apply if:**

**(*a*) The occurrence of force majeure results, either alone or in combination with other factors, from the conduct of the State invoking it; or**

**(*b*) The State has assumed the risk of that occurrence.**

*Article 32. Distress*

**1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question had no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.**

**2. Paragraph 1 does not apply if:**

**(*a*) The situation of distress results, either alone or in combination with other factors, from the conduct of the State invoking it; or**

**(*b*) The act in question was likely to create a comparable or greater peril.**

*Article 33. State of necessity*

**1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:**

**(*a*) Is the only means for the State to safeguard an essential interest against a grave and imminent peril; and**

**(*b*) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.**

**2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:**

**(*a*) The international obligation in question arises from a peremptory norm of general international law;**

**(*b*) The international obligation in question excludes the possibility of invoking necessity; or**

**(*c*) The State has contributed to the situation of necessity.**

*Article 34*

**[See article 29 ter]**

*Article 34 bis*

**. . .**

*Article 35. Consequences of invoking a circumstance precluding wrongfulness*

**The invocation of a circumstance precluding wrongfulness under this Chapter is without prejudice to:**

**(*a*) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;**

**(*b*) The question of compensation for any material harm or loss caused by the act in question.**

5. The Commission's general view, also expressed by some Governments, was that chapter III was unnecessarily detailed and created difficulties in interpretation. In his summary of proposals concerning chapter III, in paragraph 156 of his second report on State responsibility (A/CN.4/498 and Add.1-4), the Special Rapporteur had substantially reduced the number of articles.

6. The first article in chapter III was article 16 (Existence of a breach of an international obligation). The Special Rapporteur had proposed that articles 16, 17, paragraph 1, and 19, paragraph 1, should be amalgamated. The Drafting Committee had found the new structure to be economical, coherent and logical. In addition, taking into account a suggestion made in the Commission, the Committee had incorporated the ideas expressed in articles 20 and 21 in article 16.

7. Articles 20 and 21 dealt with the distinction between obligations of conduct and of result, but the Special Rapporteur had suggested their deletion on the grounds that the obligations could not always be divided as specified by the articles, that the distinction appeared to have no consequences for the rest of the draft articles and that the words "obligations of conduct" were misleading, while the words "obligations of means" would be more accurate. Most members of the Commission had supported that analysis and the idea of deleting articles 20 and 21. Some, however, had expressed concern, since the fact that the distinction had gained currency and acceptance in international law suggested that it should be retained somewhere in the draft. In order to address those concerns, the Drafting Committee had agreed that the description of various forms of obligations could be made in the commentary, while the text should refer only to the "character" of the obligation, replacing the reference to "content" of the obligation proposed by the Special Rapporteur. The new phrase not only brought the substance of article 19, paragraph 1, into article 16 but also provided a vehicle by which the notions of obligations of means and result could be explained in the commentary. The commentary would also explain why the Commission had not entirely ignored the distinction between different types of obligations: in some instances, it could be conceptually useful, even though it was of no apparent normative utility for the purposes of the draft. The commentary would also explain the different types of obligations and the reasons for looking at them slightly differently, including the change in the name of the obligation of "conduct" to obligation of "means".

8. The Drafting Committee had decided to delete article 23. The views expressed in the Commission concorded with the Special Rapporteur's conclusion that article 23 was confusing and that the obligation of prevention

was a form of obligation of result. The commentary to article 16 would also deal with that issue.

9. With regard to substance, the Commission had discussed the relationship between wrongfulness and responsibility in the context of article 16, in other words, the relationship between chapters III and IV. The Special Rapporteur had proposed inserting the words "under international law" to qualify the reference to the act of the State in article 16. The words were intended to stress the point that the requirement that the State had to comply with an obligation derived not only from the obligation itself but from a system of international law that imposed that obligation, a system that also addressed the questions of conflicting obligations, circumstances precluding wrongfulness and the hierarchy of the rules of international law. Views in the Commission had differed on the necessity or utility of including the phrase "under international law". After lengthy discussion, the Drafting Committee was of the view that the reference was potentially confusing. Article 4 (Characterization of an act of a State as internationally wrongful) already provided that the characterization of an act as wrongful was governed by international law. The relationship between article 4 and chapter V would be established in the commentary to the article.

10. In terms of drafting, article 16 as proposed by the Drafting Committee was basically the same as the one adopted on first reading. The Special Rapporteur had suggested the replacement of the words "is not in conformity with" with the words "does not comply with", but the Committee had found the language of the article as adopted on first reading more felicitous. The words "regardless of its origin" in the text proposed by the Committee were taken from article 17, paragraph 1, and made it clear that secondary rules did not distinguish between customary, conventional or other sources of the obligation or between obligations *ex contractu* or *ex delictu*. The phrase was a useful addition. The Committee had also agreed that the word "origin", as used in the text of article 17 as adopted on first reading, was broader than "source" as proposed by the Special Rapporteur. The Committee had deleted the words "whether customary, conventional or other" from article 17, paragraph 1, taking the view that they could be used and explained in the commentary and that keeping them would have made the text unnecessarily cumbersome. The title of article 16 remained unchanged, and because of the new formulation of the article, articles 17, 19, paragraph 1, 20, 21 and 23 were deleted.

11. Article 18 (International obligation in force for the State) dealt with the principle of inter-temporal law in State responsibility. As adopted on first reading, article 18 had consisted of five paragraphs. Paragraph 1 had stated the general principle of inter-temporal law, paragraph 2 had set out an exception to that principle with respect to peremptory norms and paragraphs 3 to 5 had addressed the inter-temporal consequences of breaches having a continuing character or involving composite and complex acts. The Special Rapporteur had suggested retaining paragraph 1 but reformulating it as a positive guarantee as opposed to a conditional statement, covering the issues addressed in paragraph 2 in the context of chapter V and moving paragraphs 3 to 5 to articles 24 and 25, which dealt with the same classifications as were identified in paragraphs 3 to 5.

12. The Drafting Committee had agreed to the divide of article 18 but had redrafted the text proposed by the Special Rapporteur for paragraph 1. The new version was simpler and it more clearly stated the principle of inter-temporal law: that an act of a State would not be considered a breach of an international obligation unless the State was bound by the obligation in question at the time the act occurred. The title of article 18 had also been simplified. Article 19, paragraph 1, and articles 20 to 23 had been deleted; the remaining paragraphs of article 19 had not yet been referred to the Committee.

13. Article 24, as adopted on first reading, had comprised one paragraph. The Special Rapporteur had thought it should be reformulated, combining the essential elements of articles 25, paragraph 1, 26 and 18, paragraph 3. The new article 24 (Extension in time of the breach of an international obligation) consisted of three paragraphs: paragraph 1 on the question of the completion of a wrongful act not having a continuing character, paragraph 2 on the duration of a wrongful act having a continuing character, and paragraph 3 on the beginning and duration of the violation of an obligation to prevent a given event.

14. Article 24, paragraph 1, corresponded to article 24 as adopted on first reading. It described what had been referred to as an "act not extending in time" and what the new version referred to as an act "not having a continuing character". The redrafted text was simpler and made a distinction between the completion of the act and the continuation of the effect. It included the notion of completed acts, meaning any act not having a continuing character, even if not necessarily completed in a single instance. The text adopted on first reading had drawn a distinction between an act completed at a given moment and acts that continued in time. Acts of States usually took some time to be completed, however, and the critical distinction was between the act that had not yet stopped and the one that was finished. The Drafting Committee had therefore opted for the text proposed by the Special Rapporteur, with two minor changes. It had added the words "at the moment" after the word "occurs", an addition made to provide a more precise description of the time frame when a wrongful act was performed. The Committee had also deleted the word "subsequently" at the end of the paragraph, since it was superfluous. It had felt that the commentary adopted on first reading should be reconsidered, since it used a series of concrete examples of instantaneous or continuing acts that was misleading, in that the characterization of those acts depended not only on primary rules but also on collateral circumstances.

15. Article 24, paragraph 2, described the continuing wrongful acts dealt with in article 21, paragraph 1, and article 18, paragraph 3, as adopted on first reading. The Special Rapporteur's revised text merged the two sentences of article 25, paragraph 1, for elegance. The insertion of the introductory phrase "Subject to article 18" had been criticized as being unnecessary because article 18 was overriding. The Drafting Committee had agreed and had deleted the phrase, believing that the commentary could explain the relationship more adequately. The Com-

mittee had also agreed with the idea of joining the two sentences of the paragraph and had made some drafting changes. The new text avoided the reference to the beginning of a wrongful act that had been used in the text adopted on first reading: it was difficult, in the abstract, to determine at what point a wrongful act began, and the answer to the question depended on collateral circumstances, as would be explained in the commentary. Otherwise, the text before the Commission incorporated the substance of articles 25, paragraph 1, and 18, paragraph 3.

16. Article 24, paragraph 3, corresponded to article 26 adopted on first reading, which had described as a continuing wrongful act a breach of an international obligation requiring a State to prevent a given effect. The Special Rapporteur had indicated that the presumption on which the article was based was flawed: some breaches might be continuing acts, but others not, depending on the context. The new formulation addressed only the question of continuing breaches of obligations of prevention. It, too, was subject to article 18, but since it had been decided to avoid cross-referencing, the relationship with article 18 would be explained in the commentary. The Drafting Committee had deleted the phrase "its continuance" as unnecessary, but no other changes had been made to the wording proposed by the Special Rapporteur.

17. The new title of article 24 as proposed by the Drafting Committee corresponded to the new content. With the article's new formulation, article 26 was deleted.

18. Article 25 (Breach consisting of a composite act) dealt with the composite wrongful acts that had previously been covered in articles 25, paragraph 2, and 18, paragraph 4, adopted on first reading. In the original version, the notion of a composite act applied to an obligation breached by a series of actions relating to different cases. The text proposed by the Drafting Committee limited the notion of composite acts to when the primary norm defined the wrong by reference to a systematic or composite character.

19. Paragraph 1 dealt with a situation where a series of actions or omissions occurred which, taken together, were sufficient to constitute a composite wrongful act. The discussion in the Commission had indicated support for the principle set out in that paragraph, but there had been difficulties with the drafting and the Drafting Committee had made changes to prevent misinterpretation. The term "composite act" was not used in paragraph 1, as it would have caused drafting difficulties, but it was retained in the title of the article. The Committee had also avoided using the word "established", as in the text adopted on first reading, since it could confuse the question of evidence of conduct with the description of the conduct. Since paragraph 1 was concerned with the essential elements that, taken together, constituted the breach, the Committee had preferred the word "constitute".

20. The new text of paragraph 1 described a composite act as a series of actions or omissions defined in aggregate as wrongful, such as apartheid, genocide or systematic breaches prohibited by a trade agreement. It did not exclude the possibility that every single act in the series could be wrongful in accordance with another norm, nor did it affect the temporal element in the commission of the acts: a series of acts or omissions could occur at the same time or sequentially, at different times. Those issues would be explained in the commentary.

21. Paragraph 1 did not purport to suggest that the whole series of wrongful acts had to be committed in order to fall into the category of composite wrongful acts. The series of actions or omissions might be interrupted, so that it was never completed. The commentary would make that issue clear as well.

22. Article 25, paragraph 2, was a simplified version of the same paragraph adopted on first reading, with no change in substance. It dealt with the extension in time of the composite act. Once a sufficient number of acts had occurred, producing the result of the composite act as such, the breach was dated to the first of the acts in the series. The status of that first act was equivocal until enough of the series had occurred to establish the wrongful act, but at that point the act was regarded as having occurred over the whole period. In order for a single act to be wrongful, it had to be part of a series, and the series had to remain not in conformity with the international obligation. That was the reason for the addition of the word "remain" in the final part of the paragraph. The opening phrase, "In such a case", referred to the case mentioned in paragraph 1. Paragraph 2 was subject to the provisions of article 18, a matter that would be explained in the commentary.

23. Article 25, paragraph 3, adopted on first reading, had been deleted. It had dealt with the notion of complex acts also addressed in article 18, paragraph 5, which the Commission had found unnecessary.

24. Article 27 (Aid or assistance in the commission of an internationally wrongful act) had originally covered both aid and assistance and direction and control. Following the debate in the Commission, the Special Rapporteur had proposed that the two should be separated, with direction and control now being covered in article 27 bis (Direction and control exercised over the commission of an internationally wrongful act). Article 27 assumed the existence of an internationally wrongful act of a State which was aided or assisted. The wrongful act was that of aiding or assisting. The matter should not be seen as vicarious liability of the assisting State for the assisted State. The assisted State was still responsible for its own act, while the assisting State was responsible for the aid or assistance it had given, and only to the extent of such aid or assistance.

25. The Drafting Committee had considered the advisability of qualifying the phrase "aids or assists" with the word "materially", but had felt that the qualifier was not absolutely necessary in view of the support in the Commission for limiting the provision to cases where the act would have been internationally wrongful if committed by the State itself. The Committee had decided to deal with the issue in the commentary, which would discuss the threshold of "aid or assistance". As to the necessity of using both verbs, while "assists" was marginally stronger than "aids", which on its own could have the connotation of foreign aid programmes, the Committee had felt that the two terms complemented each other and had decided to retain them in the article and in the title. The phrase "by

the latter" had been included in the *chapeau* in order to indicate that the provision did not cover the question of co-participants, which was dealt with in chapter II (The act of the State under international law), on the attribution of a wrongful act to a State. The reference in article 27, subparagraph (*a*), to "knowledge of the circumstances" required that the assisting State have knowledge of the circumstances of the act and not necessarily of its wrongfulness. It also served to limit the risk of the State that provided aid to another State which, unbeknownst to it, used that aid to finance an unlawful activity. If the aiding State was unaware of the circumstances in which the aid was used, it was not responsible.

26. In article 27 bis, the word "control" referred to a case where one State controlled another in doing something, bearing in mind that the underlying assumption of the draft, namely that each State was responsible for the acts attributable to it under chapter II. The word was not meant to refer to control in the sense of someone exercising an oversight function. Similarly, the word "directs" meant not mere incitement or suggestion but rather direction in the strong sense. While it could be subsumed under control, that was not always the case. The word "directs" alone might not be enough to establish the responsibility envisaged in the provision, and the Drafting Committee had therefore decided that the two words should be retained, with the conjunction "and". The article was limited to direction and control in the commission of an internationally wrongful act and was not a reference to more general direction and control of the State.

27. As to the distinction between articles 27 and 27 bis, the State providing aid or assistance was responsible only for doing so, in other words, to the extent of such aid or assistance. Under article 27 bis, however, the State which directed and controlled another State in the commission of an international wrongful act was responsible for the act itself because it had controlled the whole of the act. One of the effects of that formulation was that reparations in the case of aid or assistance in the context of article 27 were limited to the extent of the aid or assistance, whereas under articles 27 bis and 28 (Coercion of another State), they were determined by reference to the act itself. As for the responsibility of the directed State, the mere fact that it had been directed to do something unlawful was not an excuse under chapter V. It was incumbent on the State to decline to comply with the direction. The defence of superior orders did not exist as such for States in international law. If a State was coerced into doing something, then article 28 would apply, with the possibility of the force majeure defence envisaged in article 31. The title of the article had been amended to include a reference to direction and control "exercised over", so as to convey the connotation of domination over the commission of an internationally wrongful act.

28. The Drafting Committee had decided that article 28, would require neither that the coercion itself be unlawful nor that the act be unlawful if committed by the coercing State itself. It had favoured that approach over a narrower one requiring responsibility to be subject to the condition either that the coercion was unlawful or that the conduct coerced would have been unlawful if it had been committed by the coercing State itself. Indeed, article 28, as reflected in subparagraph (*a*), differed from articles 27 and 27 bis in that it expressly did not allow for an exemption from responsibility for the act of the coerced State in a situation in which the coercing State was not itself bound by the obligation in question. It should, however, be noted that in deciding on that approach, the Committee had worked on the assumption that coercion in article 28 was to be equated with force majeure in chapter V, and nothing less.

29. The Drafting Committee had borne in mind that the purpose of the exercise had been to determine not who was responsible for the coercion itself, but the wrongful act resulting from the action of the coerced State. Hence, the responsibility for the coercion itself would be that of the coercing State vis-à-vis the coerced State, whereas responsibility under article 28 was the responsibility of the coercing State vis-à-vis an injured third State. Indeed, article 28 bis (Effect of this Chapter) made it clear that chapter IV was without prejudice to the responsibility of the coercing State for the coercion, if that coercion was wrongful. In the latter case, it should be taken into account that chapter V applied equally to chapter IV. Consequently, the coercing State could itself rely on one of the circumstances precluding wrongfulness, for example necessity, as the basis for the lawfulness of its coercive act.

30. From a drafting standpoint, the Drafting Committee had decided to clarify article 28 by placing the two conditions in two subparagraphs, namely that the act would, but for the coercion, be an internationally wrongful act of the coerced State and that the coercing State did so with knowledge of the circumstances of the act. That approach had been seen to have the virtue of employing a formulation and structure similar to articles 27 and 27 bis. Although the knowledge element had been placed first in the other articles, it had been deemed preferable to place it in article 28 as the second condition, since the question of knowledge would not arise if the strict "but for the coercion" requirement in subparagraph (*a*) was not satisfied.

31. The words "but for the coercion" had been inserted so as to make article 28 apply only in the narrowest of circumstances, i.e. where coercion was the reason for the wrongful act, and as such was to be equated with force majeure, as envisaged in article 31. Only then would the coercing State be responsible for the act of the coerced State. The "but for the coercion" construction posited a fiction, namely an act which would have been wrongful had it not been for the coercion giving rise to the force majeure defence on the part of the coerced State. Thus, the act was not described in the opening clause of article 28 as an "internationally wrongful act", as had been done in the case of articles 27 and 27 bis, where no comparable defences existed for precluding the wrongfulness of the act of the assisted or controlled State. The Drafting Committee had considered various alternative formulations, but decided to retain the original.

32. The Drafting Committee had been mindful of some borderline cases where the coerced State might not be entirely excluded, for example where the coercion was not sufficient to satisfy the test of the force majeure defence for the coerced State under article 31, but it was sufficient to incur responsibility for the coercing State

under article 28. That narrow situation would be dealt with in the commentary and fell under article 28 bis.

33. As to the scope of the knowledge element in article 28, subparagraph (*b*), what was required was that the coercing State knew all the circumstances which would be necessary and sufficient to decide that the act was unlawful. The reference to "circumstances" was to the situation and not to the judgement of legality. Hence, while ignorance of the law was no excuse, ignorance of the facts would be material in determining responsibility. The words "of the act" had been added after "circumstances" to make that even clearer. Moreover, the commentary would explain that it must be the act which was coerced that would have been wrongful and not any subsequent or indirectly related act.

34. The shorter formulation "knowingly" had also been considered as an alternative for the knowledge requirement, but that would require the coercing State to be aware that the act would be wrongful for the coerced State. Consequently, responsibility would only arise if the coerced State was aware that the act would be wrongful as far as it was concerned. That approach had been deemed too broad and it had been felt that some limit should be placed on shifting responsibility to a State which coerced another State, since that coercion might be effected in a lawful manner. Instead, the prohibition focused not on knowledge of the circumstances of the coercion itself, but on that of the act which would have been unlawful when committed by the coerced State. The Drafting Committee had eventually decided on the shorter title "Coercion of another State".

35. Article 28 bis was a "without prejudice" clause. Its origin lay in article 28, paragraph 3, adopted on first reading. In paragraph 212 of his second report, the Special Rapporteur had proposed the formulation of that paragraph as an independent article, applicable to the whole chapter. The article aimed to avoid any *a contrario* implications arising from chapter IV in respect of responsibility stemming from primary rules which precluded certain forms of assistance or, under chapter II, for acts otherwise attributable to States. It covered both the implicated State and the acting State, and it also helped to show that the entire chapter was dealing only with situations in which the act that lay at the origin of the wrong was the act committed by one State and not by the other. If both States committed the act, then that fell within the realm of co-perpetrators, as dealt with in chapter II. Chapter IV was linked to chapter II, because it addressed special situations in which several States were involved, albeit not as co-perpetrators.

36. The Drafting Committee had decided to insert the word "international" before "responsibility" in line with previous formulations and to retain the phrase "under other provisions of the present articles" as a reference, inter alia, to article 31 which might affect the question of responsibility. It also drew attention to the fact that other provisions might be relevant to the State committing the act in question and that chapter IV in no way prejudged the issue of its responsibility in that regard.

37. The Special Rapporteur's proposal had contained two subparagraphs. The Drafting Committee had decided that subparagraph (*b*) of the proposal was too abstract and could be replaced by the reference to "or of any other State" at the end of the provision, which would cover, for example, the position of third States, together with an appropriate explanation in the commentary. The Committee had decided to retain subparagraph (*a*) with that further addition and to formulate it as a single sentence.

38. The provisions of chapter V established justifications for conduct which would otherwise be wrongful.

39. In paragraph 356 of his second report, the Special Rapporteur's proposal had been to delete article 29 (Consent) as adopted on first reading. However, the Commission had decided to keep it and refer it to the Drafting Committee, which had then produced a text based on paragraph 1 of the article adopted on first reading and deleted paragraph 2, considering it to be both inaccurate and unnecessary.

40. A number of issues had been raised by Governments and in the Commission with regard to paragraph 1 of the text adopted on first reading. One of the comments had been the lack of clarity in the words "consent validly given". There had been a request to elaborate on the elements of validity of consent, but the Drafting Committee had been of the view that the text of the article was not the proper place to spell out the circumstances under which consent would be considered valid. Consent in article 29 touched on a wide variety of issues, for example whether such consent was envisaged expressly or by inference in the primary rules, who could give consent, for what purpose, the question of ostensible authority and local authority, whether consent was given freely, etc. A related question had been whether consent was given with respect to a breach, for which the State had had the right to consent. For example, a State had no right to consent to violations of certain types of human rights, the commission of genocide and so on. That had raised the issue of consent to violations of peremptory norms. Hence, a determination on the validity of consent was complex and required consideration of a number of issues which were addressed by a body of law outside the framework of State responsibility. By including the words "valid consent", the article drew attention to an important issue that must be dealt with. The commentary to the article would elaborate on those questions.

41. Article 29 was also concerned with bilateral relations between two States and the obligation that one State owed to another. The reference to consent should therefore be understood only in respect of such a narrow bilateral relationship. Thus, a State could only consent to a wrongful act towards itself and not towards a third State. That issue would be addressed in the commentary.

42. As drafted, article 29 dealt only with prior consent. However, consent could be given at the time the breach was occurring or subsequently, which would not always fall in the category of waiver. Those issues would also be taken up in the commentary. With respect to consent ex post facto, the Drafting Committee had noted that consideration might be given to its inclusion somewhere in the draft, perhaps in part three.

43. Article 29 had to do with valid consent to the commission of a "given act" and was a redrafting of the article

as adopted on first reading, which had spoken of a "specified act". The new text was clear and more precise. The words "given act" were intended to narrow the consent and relate it to a class of conduct. The word "commission" also included "omission". That question would also be explained in the commentary. The words "within the limits of that consent" at the end of the article were intended to minimize the abuse of consent by confining it not only to a "given act" but also to the limits within which consent was given.

44. As drafted on first reading, paragraph 2 had prohibited consent with respect to peremptory norms. In the Drafting Committee's opinion, such a categorical proposition was inaccurate, because there were some peremptory norms in the application of which the consent of a particular State was relevant and might be decisive, e.g. the rule prohibiting the use of force on the territory of another State. A State could not consent to conduct inconsistent with some peremptory norms, such as genocide or forced labour by prisoners of war, but it might consent to others. For example, a State might consent to military intervention on its territory. When it met the test in article 29, such consent would preclude wrongfulness. Therefore, the proposition set out in the original paragraph 2 had been inaccurate.

45. Article 29 bis (Compliance with peremptory norms), was new and was identical to the one proposed by the Special Rapporteur in his second report, except for the deletion of one phrase.

46. Some doubts had been expressed in the Commission with respect to the need for article 29 bis. The Drafting Committee had worked on the basis of the decision in the Commission that, although the issues raised in the article would rarely occur, it would be useful to have an article that recognized the primacy of peremptory norms. Article 29 bis also emphasized the Commission's view that the obligations to which the draft as a whole was addressed were not always relations of specific rights and duties between particular States; the draft articles were potentially of a general nature, and the specific obligations would also be tested for conformity with higher norms of international law. The article also stressed that the notion of peremptory norms existed outside treaty relationships. The article did not purport to address the question of conflicting peremptory norms, but only an obligation as compared with a peremptory norm. The Committee considered that the possibility of a conflict occurring between peremptory norms was so rare as not to affect the principle set forth in that article.

47. The Drafting Committee had deleted the phrase "not in conformity with an international obligation of that State" in the article proposed by the Special Rapporteur in his second report. The issue had been raised in the Commission as to whether the articles of chapter V should make a distinction between the wrongfulness of an act and international responsibility for an act. In the context of the article, where the State conduct was in conformity with peremptory norms, the State had not committed a wrongful act. The same analysis applied to the next article, article 29 ter (Self-defence). Therefore, the phrase "not in conformity with an international obligation of that State" qualifying the act of the State was inapplicable and confusing. However, with respect to the other articles of chapter V, on force majeure, distress, state of necessity, etc. the act in question was not in conformity with the international obligation of that State, and the phrase was retained.

48. In the context of article 29 bis, the issue had been raised of a new definition for peremptory norms which would rely less heavily on the law of treaties. The Drafting Committee had not been in a position to take a decision in the absence of guidance from the Commission. The Special Rapporteur had, however, stated that he would consider the matter in the context of obligations *erga omnes* in his next report.

49. Article 29 ter corresponded to article 34 adopted on first reading. The Special Rapporteur had proposed two paragraphs for that article. Paragraph 1 contained article 34 adopted on first reading, and paragraph 2 had been an addition dealing with self-defence and peremptory norms. The purpose of new paragraph 2 had been to address important issues not dealt with in the commentary to the article adopted on first reading.

50. For example, the commentary to article 34 adopted on first reading[5] did not consider the substantive content of self-defence. It failed to distinguish between self-defence as part of the primary rules on use of force under international law and self-defence as a justification for a breach of an obligation other than Article 2, paragraph 4, of the Charter of the United Nations. Nor did it mention that there were certain rules which could not be breached even in self-defence, such as international humanitarian law. There had been no disagreement with the substance of article 29 ter, paragraph 2, as proposed by the Special Rapporteur, but it had been regarded as covered by implication and by general understanding in paragraph 1. The issues to be covered by a new paragraph 2 would be more appropriately elaborated in the commentary. The Commission had therefore referred paragraph 1 to the Drafting Committee on the understanding that the issues raised in paragraph 2 as proposed by the Special Rapporteur would be addressed in the commentary.

51. In respect of paragraph 1, the general view in the Commission had been that, since the text had been in existence for so long, any changes might raise doubts as to the meaning of the article. A number of suggestions had been made, such as replacing the words "lawful measures ... taken in conformity with the Charter" by others. However, the Drafting Committee had considered that, if there were concerns that no changes be made to the article on self-defence, then no further changes should be made. The Committee had also been of the opinion that the words "in conformity with the Charter" were appropriate. The Charter of the United Nations did not confer the right to self-defence, it merely recognized it as inherent. Moreover, the references to self-defence in the Charter were operative references in international law. The Charter established limitations on self-defence which could not be modified in any way by the current articles. Article 29 ter corresponded to article 34 adopted on first reading less the phrase "not in conformity with an international obligation of that State" which had been deleted.

[5] See 2587th meeting, footnote 12.

52. Article 30 (Countermeasures in respect of an internationally wrongful act) had been referred to the Drafting Committee only after the Committee had concluded its work for the current session, along with a new text proposed by the Special Rapporteur in paragraph 392 of his second report. Hence, the Committee had not taken any action on article 30.

53. Article 30 bis (Non-compliance caused by prior non-compliance by another State) proposed by the Special Rapporteur in his second report had not been referred to the Drafting Committee. The Commission had decided to come back to the question of retaining that article after consideration of chapter III (Countermeasures) of part two.

54. The Special Rapporteur had proposed a revised title and text for article 31 (Force majeure), which had been entitled "Force majeure and fortuitous event" as adopted on first reading, and the Commission had indicated support for a new text. Paragraph 1 proposed by the Drafting Committee merged the two sentences of the Special Rapporteur's text, thereby reducing the length of the article without affecting its content. Paragraph 1 identified the essential elements of force majeure as the irresistibility of the force, its unforeseeability, its being beyond the control of the State and the fact that it made it materially impossible in the circumstances for the State to perform the required obligation. The word "external" was unnecessary. The commentary to the article adopted on first reading[6] had not explained what that word meant. In any event, the words "beyond the control of the State" meant the same thing. On the other hand, if "external" implied that the circumstance of force majeure came from outside the territory of the State, it would be incorrect. Hence, the Drafting Committee had deleted it. The commentary would emphasize that the situation of force majeure should be genuinely beyond the control of the State invoking it and that it did not apply to situations in which the State brought force majeure upon itself either directly or by negligence.

55. The words "unforeseen event" should be interpreted objectively. That did not include circumstances in which the performance of the obligation had become difficult due to economic or financial crises. Of course, force majeure occurred as a result of natural or physical events and the acts of third parties. Thus, it was not limited to physical phenomena; other forms could also meet the test set in the article. Those issues would be discussed in the commentary, which would also explain that certain situations of duress involving force imposed on the State that was irresistible and met the other requirements of article 31 could amount to force majeure. The commentary would also elaborate on the examples of the various forms of duress or coercion which could amount to force majeure, such as the coercion of a State representative to commit a wrongful act.

56. Paragraph 2 was an exception to paragraph 1. Paragraph 2 (*a*) corresponded to paragraph 2 of article 31, adopted on first reading, which had stipulated that force majeure did not apply if the State in question had contributed to the occurrence of the situation of material impossibility. The Special Rapporteur had proposed changing the word "contributed", adopted on first reading, to "results", which set a higher threshold. The Commission had generally supported that change. The Drafting Committee had followed suit and, as a result, force majeure must not be a circumstance precluding wrongfulness if it resulted from the conduct of the State invoking it, either alone or in combination with other factors. The new wording allowed for force majeure to be invoked in situations in which a State might have unwittingly contributed to the occurrence of force majeure. For paragraph 2 (*a*) to apply, the State's role in the occurrence of force majeure must be substantial.

57. The Drafting Committee had deleted the word "wrongful", because it had been creating confusion. There was no requirement that the conduct of the State that resulted in the occurrence of force majeure be wrongful. The point was to have a direct link between the conduct of the State and the occurrence of force majeure.

58. Paragraph 2 (*b*) dealt with situations in which the State had already accepted the risk of the occurrence of force majeure in the context of an obligation, conduct or unilateral act. Once a State accepted the consequences of such a risk, it could not then claim force majeure in order to avoid responsibility. Paragraph 2 (*b*) had not been part of article 31 adopted on first reading. The idea expressed in it was often tied in with the obligation of prevention and was also covered by the primary rule and by *lex specialis*. The Commission had agreed in general with the Special Rapporteur's view on the utility of paragraph 2 (*b*) in making clear that it was also an aspect of the law of force majeure. The Drafting Committee had made some changes for the sake of clarity. The commentary to article 31 would specify that the assumption of risk under paragraph 2 (*b*) was towards those to whom the obligation was owed.

59. The Special Rapporteur's proposal for article 32 (Distress) had been substantially the same as the formulation proposed on first reading, but the Commission had indicated support for certain drafting changes suggested by the Special Rapporteur.

60. With regard to paragraph 1, the Drafting Committee had agreed to delete the word "extreme" before "distress" on the grounds that distress had been defined in the article and "extreme" appeared to add a further criterion which had not been intended and created confusion. In addition, the word "distress" had been used in a similar context without further qualification in article 18, paragraph 2, of the United Nations Convention on the Law of the Sea. The Special Rapporteur had further proposed that the State agent whose action had been in question must have reasonably believed, on the basis of the information that had been or should have been available, that life was at risk. The criterion of "reasonably believed" had not been included in the text adopted on first reading. The Committee had agreed with the Special Rapporteur that, in situations in which the State agent was in distress and had to act to save lives, there should be a certain degree of flexibility in the assessment of the condition of distress. One could not use a completely objective test as had been done in the text adopted on first reading. The Committee had agreed with the idea that there should be some, but not too

[6] Ibid., footnote 8.

much flexibility in article 32. It had therefore revised the Special Rapporteur's proposal to read that "the author of the act in question had no other reasonable way, in a situation of distress".

61. Three issues should be emphasized in connection with article 32. First, it was the author of the act, and not the State, that was in distress. Secondly, the "no other reasonable way" criterion provided some flexibility regarding choices of action by its author in saving lives. The commentary would explain that the words "reasonable way", while allowing for some flexibility, should nevertheless be narrowly construed, having regard to the exceptional nature of the circumstance. Thirdly, the choice of the act by the author was for the purpose of saving lives. Hence, any comparison of alternatives available to the author in distress had to take into account the object of the act in question.

62. Article 32, paragraph 2, was similar to article 31, paragraph 2, and was an exception to paragraph 1. His explanations for the structure and drafting of paragraph 2 (*a*) of article 31 applied equally to paragraph 2 (*a*) of article 32. Paragraph 2 (*b*) was identical to the last sentence of paragraph 2 of article 32 adopted on first reading, except for the change of the word "conduct" to "act" to avoid any confusion with the word "conduct" in paragraph 2 (*a*). Paragraph 2 (*b*) stipulated that distress did not apply if the act in question was likely to create a comparable or greater peril. That provision struck a balance with paragraph 1 by providing an objective test for assessing and limiting the standard of "reasonable way" in paragraph 1. The commentary would explain the words "comparable or greater peril", which must be assessed in connection with the saving of lives. The title of article 32 remained unchanged.

63. Article 33 (State of necessity), as proposed by the Special Rapporteur, had closely resembled the version adopted on first reading, save for some minor amendments, such as the use of the present, instead of the past, tense. It was the only article in chapter V drafted in the negative. While it had been considered to be one of the most controversial articles of part one when the Commission had adopted it at its thirty-second session, in 1980, it had provoked little comment from Governments. The first sentence of paragraph 1 was identical to that adopted on first reading, except for the replacement of the words "state of necessity" with the word "necessity".

64. In the light of comments that the text adopted on first reading had been too narrowly drafted, the Special Rapporteur had revised the article to extend the concept of necessity to the protection of a common interest, but it was still not fully compatible with contemporary international law. Many members had supported the idea that it ought to be possible to invoke necessity in order to protect the essential interest not only of the State but also of the international community. Nevertheless, such a provision would have to be drawn up with great care so as to guard against abuse. The Drafting Committee had therefore revised paragraphs 1 (*a*) and 1 (*b*). The purpose of paragraph 1 (*a*) was no longer to safeguard solely the essential interest of a State in a bilateral context, but embraced a wider interest. That concept would be elucidated in the commentary, which would explain that the word "means" was not limited to unilateral action, but might also comprise other forms of conduct available to the State through cooperative action with other States or through international organizations. Nevertheless, in order to understand the scope of paragraph 1 (*a*) it should be read together with paragraph 1 (*b*), where the words "or States" were intended to cover situations where the cumulative impact of an act on States towards which an obligation existed was such that it outweighed the benefit to the acting State.

65. The Drafting Committee considered that the phrase "an essential interest ... of the international community as a whole" in paragraph 1 (*b*) might overlap with the notion expressed in paragraph 2 (*a*). Nevertheless it elected to retain the phrase in paragraph 1 (*b*), since it was a broader concept than that of peremptory norms contained in paragraph 2 (*a*). An essential interest of the international community as a whole might or might not be a peremptory norm. There might be an essential interest of the international community as a whole which was not embodied in peremptory norms. The commentary would also explain that some treaties had already addressed the question of necessity in the treaty itself, so necessity could not be invoked as an additional ground for a breach of the obligations imposed by such treaties.

66. To avoid abuse, the commentary would make it clear that the action of a State under paragraph 1 (*a*) would have to be warranted by some relationship between the acting State and the essential interests being protected, although such interests were not entirely subjective. Nonetheless, the act would have to be the only means by which the State could protect that interest. If there were other means of protecting the essential interest through cooperative action or action by international organizations, then that alternative course of action should be followed. The essential interest of a State which would be impaired would not necessarily have to be an essential interest connected with the obligation. It could be some other essential interest of the States towards which the obligation existed. The Drafting Committee was therefore of the view that the vagueness of the words "or of the international community as a whole" would be acceptable. Thus paragraph 1 (*a*) was a ground for precluding reliance on necessity and had to be as restrictive as possible.

67. Paragraph 2 precluded reliance on necessity. Paragraph 2 (*a*) prohibited any action in the name of necessity that breached a peremptory norm. Paragraph 2 (*b*) covered situations where the obligation itself ruled out the invocation of necessity, for example, non-derogable obligations under humanitarian law. Those issued would be explained in the commentary. Paragraph 2 (*b*) no longer retained the words "explicitly or implicitly", because the text was no longer confined to the exclusion of necessity by a treaty and applied to any such exclusion under international law. The commentary would clarify the relevance of the notion of "explicitly or implicitly" in relation to paragraph 2 (*b*) and, in particular, with reference to its application to treaty obligations.

68. In paragraph 2 (*c*) the qualification of "materially" contributing to the situation of necessity had been deleted on the understanding that the commentary would explain that the contribution of the State should be serious and

substantial. Paragraph 2 (*c*) did not parallel paragraph 2 (*a*) of article 31, which dealt with a similar issue. The Drafting Committee considered that lack of consistency to be justified. Force majeure was a rarer occurrence than the state of necessity, which had to be construed narrowly. Furthermore, the Committee believed that the scope of the article on the state of necessity should be narrowly delimited. The title of the article remained unchanged.

69. The Drafting Committee had renumbered article 34 adopted on first reading as article 29 ter. Article 34 as such had therefore been deleted. In the Committee's view, article 34 bis was closely related to the articles of part two on countermeasures and to issues concerning dispute settlement in part three. The text of that article would therefore be significantly affected by deliberations on countermeasures and, conceivably, by what the Commission might decide in respect of *jus cogens* norms, given the special connection between dispute settlement and the *jus cogens* provisions of the 1969 Vienna Convention. The Committee would consequently review the article after the Commission had considered countermeasures and dispute settlement.

70. Article 35 (Consequences of invoking a circumstance precluding wrongfulness) was a "without prejudice" clause. The text adopted on first reading had contained a reservation on compensation for harm arising from four of the circumstances precluding wrongfulness. The Special Rapporteur had suggested that the article be reworded in order to make it clear that chapter V had a merely preclusive effect. When a circumstance precluding wrongfulness ceased or stopped having a preclusive effect for any reason, the obligation in question (if it was still in force) again had to be honoured. As the Commission had supported that idea, the new text had two subparagraphs. Subparagraph (*a*) addressed the question of what would happen when a condition preventing compliance with an obligation no longer existed or gradually wound down. The words "and to the extent" were intended to provide for situations in which the conditions preventing compliance with an obligation gradually became less and allowed for partial performance of the obligation. Although the text was a reformulation of the version proposed by the Special Rapporteur in his second report, the substance had not changed. The Drafting Committee believed that the revised text was clearer, comprehensive and more elegant. The commentary to the article would indicate that compliance with an obligation also included cessation of the wrongful act.

71. Subparagraph (*b*) was similar to the article 35 adopted on first reading. The Commission had supported the idea behind the Special Rapporteur's text, which proposed that the possibility of compensation be restricted to situations of distress or a state of necessity and also limited financial compensation to actual harm or loss, in order to avoid confusion as to whether the subparagraph dealt with the question of restitution or compensation for moral damage. Nevertheless, there were difficulties in restricting the possibility of compensation to only two of the circumstances precluding wrongfulness and so the Drafting Committee had deleted any reference to an article in subparagraph (*b*). Similarly it had deleted the word "financial" before the word "compensation" because compensation in cases covered by that provision might not be limited to pecuniary compensation but might also include equivalent compensation. Since the word "compensation" was used in part two in a narrow sense, the commentary would explain what remedies under that provision were covered by the term "compensation". The use of the term might have to be reconsidered when the relevant articles of part two had been examined. Subparagraph (*b*) likewise limited compensation to "material harm or loss". The Special Rapporteur had made it clear in his second report that the question of compensation was limited to material harm and did not include moral harm. That idea would also be explained in greater detail in the commentary. Lastly, payment of the compensation referred to in article 35, subparagraph (*b*), was not limited to the State most directly affected. It was sufficiently general to extend to third States as well. The title of the article, as proposed by the Special Rapporteur in his second report, had remained unchanged.

72. He reiterated that the Drafting Committee recommended that the Commission should only take note of its report.

73. Mr. PELLET said that, if the Commission merely took note of the report and did not discuss it, when the topic came to be re-examined, say two years hence, its content would have been forgotten and a new report would have to be presented in order to refresh members' memories.

74. Mr. CRAWFORD (Special Rapporteur) agreeing with Mr. Pellet, said that concerns about any of the articles were best aired immediately. The reason behind the Drafting Committee's recommendation had been that it might prove necessary to amend the articles in the light of subsequent deliberations and indeed former article 22 (currently article 26 bis) might ultimately be inserted in chapter III of part one. Since it would be helpful to consolidate progress and identify outstanding difficulties, he would have no objection to perusal of the report article by article, so that the Committee could focus on any remaining problems at the fifty-second session of the Commission.

75. Mr. ECONOMIDES pointed out that if the debate was to be productive, a decision had to be taken on whether the report was to be examined as a whole or article by article.

76. Mr. LUKASHUK said that it would expedite the Commission's work if the report was discussed as a whole. Generally speaking, although he could support the articles drafted by the Drafting Committee, he had some doubts about one or two of them. First, with regard to article 27 bis, the Chairman of the Committee had stressed that the control and direction of one State by another referred solely to the commission of a wrongful act and not to a wider context. If so, subparagraphs (*a*) and (*b*) were incomprehensible. If a State was directing another, how could it fail to know about the act in question? With regard to article 29, he believed that from a purely legal point of view, it was hard to justify the adjective "valid", because any legal act had to be valid. If consent was not

valid, it was non-existent. In his opinion, further thought therefore had to be given to the drafting of that article.

77. Again article 29 bis needed to be considered. The Chairman of the Drafting Committee had commented that the article largely dealt with rare, hypothetical cases, but such situations were often encountered in reality. Did Article 103 of the Charter of the United Nations not constitute a peremptory norm? Furthermore, under that Article, Security Council resolutions took precedence over a State's pre-existing obligations. As a result, a breach of an obligation would become lawful if it rested on a Council resolution. And, lastly, what of a regional agreement which provided that other obligations of a State could not run counter to that agreement? Did existing hierarchical norms preclude the wrongfulness of an act? While it did not appear necessary to discuss the articles in detail, the commentary should deal with that specific issue as it was of great practical significance.

78. The CHAIRMAN suggested that the report of the Drafting Committee should be examined chapter by chapter and that comments should be submitted on each cluster, starting with chapter III (arts. 16-26 bis).

79. Mr. PELLET pointed out that the word "deleted" had been added after several articles listed in the report of the Drafting Committee. The contents of some articles, however, had not been deleted but subsumed under other articles. It would therefore be better to put "See ..." and to specify where the notion or phrase was to be found. In article 16, the word "character" had been translated as *caractère* in French, whereas he thought that *nature* would be more appropriate. He disliked the text of article 18. Why was it couched in negative rather than positive terms? With regard to article 24, he simply wished to ask the Special Rapporteur to set out the meaning of a "breach not having a continuing character" in the general article on definitions. An explanation in the commentary was not enough. Article 25, paragraph 1, spoke of a series of actions or omissions "defined" as wrongful. It was not a well-chosen term and "considered" would be more apposite. Furthermore, the remainder of the sentence "occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act" was not an improvement on the earlier text and was almost incomprehensible.

80. Mr. ECONOMIDES said that, unfortunately, he had not been able to attend all the meetings of the Drafting Committee. First, he would like to see the words *en vertu de* replaced by *par* in the French version of article 16, as it seemed both stylistically awkward and semantically not quite correct. He did not agree with Mr. Pellet's proposal to replace the word *caractère*. The word was appropriate, since the article was concerned with acts and obligations all having essentially the same character. It was not a question of differences between their natures.

81. However, he agreed with Mr. Pellet about article 18, the object of which was to set forth a condition, rather than define an exception. He therefore proposed that *à moins que* should be replaced by *si*. As to article 24, *l'événement* should be replaced by *cet événement*, as reference was being made to a specific event.

82. With regard to article 25, it would be difficult to find another term to replace the word "defined", as Mr. Pellet had proposed, although he agreed that it was not ideal. Article 25 was concerned with an occurrence which was wrongful at the international level and which was made up of a series of acts which could be omissions or actions. It was when that series was completed that a wrongful international event occurred. The difficulty was to decide when such a series of actions came to an end and he could accept the wording as it stood.

83. Mr. CANDIOTI (Chairman of the Drafting Committee), replying to comments made on the articles in chapter III, said he would have to seek further guidance as to whether to take up Mr. Pellet's suggestion on including a reference whenever part of a deleted article had been included in an existing article. With regard to Mr. Pellet's proposal to replace *caractère* by *nature* in article 16, he felt that the latter was slightly more open to other interpretations. Having discussed the matter at length, the Drafting Committee had felt that any word used in the context would be ambiguous. It had been a question of selecting a word with sufficiently general applicability. The important consideration would be to formulate a commentary that clarified the meaning of "character" in the context.

84. The negative wording of article 18 was a matter on which the Special Rapporteur should comment, as he had advised on the article's formulation. However, as far as he was concerned, the meaning of the article was clear: the obligation in question could be breached only when it was in force, at the moment the act occurred.

85. As to Mr. Pellet's comments on article 25, the Drafting Committee had spent considerable time attempting to define what constituted a composite act. The use of the word "defined" reflected the Committee's concern to typify a composite act as defined by the actions or omissions of which it was comprised. He thus preferred to retain "defined", as it was more precise than "considered" in the context. Finally, with regard to the proposal by Mr. Economides to amend paragraph 3 of article 24, he thought the wording was sufficiently clear as it stood. The question whether to say *l'événement* or *cet événement* did not affect the substance of the article.

86. The CHAIRMAN said it was his understanding that the inclusion of wording to indicate that an article had been deleted was in keeping with the Commission's custom. The practice had the merit of making clear to the reader that nothing was missing, and especially that nothing had been omitted from the articles which had been adopted. The Commission was not bereft of information on the point which had been raised, since the Chairman of the Drafting Committee had stated in his report that articles 17, 19, 20, 21 and 23 had been deleted as a result of the reformulation of article 16.

87. Mr. CRAWFORD (Special Rapporteur) said he would not comment on matters such as whether the word "nature" should replace "character" in article 16. The Drafting Committee had already debated those matters at some length and had reached its decision. With regard to Mr. Pellet's point about the use of the word "deleted", he sympathized to the extent that material contained in some

of the articles had not been deleted but subsumed under other articles. While it might be helpful to include footnotes explaining that fact, the practical problem was that it was not possible to attach the explanations of the Chairman of the Drafting Committee to the individual articles in the context of the report currently before the Commission.

88. He could see no objection to the drafting proposals in connection with the French text made by Mr. Economides. The Commission could take careful note of them and return to them at the *toilettage* phase of its consideration of the text at the next session.

89. As to Mr. Pellet's first point of substance concerning the wording of article 18, it would be incorrect to couch the article in "positive" terms, such as "An act of a State is considered a breach of an international obligation if the State is bound ...", as that excluded the notion of inconsistent conduct. More significantly, the "negative" wording reflected the fact that the article constituted a guarantee against the retrospective application of international law in the area of responsibility. With regard to Mr. Pellet's second point of substance, the drafting of paragraph 1 of article 25 had caused considerable difficulties, with the result that the English and French versions were slightly different. The paragraph in question could apply only to a particular obligation, whereas in the article as adopted on first reading it had constituted a general proposition applicable to any obligation. Thus, the word "define" had been used in the latest version precisely because of the fact that the obligation in question defined the conduct as wrongful, by reference to its composite character. The article should be retained in its narrower form, which reflected the fact that it concerned a particularly important category of obligation. Again, the question whether to replace "define" by a different formulation could be discussed at the next session at the *toilettage* stage.

90. Mr. PELLET said he was satisfied that the proposal by Mr. Economides to replace *en vertu de* by *par* in article 16 would bring the French version into line with the English, in which the word "by" was used. However, it should be borne in mind that the replacement of *à moins que* by *si* in the French version of article 18 would also necessitate the replacement of "unless" by "if" in the English text. Likewise, in article 24, paragraph 3, the introduction of *cet événement* meant that the phrase in question in the English text would have to be modified to read "that event". He was not convinced by the Special Rapporteur's clarification concerning article 18. Surely, a positive text along the lines of "An act of a State shall be considered a breach of an international obligation only if ..." would meet the concerns the Special Rapporteur had expressed. Lastly, although also unconvinced by the explanations he had heard concerning his comments on article 25, he would withdraw his objections.

91. The CHAIRMAN invited the members of the Commission to consider the cluster of articles under chapter IV (arts. 27, 27 bis, 28 and 28 bis).

92. Mr. PELLET said he wished to place on record his continuing preference for the former version of the heading of article 27 bis, which referred to "Direction or control", rather than the latest version which read "Direction and control". Either direction and control amounted to the same thing, in which case there was no need to complicate matters, or there was a difference between the two terms. That being so, a State would not escape its responsibilities whether it exercised direction or whether it exercised control—the use of the word "and" gave the impression that responsibility occurred only when a State exercised both together. The thing missing from the article was that responsibility could only be partial if the direction or the control was not complete. However, a State which exercised direction or control bore responsibility because of the wrongful act.

93. Partial control or direction still engaged State responsibility for the internationally wrongful act. In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, for example, ICJ had probably reasoned wrongly in considering that, as there had not been complete control and direction, the United States of America did not bear at least a part of the responsibility for acts by the contras. He regretted that the article was not aimed at making powerful countries pay for the occasions when they avoided their responsibilities and behaved badly.

94. With regard to article 28 bis, he considered that the phrase "the State which commits the act in question" was not in keeping with the very definition of an internationally wrongful act. The latter could be an action—and in fact one "committed" an act—or an omission. The same problem arose in article 29. There, the Chairman of the Drafting Committee had said that an explanation would be included in the commentary to make it clear that "commission" could also mean "omission". As it made no sense to speak in article 28 bis of committing an omission, he proposed that the text should be amended to read "This Chapter is without prejudice to the international responsibility of the State to which the act in question is attributable". An action or omission was attributable to a State. However, an act (*fait*) could not be committed by a State. Something was committed by a State if it was an action; if it was a question of an omission, then it was not an act that was being committed. Thus, in the final *toilettage*, he would like to see *commet le fait* replaced by *auquel le fait en question est attribuable*. The problem, however, was not one of French, but of logic.

95. Mr. ELARABY said he found that article 28, subparagraph (*a*), gave a somewhat contradictory impression. The same applied to paragraph 2 of article 31 and although the latter, strictly speaking, came under chapter V, he would welcome clarifications on both articles from the Special Rapporteur.

96. Mr. CRAWFORD (Special Rapporteur) said the critical point about article 28, subparagraph (*a*), was that the coercion did not necessarily have to involve the use of force, i.e. it did not necessarily have to be contrary to Article 2, paragraph 4, of the Charter of the United Nations. Subparagraph (*a*) covered any coercive act, subject to the possibility of precluding wrongfulness under chapter V. In that respect, article 28 had not changed since the first reading. Under the terms of the article the State which was

coerced had no choice but to do what it was being coerced to do, by reason of the very strong meaning given to coercion. The defence of that State would be effected on a basis of force majeure, i.e. its defence would be covered by article 31. However, the coercing State would be responsible to the injured State in such a situation. That being so, the effect of article 28 was to transfer liability from the coerced State—which had no choice but to act in any other way—to the coercing State. The problem raised during drafting was that it could not be said, as it had been in the first version of article 28, that the act was an internationally wrongful act of the coerced State, because under article 31 it was not. That was the reason for the current wording of article 28.

97. There were two conditions for the "transferred" responsibility under article 28: first, if the coerced State acted voluntarily, rather than involuntarily, it would have committed a wrongful act. Secondly, the coercing State must be aware of that. If both those conditions applied, responsibility was transferred from the coerced State to the coercing State, irrespective of the character of the coercion. Furthermore, article 28 bis made it clear that that occurred without prejudice to any other basis for the responsibility of the coercing State. Other situations might arise, for instance, if the coercion was intrinsically unlawful, in which case article 28 bis would apply. Article 28 was intended to deal with a situation in which a State was coerced to commit a wrongful act, and the injured State would otherwise be left without redress.

98. It was not normally the case that a State which agreed to have forces placed on its territory was also accepting the risk that those forces would exercise coercion against it. The assumption was that the forces in question would act lawfully. The object of article 31, paragraph 2 (*b*), however, was designed to cover situations in which, for example, one State offered another State a guarantee against the occurrence of an event, such as flooding caused by climatic factors. In such a case, the existence of a guarantee against flooding meant that the guarantor State had accepted the risk of flooding caused by climatic conditions. It could not then claim that the floods had occurred because of exceptional monsoon rains, which were part of the natural order of things. On the other hand, if the floods were caused by the collapse of a dam, and not by the circumstances guaranteed, force majeure might apply.

99. Thus, paragraph 2 (*b*) of article 31 was a standard proviso of the kind found in force majeure provisions in legal systems worldwide. It was certainly not intended to deal with a situation in which, for instance, forces located on the territory of a State stepped outside their mandate and coerced the host State.

*The meeting rose at 1 p.m.*

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# 2606th MEETING

*Monday, 19 July 1999, at 3 p.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

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

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

1. The CHAIRMAN invited the Commission to resume its consideration of the cluster of articles under chapter IV (Responsibility of a State in respect of the act of another State) of the draft articles (arts. 27, 27 bis, 28 and 28 bis) contained in the report of the Drafting Committee on the draft articles on State responsibility (A/CN.4/L.574 and Corr.1 and 3).

2. Mr. ECONOMIDES, referring to article 27 bis, said he agreed with other members that "directs or controls" would be preferable to "directs and controls". He had made the same comment at an earlier plenary meeting.

3. He did not find the wording of article 28 at all satisfactory. Subparagraph (*a*) made a somewhat premature reference to force majeure, namely, chapter V (Circumstances precluding wrongfulness). However, article 28 was intended only to define a State's responsibility in respect of the act of another State, not the wrongfulness of that act. Subparagraph (*a*) did not make that clear. Subparagraph (*b*) was obvious and could very well be deleted. Article 28 should perhaps be condensed into a simple sentence, such as, "A State which coerces another State to commit an internationally wrongful act is responsible for that act".

4. Mr. LUKASHUK said that article 27 bis was somewhat naive in stipulating that a State which directed and

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

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

[3] Ibid.

controlled another State must have done so with knowledge of the circumstances of the internationally wrongful act. Did that mean that the State had to be aware of all circumstances and all details of the act in question in order to be considered responsible? He did not think so. Moreover, "direction" and "control" were simply two kinds of coercion. He did not see why they should not be given exactly the same treatment as coercion in article 28. In fact, "direction and control" was a civil law concept which did not actually belong in public law.

5. He endorsed Mr. Economides' comments on article 28, especially those on subparagraph (*b*).

6. Mr. TOMKA noted that article 27 bis set two conditions in order for the State which directed or controlled another State to be considered responsible for the other State's act. That was one condition too many; the second was unnecessary. The act as such was wrongful, in other words not in conformity with international law. The act remained wrongful, whatever the direction or control exercised. If it was decided to keep the article as it stood, however, he agreed that it should say "directs or controls" rather than "directs and controls".

7. The same comment could be made about article 28: the internationally wrongful act was in itself wrongful, regardless of the coercion. The point of the article was to define the responsibility of the coercing State, not to determine the wrongfulness of the act of the coerced State, but it could be interpreted to mean that, if there had been no coercion, there would have been no wrongful act.

8. Mr. CANDIOTI (Chairman of the Drafting Committee), summing up the debate, generally referred the members of the Commission to the arguments he had put forward in his presentation of the report of the Drafting Committee (2605th meeting) on the use of the words "direction and control". Several members now wished to change those words to "direction or control". However, the Drafting Committee had suggested that wording because it had felt that mere "direction" was not enough, as it was not a strong enough concept to be used as a criterion for responsibility, especially as the coerced State had the freedom not to follow the coercing State's direction. The idea that the coercing State was exercising a kind of dominance over the coerced State's will must be added; hence the word "control". The terms went together.

9. The condition set in article 27 bis, subparagraph (*b*), had also been explained at length in his presentation (ibid.). It was an essentially restrictive clause and the Drafting Committee had seen fit to put it not only in article 27 bis, but in articles 27 and 28 as well.

10. Concern had been expressed that article 28 on coercion might overlap with chapter V. He noted that article 28 did not seek to define a circumstance exonerating the coerced State, although it probably would be exonerated, but to establish the responsibility of the coercing State. The dividing line was quite clear.

11. With regard to Mr. Pellet's concern about the words "commission of an ... act" in the title and in the text of article 27, according to the definition in article 3 an act could consist of an action or an omission. Mr. Pellet was right to fear that there might be a reference to "the commission of an omission", but the Drafting Committee had found no better solution.

12. Mr. CRAWFORD (Special Rapporteur) said that the matter of choosing the appropriate conjunction, "and" or "or", in article 27 bis was not so important. The Drafting Committee's idea, which he found convincing, was that "direction and control" went together.

13. In reply to Mr. Lukashuk, who had said that the case covered by article 28 related to private law—by analogy, for example, with a concept such as complicity—whereas the entire draft was a public law construct, he said that article 28 had to cover both bilateral obligations between States, which came under the law of contracts, as well as obligations *erga omnes*, which came under public law. The problem with the draft articles as adopted on first reading was that they referred only to obligations *erga omnes*: nothing else was mentioned in the commentary. As article 28 also had to apply to bilateral treaties, the conditions provided for in subparagraphs (*a*) and (*b*) had been added. The article would thus operate as a public law rule in respect of obligations *erga omnes* or obligations under multilateral treaties and as a private law rule in respect of bilateral obligations. It had been formulated with a view to achieving that versatility.

14. With regard to the comment that article 28, specifically subparagraph (*a*), contained a reference to force majeure (art. 31), he said there was a logical connection between the two provisions. Article 31 stated that the conduct of a State acting under irresistible force was not wrongful. If it had stated that the act remained wrongful, but that responsibility was precluded, it would not have been necessary to include article 28, subparagraph (*a*), setting the basic condition for wrongfulness. However, it said that a State which acted under irresistible force could not be committing a wrongful act. Article 28 could not contradict article 31 by stating that that same State was in a situation of wrongfulness. If article 28 was changed, then article 31 also had to be changed.

15. The Drafting Committee had considered the possibility of drawing a clear distinction in chapter V between circumstances precluding wrongfulness, such as self-defence and consent, and circumstances precluding responsibility, such as force majeure, distress and state of necessity, but it had decided that that was too sharp a distinction to serve as a link with that part of the law of responsibility.

16. Mr. AL-BAHARNA, referring to articles 27 and 27 bis, said that the use of the words "that State" was confusing, especially in subparagraph (*b*) common to both articles. Perhaps the State in question should be indicated each time, by wording such as "the aiding State" or "the assisting State".

17. Article 28 might imply that the coerced State was completely innocent. Just as degrees of coercion existed, so might degrees of responsibility. The article should be more finely shaded.

18. Mr. PAMBOU-TCHIVOUNDA said that the words "internationally responsible" were used several times in chapter IV. They were not usually found in international law and in fact did not indicate exactly what responsibility

was meant. It would be clearer to delete "internationally" and simply say "a State ... is responsible".

19. Mr. PELLET endorsed Mr. Pambou-Tchivounda's comment. However, he could not agree with Mr. Crawford that the difference between "direction and control" and "direction or control" was minimal. In fact, the concept of control was already quite political and had to be handled with the greatest care. He would ask the Commission to take a formal vote on the matter at the appropriate time.

20. Mr. TOMKA said that article 28 did not clearly state its purpose, which was simply that the State which had exercised coercion was responsible not because of the coercion, but as a result of the ensuing act. If the wrongfulness of the act was precluded, on the ground that the coerced State was in a situation of force majeure, what was the coercing State responsible for? The corresponding provision of the draft adopted on first reading, contained in article 28, paragraph 2, had been clearer.

21. Mr. CANDIOTI (Chairman of the Drafting Committee) said that article 28 referred to responsibility for the wrongful act, not to responsibility for the coercion. Despite possible similarities with article 31, he believed that article 28 was in its proper place. And article 28 bis, which had been added to chapter IV, offered a kind of safeguard clause in relation to the other aspects of international responsibility not covered in chapter IV.

22. The comments on terminology ("internationally", "that State") would be taken into account when the text was put into its final form.

23. Whether the coerced State was completely innocent was clearly a matter for the judge to determine depending on the circumstances of the case and on the primary rules violated by the breach. As Mr. Al-Baharna had pointed out, there might be some remaining responsibility on the part of the coerced State.

24. The CHAIRMAN invited the Commission to take up the cluster of articles under chapter V of the draft, (arts. 29, 29 bis, 29 ter, 31, 32, 33 and 35).

25. Mr. PELLET noted that the French version of article 29 again spoke of the *commission ... d'un fait*. The term was not appropriate, even if alternative wording was not found. In French, in any event, the "commission of an act" could in no way cover the case of an "omission". Article 29 also spoke of *consentement valable*, which was surprising, as the expected adjective would be *valide*. The wording used in article 29 adopted on first reading, *consentement valablement donné*, had been far better. He also wondered why the form of article 29 was so different from that of articles 29 bis, 29 ter, 31 and 32, whereas all had been drafted according to the same model. It was important not to give the impression that that had been deliberate.

26. Article 29 bis was completely satisfactory. However, it referred to "peremptory norms of general international law", which still had to be defined. Article 53 of the 1969 Vienna Convention did provide a definition, but stated that the definition was valid only "for the purposes of the present Convention".

27. Concerning article 29 ter, he regretted the fact that the Drafting Committee had reproduced the phrase contained in article 34 as adopted on first reading, "in conformity with the Charter of the United Nations". The Charter was certainly a major source of law, but self-defence, which was the subject of article 29 ter, was not inexorably linked to it. As the Charter itself said, self-defence was an inherent right and the idea of "conformity with the Charter" restricted its scope. He therefore advised the Commission not to mention the Charter and to speak simply of a "lawful measure of self-defence".

28. Article 33 was well drafted and generally satisfactory, although he had reservations about it because he found it dangerous. However, he doubted the value of the expression "In any case" at the beginning of paragraph 2, which was not usually found in legal texts. If it was needed, the commentary should explain why.

29. Mr. ECONOMIDES noted that, according to the Chairman of the Drafting Committee, article 29, paragraph 2, as adopted on first reading, which provided for peremptory norms of international law on an exceptional basis, had been deleted on the ground that it did not apply in all cases and that there were situations in which peremptory norms might, as it were, be disregarded. That was new to him, as, to his knowledge, a peremptory norm, a rule of *jus cogens*, could be derogated from only through a new rule of the same nature, i.e. a rule which was itself a rule of *jus cogens* and not a mere treaty provision, much less a unilateral act such as consent. It was a grave matter for the Commission to be the first to raise the possibility of disregarding, through consent, a rule of *jus cogens*. In that connection, the example given by the Chairman of the Committee was not relevant; if a State gave another State the power to bring military forces into its own territory, the situation would be one of alliance rather than military intervention, which occurred against the will of the State concerned. In his view, the deletion of former article 29, paragraph 2, could be explained by the adoption of new article 29 bis, but certainly not by the arguments given by the Chairman of the Committee.

30. A second comment of a general nature related to the expression "not in conformity with an international obligation", which appeared in some articles and not in others for no apparent reason. The Commission should carefully examine that question at its fifty-second session and decide either to use the expression in all cases or not to use it at all, but the commentary would have to include a rational explanation of why the decision had been taken.

31. Article 35, subparagraph (*b*), which referred to "harm or loss", should also refer to "innocent victims", whether States or persons.

32. Mr. HAFNER asked whether Mr. Pellet's position on the expression "in conformity with the Charter of the United Nations" in article 29 ter did not arise from the fact that, in the French text, the word "defence" was doubly qualified, as *licite* and *légitime*, whereas, in the English text, it was qualified only as "lawful". He wondered whether the problem could not be solved by finding a French translation for "self-defence" which did not include the word *légitime*.

33. Mr. PELLET said that there was no linguistic misunderstanding; the English and French texts matched. His opposition to the phrase "in conformity with the Charter of the United Nations" was based on the idea that it was not for the Commission to cast itself as the defender of the Charter in a specific draft article by stating that measures of self-defence had to be taken in conformity with the Charter, for example, when a non-member State was involved. It was enough to state that such measures had to be lawful measures of self-defence. In its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, ICJ had in fact stated that Charter law and general international law did not coincide exactly in that area. Thus, in his view, the last phrase of article 29 ter was unnecessary and dangerous in that it left States which were not bound by the Charter, such as Switzerland and the Federal Republic of Yugoslavia, outside the regime covered by the draft articles.

34. Mr. LUKASHUK said that, for reasons of form, the last phrase of article 29 ter could not be deleted. Many bilateral and multilateral instruments contained a standard formula to the effect that self-defence could be exercised only in conformity with the Charter of the United Nations. That feature was firmly established in practice. Concerning Mr. Pellet's argument relating to non-member States, he noted that the Charter clearly stated that the United Nations also functioned with respect to non-member States, especially in situations where peace and security were involved. Therefore, the rules of international law embodied in the Charter were in fact generally accepted rules which would be followed even by non-member States. From the standpoint of principle, also, it would be a mistake to delete the phrase.

35. With regard to article 29 bis, he believed that, beyond "peremptory norms", there were many other norms of a higher rank, such as the decisions of the Security Council, which, according to Article 103 of the Charter of the United Nations, prevailed over obligations under any other international agreement. A hierarchy of norms also existed at a lower level, in that, when States concluded an agreement, they could stipulate that they would accept no other obligations which might be contrary to those deriving from the agreement. Thus, if a State complied with the higher-ranking rule, but violated obligations deriving from a lower-ranking rule, was the resulting situation contradictory or not? The Commission should consider that question carefully.

36. The CHAIRMAN, speaking as a member of the Commission, said that, although it was true that other international instruments referred to the Charter of the United Nations, such references were often indirect, as in article 52 of the 1969 Vienna Convention, which used the words "in violation of the principles of international law embodied in the Charter of the United Nations". He therefore agreed with Mr. Pellet that the Commission should reconsider the question and give some thought to whether such a "short-cut" was justified.

37. Mr. CRAWFORD (Special Rapporteur) said that article 29 ter used the wording of the text adopted on first reading, which had been generally, though not universally, approved by Governments. Although there had been a full debate on the issue at the current session, the Commission could return to it later on. He regretted that the Commission had rejected his proposal for paragraph 2, which, in his view, had been a definite improvement.

38. With regard to article 33, paragraph 2, the words "In any case" were already present in the article as adopted on first reading. In his view, they had been added to avoid the infelicity of repeating the formula at the beginning of paragraph 1, "Necessity may not be invoked". The problem would not have arisen if paragraph 1 had said "Necessity may be invoked", as paragraph 2 might then begin with the words "Necessity may not be invoked" or "Nonetheless, necessity may not be invoked".

39. As to Mr. Economides' suggestion, he said that the Commission might consider including a reference to "innocent victims" in article 35, subparagraph (*b*).

40. Mr. TOMKA, referring to article 29 bis, said that, although the Commission was fascinated by the concept of *jus cogens*, he continued to doubt that that article belonged in the articles on State responsibility. According to a general principle of law, if a person was bound to a certain obligation by a legal rule and fulfilled that obligation, that could not be contrary to law. Moreover, it was difficult to conceive of two customary rules being contradictory, with one requiring a certain type of conduct and the other requiring a different type. By definition, there could not be two customary rules with conflicting content. There could be a conflict between treaty rules, but that would be an issue of the application and applicability of treaties.

41. Concerning article 33, he believed that, in the French text, the wording of paragraph 1 adopted on first reading, *L'état de nécessité ne peut pas être invoqué par un Etat ... à moins que ...* was preferable to the proposed wording, *Un État ne peut invoquer la nécessité ... que si ....* In paragraph 2 (*c*), the deletion of the words "invoking necessity", as indicated in a corrigendum to the report of the Drafting Committee (A/CN.4/L.574/Corr.3), would create confusion. To avoid that confusion, he wondered whether the Commission might not use the expression in the text adopted on first reading, "the State in question".

42. Mr. PAMBOU-TCHIVOUNDA said that there was a need to harmonize the provisions of chapter V in general. Like Mr. Pellet, he regretted that article 29 had been worded differently from articles 29 bis and 29 ter. Likewise, regarding the negative form used in article 33, paragraph 1, although the concern to circumscribe the concept of necessity was understandable, that could have been done through a different formulation. In his view, the precaution rendered negatively in article 33, paragraph 1, had no doubt arisen from a desire to reflect the precaution rendered positively with respect to force majeure in article 31. The concepts of force majeure, distress and necessity, which were all related, were subjective and dangerously loaded. As there was not the slightest indication to give those who would be using them an idea of their objective meaning, there was a risk that those draft articles would be improperly used; in each case, it would be necessary for a third party, such as an arbitrator or judge, to provide the clarifications which the Commission had not included in its draft.

43. More specifically, he believed that the Chairman of the Drafting Committee should take account of Mr. Economides' comments on article 29 bis, namely, that there could be no possible consent to derogation from *jus cogens*. He also strongly supported the idea expressed earlier that the law governing responsibility should include a concept corresponding to the category of a peremptory norm of international law and clearly expressed in the draft. He would also be in favour of the deletion of the words "not in conformity with an international obligation of that State" in articles 31 to 33 because they were unnecessary coming after the expression "the wrongfulness of an act". Either wrongfulness occurred or it did not and wrongfulness was measured in terms of the international obligation.

44. The drafting of articles 32 and 33 also needed to be harmonized and a positive indication of what necessity was should be given in article 33; that might be done by combining paragraphs 1 (*a*) and 1 (*b*) with paragraph 2 corresponding to the system for utilizing, or invoking, a state of necessity.

45. Mr. LUKASHUK said that he did not agree with Mr. Tomka that the rules of international customary law could not contradict one another. On the contrary, a single treaty could contain rules that were so divergent that they contradicted one another when applied to concrete situations. Such contradictions could also appear in connection with peremptory norms, as it was conceivable for principles of international law to contradict one another, and that did happen. Numerous articles had been written about the potential contradiction between the principle of self-determination and the principle of territorial integrity. Moreover, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[4] had shown how important those elements were. The authors of the Declaration had stressed the fact that each of the principles could be interpreted on its own, but also in the light of the other principles; otherwise, contradictions might arise. The Commission should therefore base itself on the idea that it was quite possible for contradictions to exist between the provisions of different treaties, between the provisions of the same treaty and between the rules of international law, including peremptory norms.

46. Mr. CRAWFORD (Special Rapporteur), replying to Mr. Economides' comment on peremptory norms, said it was not being suggested that norms of *jus cogens* could be derogated from by consent; it was simply a question of recognizing the broad view taken of consent in the context of chapter V.

47. Mr. GAJA said he would try to lighten the burden of the Chairman of the Drafting Committee by defending certain points in the draft. First, the expression *En tout cas* at the beginning of article 33, paragraph 2, of the French text consisted of more or less the same wording as the text adopted on first reading, i.e. *En tout état de cause*. The idea was to stress the draft's limitative attitude towards necessity.

[4] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

48. He believed that the words "not in conformity with an international obligation" had been left out of articles 29, 29 bis and 29 ter, but included in articles 31 to 33 because those articles covered cases involving an excuse under the particular circumstances rather than a general derogation from the obligation, as was the case with articles 29, 29 bis and 29 ter.

49. Concerning the Chairman's comments about the indirect reference to the Charter of the United Nations in article 52 of the 1969 Vienna Convention, he pointed out that article 30 of the Convention contained a direct reference to the provisions of Article 103 of the Charter. He believed the reason why the reference to the Charter in article 29 ter had been kept was that it appeared in the draft adopted on first reading. As the members of the Commission knew, ICJ had already endorsed the draft articles to a large extent, and that explained the Drafting Committee's relative caution with regard to certain articles, including article 33.

50. Mr. CANDIOTI (Chairman of the Drafting Committee) said that formal aspects such as translation and presentation problems had been settled; other points would have to be taken into account in the general review of the draft as a whole. For the moment, he had taken due note of the interesting points raised by the members, including Mr. Economides' comment on the question of peremptory norms. He would amend the paragraph in question in order to avoid any misunderstanding about the nature of peremptory norms.

51. Mr. AL-BAHARNA noted that the Chairman of the Drafting Committee had the intention of taking the views of all the members into account. In his own view, article 33, paragraph 2, should begin with the word "Necessity", which would strengthen its drafting. No other changes were needed in article 33. He would prefer that draft articles 29, 29 bis and 29 ter remained as they stood. The Commission was emphasizing the idea of consent by beginning article 29 with the words "Valid consent", as was currently the case. Moreover, the drafting of articles 29, 29 bis, 29 ter and 33 was the same in the draft articles adopted on first reading, and that was another reason why extensive changes should not be made.

52. The CHAIRMAN said that the Commission had concluded its consideration of the draft articles proposed by the Drafting Committee. He took it that the Commission wished to take note of the report of the Drafting Committee, as suggested by the Chairman of the Committee, on the understanding that it would review the topic at its next session.

*It was so agreed.*

53. Mr. CRAWFORD (Special Rapporteur) said that the Commission was starting on a four-year programme to complete the second reading of the draft articles and not a one-year programme to complete part one. He had carefully noted all the points raised during the debate and would return to them to the extent necessary. He assured the members that all the points would be taken into account in the Commission's further work. Certain issues in relation to chapter II (The "act of the State" under international law) on attribution had not been fully resolved and would be settled only when the Commission consid-

ered part two. The Commission must work with the whole text in mind. He hoped that a text acceptable to all members would be reached, although some compromise would be necessary on all sides.

## Draft report of the Commission on the work of its fifty-first session (*continued*)*

### CHAPTER IV. *Nationality in relation to the succession of States* (continued)* (A/CN.4/L.581 and Add.1)

#### E. Text of the draft articles on nationality of natural persons in relation to the succession of States adopted by the Commission on second reading (*concluded*)* (A/CN.4/L.581/Add.1)

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

*Commentary to article 21*

*The commentary to article 21 was adopted.*

*Commentary to articles 22 and 23*

*The commentary to articles 22 and 23 were adopted.*

*Commentary to articles 24 to 26*

54. Mr. PELLET said that the wording *qui pourrait survenir dans l'avenir* at the end of paragraph (2) of the French version implied that the substantive rules embodied in articles 24 to 26 related at best to the progressive development of international law and did not apply to situations which had already arisen. Even if that were so, he did not see why States could not use them to settle problems concerning cases of decolonization already settled on the basis of articles 24 to 26. He proposed that the phrase should be deleted and a full stop placed after the word *l'indépendance*. The equivalent change in the English version would be to delete the words "possible future", with the end of the paragraph reading: "in any case of emergence of a newly independent State". Once again, he regretted the fact that no specific draft articles had been drafted to cover decolonization.

55. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission accepted Mr. Pellet's proposed amendment.

*It was so agreed.*

*The commentary to articles 24 to 26, as amended, was adopted.*

*Section E, as amended, was adopted.*

56. The CHAIRMAN invited the Commission to continue its consideration of chapter IV paragraph by paragraph.

#### A. Introduction (A/CN.4/L.581)

Paragraphs 1 to 6

*Paragraphs 1 to 6 were adopted.*

*Section A was adopted.*

#### B. Consideration of the topic at the present session

Paragraphs 7 to 9

*Paragraphs 7 to 9 were adopted.*

Paragraph 10

57. Mr. ECONOMIDES said that the Commission should inform the Sixth Committee of the widely divergent views expressed during the adoption of paragraph (3) of the commentary to article 3, which five members had agreed by show of hands should not be included in the draft.

58. Mr. ROSENSTOCK (Rapporteur), speaking on a point of order, said that the Commission had adopted the final version of the draft articles and the commentaries thereto: the debate had been closed.

59. The CHAIRMAN said he agreed with the Rapporteur that members should refrain from making comments on the draft articles and commentaries already adopted by the Commission. The paragraph under review was purely a matter of information and form, and it would be quite atypical to insert comments on the opinions expressed within the Commission. Such opinions, were, of course, contained in the summary records of the meetings in question. In addition, according to the Commission's working methods over a 50-year period, dissenting opinions did not appear in commentary adopted on second reading. The commentary to article 3 had been adopted. The decision in question was a decision of the Commission which bound both the members and the Chair.

60. Mr. KABATSI said that Mr. Economides' concern might be accommodated by the insertion of a footnote to paragraph 10 indicating that there had been a fair amount of dissent concerning paragraph (3) of the commentary to article 3.

61. Mr. ECONOMIDES said that he was prepared to withdraw his proposal if the Secretary to the Commission could assure him officially that there had never been an exception to the rule that dissenting opinions, even when held by several members, were not mentioned in the final result of the Commission's work.

62. Mr. MIKULKA (Secretary to the Commission), replying to Mr. Economides, said that the working method in question had been developed at the first to third sessions of the Commission, from 1949 to 1951, when the Commission had decided that the final text of the commentaries reflected the view of the Commission as a whole and would make no reference to dissenting opinions, even when shared by several members. He was not in a position to say that the Commission had never departed from that rule; to do so, he would have to analyse all the commentaries adopted since the first session. To his knowledge, however, the rule had always been followed. Of course, if the Commission wished, it could always reopen discussion on the commentary to article 3 and amend it.

* Resumed from the 2604th meeting.

63. Mr. TOMKA said that paragraph 10 merely reflected the facts. It was true that a vote by show of hands had taken place, but the commentary to article 3 had been adopted without a vote. The Sixth Committee would not be considering the commentary, but the text itself. The views expressed during the debate would be reflected in the summary records and become part of the preparatory work; they could be consulted by anyone who so wished.

64. Mr. KATEKA said that, while he agreed with the views expressed by the Chairman and the Secretary to the Commission, a compromise was possible: the Chairman might, when submitting the report of the Commission on the work of its fifty-first session to the Sixth Committee, indicate that there had been some dissension concerning the adoption of paragraph (3) of the commentary to article 3.

65. Mr. ROSENSTOCK (Rapporteur) said that, in giving effect to Mr. Kateka's proposal, the Chairman would achieve the very result which the Commission had always tried to avoid in refraining from mentioning dissenting opinions in texts it adopted on second reading. It would be extremely unwise to introduce such a practice, but he would not formally object to Mr. Kateka's proposal.

66. The CHAIRMAN said that he had taken careful note of Mr. Kateka's proposal; he took it that the Commission wished to adopt chapter IV, paragraph 10, of its report indicating that it had adopted the commentaries to the aforementioned draft articles at its 2603rd, 2604th and 2606th meetings.

*It was so agreed.*

*Paragraph 10 was adopted.*

*Section B was adopted.*

**C. Recommendations of the Commission**

Paragraph 11

*Paragraph 11 was adopted.*

Paragraph 12

67. Mr. PELLET said that he was a bit frustrated: he certainly agreed that the work on nationality in relation to the succession of States was coming to a close as a result of States' obvious lack of interest in the problems of the nationality of legal persons, but he had always felt that the rights and obligations of legal persons in relation to the succession of States was an extremely interesting subject and one of great practical importance, especially as the end of the cold war had made such issues, which used to divide States deeply, less sensitive. He would therefore like to see that question mentioned somewhere in the report of the Commission, either in paragraph 12 or in the section on the long-term programme of work.

68. Mr. KABATSI said that, like Mr. Pellet, he was troubled by the finality expressed at the end of paragraph 12. He proposed that the words "for the time being" should be added before the last word of the paragraph, "concluded".

69. Mr. ROSENSTOCK (Rapporteur) pointed out that Mr. Pellet had made a compromise proposal; taking into account paragraph 468 of the report of the Commission on the work of its fiftieth session,[5] cited in paragraph 12, it would not be appropriate to redraft the paragraph. It was, however, entirely appropriate, even necessary, to include Mr. Pellet's remark that the issue might be taken up in connection with the Commission's future work in the section of the report covering the Commission's long-term programme of work.

70. Mr. KABATSI noted that, as States had not shown interest in the question, it was not likely that they would approve its inclusion in the list of subjects for possible future work. In his view, it would be preferable to make the last sentence of paragraph 12 less final.

71. Mr. TOMKA said that the sentence in question was dictated by the decision reproduced in paragraph 12, which had been taken by the Commission the preceding year and which could not be reopened, and by the lack of interest shown by the Member States. The Working Group had proposed two approaches for future study of the topic, both of which would require a new mandate from the General Assembly. The Commission should try to complete its work on the other items on its agenda during the current quinquennium, but that would not prevent it from coming back to the topic of nationality of legal persons in relation to the succession of States if it received a mandate to do so from the General Assembly.

*The meeting rose at 6.15 p.m.*

[5] *Yearbook ... 1998*, vol. II (Part Two), p. 89.

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## 2607th MEETING

*Tuesday, 20 July 1999, at 3.05 p.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

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## Draft report of the Commission on the work of its fifty-first session (*continued*)

CHAPTER IV. *Nationality in relation to the succession of States* (concluded) (A/CN.4/L.581 and Add.1)

C. Recommendations of the Commission (*concluded*) (A/CN.4/L.581)

Paragraph 12 (*concluded*)

1. The CHAIRMAN invited the Commission to resume its consideration of paragraph 12. He recalled that several members had proposed (2606th meeting) that something should be done to make it clear that the Commission intended to revert to the topic "Nationality in relation to the Succession of States" in the future. Although there was majority approval for the conclusion contained in paragraph 12, it was also felt that further qualification of its second part was required, perhaps in another chapter. That part read "... the Commission decided to recommend to the General Assembly that, with the adoption of the draft articles on nationality of natural persons in relation to the succession of States, the work of the Commission on the topic 'Nationality in relation to the succession of States' should be considered concluded". At the subsequent meeting of the Working Group on the long-term programme of work, he had successfully proposed a formula to be included in the report of the Working Group. The new text had also been approved by the Planning Group, with the result that it would come before the Commission as part of the report of the Planning Group. The relevant paragraph read:

> "A further topic relating to the status of legal persons in relation to the succession of States was also brought to the attention of the Working Group. The Group decided that it needed a feasibility study on that subject in order to reach a decision. It decided to consider the subject, in the light of the feasibility study, at the next session."

2. Mr. ECONOMIDES said that, as a result of the Planning Group's wise initiative, the Commission could use the occasion of the adoption of the report to ask States once again about their interest in the issue of legal persons. He was not happy with the implication in paragraph 12 that the Commission intended to conclude its work on the topic on the basis of the low level of interest expressed by States. States took a long time to react. Given the fact that the relevant reports had already been adopted, the Commission could repeat its inquiries, perhaps with greater insistence, in parallel with the actions of the Planning Group, with a view to clarifying once and for all where States stood in relation to the issue of legal persons. The topic of legal persons was an important matter and the information received on it would complement the study which had already been carried out. Several of its aspects were of greater importance than aspects of the topic on natural persons. The information received on legal persons would also facilitate the work of the Planning Group, which would feel more free to draw its conclusions after having established that States really did not have an interest in the topic of legal persons. He would thus like paragraph 12 to be replaced by a fresh request to States concerning their interest in the topic of legal persons.

3. The CHAIRMAN said that he agreed with Mr. Economides on the importance of the topic of nationality of legal persons. After thorough discussion, however, the Commission had agreed that it had virtually exhausted its mandate concerning the topic of nationality in relation to the succession of States. The Commission was satisfied that it had received sufficient responses from States on the subject of natural persons and that, after several attempts, it could go no further on the subject of legal persons, having received virtually no replies from States. Although the Commission regarded its task as complete for the time being, the discussions in both the Working Group on the long-term programme of work and in the Planning Group had revealed a will to continue with the topic at the next session. It was hoped that the proposed feasibility study would lead to the formulation of new arguments and questions that would stimulate a greater volume of replies from States. The aim of the feasibility study was not to kill off the topic, but to maintain it and build on what the Commission had already achieved.

4. Mr. KABATSI said that, in view of the Planning Group's recommendation, as just explained by the Chairman, it would seem contradictory to state in the conclusion contained in paragraph 12 that the work of the Commission on the topic of nationality in relation to the succession of States should "be considered concluded" when a different chapter now stated that the Commission intended to conduct a feasibility study. To redress the situation, he proposed that the end of paragraph 12 should be amended to read: "the work of the Commission on the topic of natural persons in relation to the succession of States be considered concluded." As it stood, paragraph 12 implied that the work on legal persons had also been concluded.

5. The CHAIRMAN said that he understood the reason for Mr. Kabatsi's proposal. However, the paragraph in question already contained references to the effect that the work of the Commission on the topic would be considered concluded "with the adoption of the draft articles on nationality of natural persons in relation to the succession of States". There was thus no need to repeat the idea. He recalled that, originally, the topic had been a general one relating to nationality in relation to the succession of States. The issue of the nationality of natural persons had been introduced later and it was therefore quite understandable that it should still be incomplete.

6. By contrast, he felt that the proposal Mr. Kabatsi had made (ibid.) for the inclusion of the phrase "for the time being" in paragraph 12 would bring the text more closely into line with the reference to the Commission's future work on the topic contained in the report of the Planning Group; paragraph 12 would then also reflect the history of the topic more completely.

7. Mr. ROSENSTOCK said that he agreed with the Chairman's reply to Mr. Economides. It was not a matter of deciding whether or not to have a new topic; the Commission was asking the Planning Group to consider whether a topic on nationality in relation to legal persons would be a worthwhile undertaking, without prejudice to

any other developments. He feared that any change in the wording of paragraph 12 might restrict the Planning Group's freedom of action when it came to the feasibility study on legal persons. The important thing was to keep that subject open, although he suspected that ultimately it would not be limited to the succession of States.

8. He was satisfied with the conclusion reached in paragraph 12, which was in part a response to the fact that, although by implication it had demonstrated its approval, the General Assembly had not replied directly to the Commission with regard to the decision the latter had taken at its forty-eighth session to focus on the topic of nationality in relation to the succession of States, with respect to natural persons.[1] He also had no problem with the recommendation that the Planning Group should examine the question of the future topic with a view to raising further questions on the nationality of legal persons. That was not in any way inconsistent with the conclusion that the Commission had felt it would have to draw, at its fiftieth session, should the silence on the part of the General Assembly continue.

9. Mr. ECONOMIDES said he could not agree that States had shown complete disinterest in the second part of the topic. His recollection was that Greece had declared that it was interested in the topic of legal persons. Thus, to say "In the absence of positive comments from States" in paragraph 12 was incorrect.

10. The CHAIRMAN said it was his recollection that no written response had been received from States following the final appeal for contributions which the Commission had made in its report to the General Assembly on the work of its fiftieth session.[2]

11. Mr. MIKULKA (Secretary to the Commission) said that, when the topic had first been included in the Commission's agenda at its forty-fifth session,[3] States had been requested to submit to the Commission, through the Secretariat, details of their national legislation relating to the issue, together with any material that would facilitate the Commission's study of the topic.[4] The invitation had referred to nationality issues in respect of both natural and legal persons. The result was that abundant documentation had been received in respect of the former and none in respect of the latter.

12. Mr. Economides was correct in saying that Greece had expressed a short favourable opinion on the second part of the topic during the discussions in the Sixth Committee.[5] Subsequently, however, Greece had not submitted any documentation. By contrast, a number of other States, including those directly involved in State succession, had indicated clearly in the Sixth Committee that they were not interested in the second part of the topic. At its fiftieth session, the Commission had discussed the fourth report of the then Special Rapporteur,[6] who had proposed two strategies for dealing with the second part of the topic in response to the prevailing opinion that the topic of the nationality of legal persons in relation to the succession of States was not broad enough to warrant an independent study by the Commission. The two options were summarized in paragraphs 461 to 468 of the report of the Commission on the work of its fiftieth session. Neither option seemed to have attracted the attention of the Sixth Committee and, to date, no response or further comment had been received from any State.

13. Mr. LUKASHUK said that he endorsed the whole report. In general terms, the success of the Commission's work depended on the topics it selected for study. In that regard, the Commission's statute clearly stated that the Commission had a duty to review all areas of international law, but to focus on the issues that seemed most topical and appropriate. Thus, the Commission could not simply choose topics at random and, if it abandoned its systematic approach, its work would not be so effective.

14. His second point, and one which had been addressed by the General Assembly at its fifty-third session, had to do with the fragmentation of international law. The topics examined by the Commission related to several major fields of international law, all of them involving many different types of institution. Consequently, no topic could be studied in isolation and the Commission was obliged to adopt a very thorough approach in selecting topics. It must also seek to maximize the contribution it could make, taking into account the interests of its members.

15. In that regard, while the Commission was called on to deal with matters of topical relevance, it was also uniquely placed to examine particularly pressing concerns. An example was the special task with which the Commission had been entrusted in the context of the United Nations Decade of International Law,[7] namely, to study and promote knowledge of international law worldwide. The task was a crucial one, since the manner in which it was handled would determine the future effectiveness of the entire system of international law. A number of speakers invited to appear before the Commission had described how human rights legislation and the supremacy of law were directly affected by the overall level of legal expertise.

16. He thus proposed that the Commission should undertake a preliminary study with a view to drawing up articles on the study and promotion of international law, in implementation of the tasks which the Commission had been set by the General Assembly in the framework of the United Nations Decade of International Law.

17. The CHAIRMAN said that, as there were no further comments, he took it that the Commission wished to adopt paragraph 12 as it stood.

*It was so agreed.*

*Paragraph 12 was adopted.*

*Section C was adopted.*

[1] *Yearbook ... 1996*, vol. II (Part Two), p. 76, document A/51/10, para. 88.

[2] *Yearbook ... 1998,* vol. II (Part Two), p. 89, para. 468.

[3] *Yearbook ... 1993*, vol. II (Part Two), pp. 96-97, paras. 427 and 440, respectively.

[4] *Yearbook ... 1995*, vol. II (Part Two), p. 33, para. 145.

[5] See *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 22nd meeting (A/C.6/50/SR.22), and corrigendum, para. 63.

[6] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/489.

[7] See 2575th meeting, footnote 4.

### D. Tribute to the Special Rapporteur, Mr. Václav Mikulka, and to the Chairman of the Working Group, Mr. Zdzislaw Galicki

Paragraph 13

18. Mr. ROSENSTOCK said that it had become a matter of routine for the Commission to adopt a resolution expressing thanks to the Special Rapporteur. However, it was one of those occasions when the Special Rapporteur, Mr. Mikulka, should be given particular praise. He had made a singular contribution to the topic over the years through his originality, the quality and timelessness of his reports and the thoroughness of his scheduling, enabling the Commission to approach its work on the basis of sufficient preparation and with ample time for reflection. As a measure of the Special Rapporteur's contribution, conversations he had held with representatives of UNHCR indicated that the work the Commission had carried out on the topic could be applied directly in the context of the human tragedies with which they were concerned. He therefore enthusiastically endorsed the resolution, which also paid a tribute to the work done by the Chairman of the Working Group, Mr. Galicki, after the Special Rapporteur had moved on to other areas of the Commission's work.

*Paragraph 13 was adopted.*

*Section D was adopted.*

*Chapter IV, as a whole, as amended, was adopted.*

## Chapter IX. *International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)* (A/CN.4/L.586)

### A. Introduction

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

Paragraph 3

19. Mr. KATEKA pointed out that, as the paragraph referred to the Commission's work of the previous year, it should begin "At its fiftieth session", and not "At its fifty-first session".

*Paragraph 3, as amended, was adopted.*

Paragraphs 4 to 6

*Paragraphs 4 to 6 were adopted.*

*Section A, as amended, was adopted.*

### B. Consideration of the topic at the present session

Paragraphs 7 to 9

*Paragraphs 7 to 9 were adopted.*

Paragraph 10

20. Mr. SIMMA pointed out that the antecedent of the word "deferring" was ambiguous and might be taken to be the "overwhelming majority of the members who spoke". He proposed that that word should be replaced by the phrase "i.e. to defer".

21. Mr. ROSENSTOCK (Rapporteur) said that he endorsed the proposed correction as an improvement on the text and a better reflection of what had actually happened.

*It was so agreed.*

22. Mr. KATEKA recalled that he had expressed great concern about the substantive issue of how the Commission had dealt with the topic of international liability for injurious consequences arising out of acts not prohibited by international law for the past 20 years.

23. Mr. AL-KHASAWNEH said that he shared that concern.

24. Mr. PELLET said that those two comments indicated that the phrase "The overwhelming majority of members" was somewhat excessive. As it was also not the Commission's practice to use such wording, he proposed that, in the French version, the words *L'immense majorité* should be replaced by the words *La grande majorité*.

25. Mr. KATEKA, supported by Mr. Sreenivasa RAO (Special Rapporteur), suggested that, in English, the words "The overwhelming majority" should be replaced by the word "Most".

*Paragraph 10, as amended, was adopted.*

Paragraph 11

26. Mr. GOCO suggested that the word "defer" should be replaced by the words "hold in abeyance" to reflect the fact that the Commission had expressed a real desire to tackle the question of international liability, as opposed to dealing only with prevention.

27. Mr. ROSENSTOCK (Rapporteur) said he would not oppose that amendment, but would prefer to retain the text as it stood, as it more accurately captured the general mood of the Commission. The Special Rapporteur had proposed three options: to move forward on the question of liability, to suspend work on that question until the draft articles on prevention had been finalized and to terminate the work on liability. Each option had had its supporters, with the majority favouring the second option. The change suggested by Mr. Goco would obliterate any reference to the views of that school of thought.

28. Mr. Sreenivasa RAO (Special Rapporteur) said that he endorsed those comments. The text as it stood struck the required balance and was likely to be acceptable to all members.

29. Mr. SIMMA said it was true that the proposed amendment was likely to create difficulties.

*Paragraph 11 was adopted.*

*Section B, as amended, was adopted.*

*Chapter IX, as a whole, as amended, was adopted.*

**CHAPTER VI. *Reservations to treaties* (A/CN.4/L.583 and Add.1-5)**

**A. Introduction (A/CN.4/L.583)**

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

Paragraph 4

30. Mr. TOMKA, referring to the first part of the last sentence, asked whether the word "draft" had to be included before the word "guidelines".

31. Mr. ROSENSTOCK (Rapporteur) said that, since the paragraph was merely descriptive and did not specify whether the subject was the result of the Commission's work or the final product, there was no reason why the word "draft" needed to be retained.

32. Mr. PELLET (Special Rapporteur) said that the deletion would certainly be advantageous, but might be a bit audacious. It meant that the Guide to Practice prepared by the Commission would be the end product and would not require approval by any other body. There was no compelling need to delete the word "draft" and he would prefer to retain it.

33. Mr. HAFNER said that the last sentence did not appear in the report of the Commission on the work of its fiftieth session. That indicated that the decision that the Guide to Practice would take the form of draft guidelines with commentaries had been adopted at the current session. He requested clarification as to when the decision had been taken.

34. Mr. ROSENSTOCK (Rapporteur) said that the decision had been taken at the forty-seventh session[8] and had served as the basis for the Commission's work ever since.

35. Mr. PELLET (Special Rapporteur) said that that was true. The deletion of the word "draft" raised the question whether the Guide to Practice was a product of the Commission which would be imposed on the international community or whether the Commission would try to have it adopted by the General Assembly. He was convinced that the implications of the deletion were important enough to warrant further consideration and that the text should be retained unchanged.

36. Mr. ELARABY said that he supported the position taken by the Special Rapporteur. The deletion of the word "draft" might be premature, there was no pressing need for it and it could in fact have broad implications.

37. Mr. GOCO said that he, too, endorsed the comments made by the Special Rapporteur. The deletion was premature and would create inconsistencies, as the words "draft guidelines" appeared throughout the text.

38. Mr. TOMKA said that he would not press for his amendment.

*Paragraph 4 was adopted.*

[8] See *Yearbook ... 1995*, vol. II (Part Two), p. 108, document A/50/10, para. 487 (*b*).

Paragraphs 5 to 12

*Paragraphs 5 to 12 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session**

Paragraph 13

*Paragraph 13 was adopted.*

Paragraph 14

39. Mr. PELLET (Special Rapporteur) said that, in the first sentence of the French text, the word *directive* should be in the plural and the phrase should then read *projets de directives* because there were several drafts relating to several guidelines, not several drafts relating to one guideline. The same comment applied to paragraph 11. He had pointed that out a number of times to the secretariat, which refused to listen to reason. He therefore called on the secretariat systematically to put an "s" on *directive* in the phrase *projets de directive* of the French version whenever several different guidelines were meant.

40. Mr. MIKULKA (Secretary to the Commission) said he regretted that he could not give the Special Rapporteur any guarantee that his request would be met. The question had been raised with the French translation service, which had informed the secretariat that, grammatically speaking, the word *projet* should be in the plural, while *directive* took the singular.

41. Mr. PELLET (Special Rapporteur) said that he protested vigorously. Since there were several drafts concerning several guidelines, the word *directive* took an "s": that was a fact, regardless of what the translation and editing services believed. It was inadmissible to retain absurdities just because that was the wish of the translation and editing services. The French language was not as extravagant as the translators and editors thought.

42. Mr. GAJA said that he agreed with Mr. Pellet on the need to put the word *directive* in the plural in the French version.

43. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph 14 as proposed.

*It was so agreed.*

*Paragraph 14 was adopted with a minor correction to the French version.*

Paragraph 15

44. Mr. SIMMA said that, at the end of the first sentence, the words "himself had some doubts about their utility and he" should be deleted; it was sufficient to say that "the Special Rapporteur had proposed them only tentatively".

45. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph 15, as amended.

*It was so agreed.*

*Paragraph 15, as amended, was adopted.*

Paragraph 16

46. The CHAIRMAN said that there was a typographical error. The number in square brackets should read "18", not "17".

47. Mr. PELLET (Special Rapporteur) said that the square brackets could be deleted because it was now certain that there were 18 draft guidelines in all.

48. The CHAIRMAN, noting that the exact dates and the number of meetings would also be filled in, said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph 16 with those drafting changes.

*It was so agreed.*

*Paragraph 16, as amended, was adopted.*

*Section B, as amended, was adopted.*

### C. Draft guidelines on reservations to treaties (A/CN.4/L.583/Add.1-5)

#### 1. Text of the draft guidelines on reservations to treaties provisionally adopted by the Commission on first reading (A/CN.4/L.583/Add.1)

49. The CHAIRMAN asked the members of the Commission whether they were prepared to adopt the text of the draft guidelines on reservations to treaties as a whole.

50. Mr. ECONOMIDES said that he was in favour of adopting the draft guidelines as a whole, but drew attention to the fact that one draft guideline was missing and should be inserted after draft guideline 1.3.3 [1.2.3], namely, the case of a unilateral statement which was contrary to the object and purpose of a treaty. Draft guideline 1.3.3 [1.2.3] dealt only with cases of a treaty which prohibited certain reservations. Some treaties allowed reservations, however, and, in those cases, a provision was needed which said that, when a treaty did not prohibit reservations, a reservation formulated with regard to that treaty was deemed not to be contrary to the object and purpose of the treaty, in keeping with the principle of good faith, unless that was not true, in which case the reservation was impermissible.

51. The CHAIRMAN pointed out that, as the Commission had just adopted sections A and B, it could not return to the substance. He requested the members to confine themselves to corrections of possible mistakes in section C.1.

52. Mr. TOMKA said that the wording of draft guideline l.5.2 [1.2.7] was imprecise. The text should read: "Guidelines 1.2 and 1.2.1 [1.2.4] are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties."

53. Mr. CANDIOTI said that, in the Spanish text of draft guidelines 1.1.3 [1.1.8] and 1.1.4 [1.1.3], for example, the terms adopted at the fiftieth and fifty-first sessions should be consistent.

54. Mr. KABATSI said that he found the method of numbering the guidelines cumbersome and unhelpful.

55. Mr. SIMMA, endorsing Mr. Kabatsi's comment, said that the cumbersome numbering of the guidelines was especially striking in paragraph 1. Was that paragraph really needed?

56. The CHAIRMAN said that, as he understood it, paragraph 1 was a kind of draft guideline on the draft guidelines, without which the Commission might be lost. In future, the Commission might ask the Special Rapporteur to try to simplify the numbering. The Special Rapporteur had retained the double numbering to make it easier to compare the texts, but eventually the time would come to number the paragraphs uniformly.

57. Mr. HAFNER said that the footnote to draft guideline 1.1.3 [1.1.8] seemed to be hanging in mid-air, since there was no indication as to when a decision had been taken on that guideline.

58. Mr. ECONOMIDES said that he endorsed the comments by Mr. Kabatsi and Mr. Simma on the numbering of the draft guidelines. Once section C.1 was adopted by the Commission, it was no longer the Special Rapporteur's draft guidelines. He saw no reason why there should be three figures when one would suffice. The numbering must be simplified for the sake of future readers. He asked the secretariat whether it was the Commission's practice to number the draft guidelines in such a complex manner. It would have been much more practical to have part one take a Roman numeral, followed by a capital letter and an Arabic numeral.

59. The CHAIRMAN said that he fully agreed with Mr. Economides. However, he reminded the members that, as the double system of numbering had already been adopted along with the draft guidelines, it would be rather strange to change it because that would constitute a substantial intrusion into the adopted text. He agreed with Mr. Hafner's suggestion because footnotes were another matter. Proposals for a different system of numbering should be made at the next session.

60. Mr. KATEKA recommended that paragraph 1 should be deleted because it looked like a logarithm. Referring to Mr. Hafner's suggestion on the footnote to draft guideline 1.1.3 [1.1.8], he said that an asterisk should be added in order to show which guidelines had been adopted at the fiftieth session and which had been adopted at the fifty-first session.

61. Mr. PELLET (Special Rapporteur), pointing out that he had already explained why the system of numbering had been chosen, expressed dismay that the issue had been raised again at the current stage and emphasized that he was fundamentally opposed to any alteration of that system. The Chairman had referred to a different matter, namely, whether a reference in brackets to guidelines adopted at the fiftieth session should be retained. Since such a reference was advisable, he proposed that, in paragraph 1, the long list of numbers should be deleted and that the sentence should read: "The text of the draft guidelines provisionally adopted by the Commission at its fiftieth and fifty-first sessions is reproduced below." The numbering used in the text of the draft guidelines should

be retained in brackets, but, in the text of draft guideline l.5.2 [1.2.7], the number in brackets, "[l.2.4]" should be deleted.

62. The footnote to draft guideline 1.1.3 [1.1.8] raised a more general question. He believed that more systematic footnotes were required to indicate not only which draft guidelines had been adopted at the fiftieth session, but also exactly where the relevant commentaries were to be found. Special footnotes would, however, be needed on draft guidelines 1.1.1 [1.1.4] and 1.1.3 [1.1.8] to explain that there was a fresh commentary to draft guideline 1.1.1 [1.1.4] because it had been provisionally adopted at the fiftieth session, but revised and amended at the current session, whereas draft guideline 1.1.3 [1.1.8] had not been changed and there was thus no new commentary.

63. Mr. ROSENSTOCK (Rapporteur) stated that he saw considerable merit in including a reference to the commentaries to the draft guidelines provisionally adopted at the fiftieth session, but urged the Special Rapporteur to reconsider the disastrous numbering system.

64. Mr. GAJA proposed that paragraph l should be used as an index, as that would obviate any need for the incorporation in the text of numbers in brackets, which were of no immediate use.

65. Mr. SIMMA said that he supported Mr. Pellet's proposal on paragraph 1.

66. Mr. PELLET (Special Rapporteur) said he agreed that paragraph l should be amended, but was opposed to the deletion of the footnote to draft guideline 1.1.3 [1.1.8]; he believed, rather, that a footnote to draft guideline 1.1.3 [1.1.8] should be added.

67. Mr. MIKULKA (Secretary to the Commission) said that, in sections C.1 and C.2, the secretariat had merely followed the Commission's normal practice. If it wished to alter that practice, it would have to do so for all topics under consideration and it should therefore consider the consequences of such a step.

68. Mr. PELLET (Special Rapporteur) said that precedents did not necessarily have to be followed in all cases.

69. Mr. HAFNER said that he endorsed Mr. Pellet's proposal on footnotes.

70. Mr. KATEKA said that he agreed with Mr. Hafner and Mr. Pellet on the inclusion of footnotes.

71. Mr. PELLET (Special Rapporteur) said that, on the basis of Mr. Tomka's suggestion, draft guideline l.5.2 [1.2.7] should be amended to read: "Guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties." The title should be amended accordingly.

*It was so agreed.*

72. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the text of the draft guidelines, as amended by the deletion of the guideline numbers from paragraph 1, the inclusion of appropriate footnotes concerning the genesis of certain draft guidelines, the deletion in the text of draft guideline l.5.2 [1.2.7] of the numbers in square brackets and the adoption of Mr. Tomka's suggestion.

*It was so agreed.*

*Section C.1, as amended, was adopted.*

*The meeting rose at 5.20 p.m.*

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# 2608th MEETING

*Wednesday, 21 July 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

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## Draft report of the Commission on the work of its fifty-first session (*continued*)

**CHAPTER VI. *Reservations to treaties* (continued) (A/CN.4/L.583 and Add.1-5)**

**C. Draft guidelines on reservations to treaties (*continued*) (A/CN.4/L.583/Add. 1-5)**

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-FIRST SESSION (A/CN.4/L.583/ADD.2-5)

*Commentary to guideline 1.1.1 [1.1.4]* (A/CN.4/L.583/Add.2)

1. Mr. HAFNER, referring to paragraph (5), said that it was too categorical to say that across-the-board reservations had never raised any particular objection; he would prefer to say that they had never raised any major objection.

2. Mr. PELLET (Special Rapporteur) replied that it was simply incorrect to say that across-the-board reservations had never raised any major objection: they had, but not because of their across-the-board nature, not "as such". Mr. Hafner's proposal tended to give the first sentence of paragraph (5) a meaning that was unacceptable.

3. Mr. HAFNER thanked the Special Rapporteur for his explanation; however, he remained concerned at the unconditional nature of the statement. He proposed a

compromise, namely, to say that across-the-board reservations, as such, had "not" raised any particular objection.

4. Mr. PELLET (Special Rapporteur) said that he accepted Mr. Hafner's proposal.

5. The CHAIRMAN said he took it that, in paragraph (5) of the commentary, the Commission wished to replace the word "never" by the word "not".

*It was so agreed.*

6. Mr. TOMKA, supported by Mr. ADDO, said that it was not necessary to reproduce the criticism of one author—controversial at that—in the commentary. He proposed that, in paragraph (2), all the words between "Conventions" and "takes care" should be deleted and, consequently, that "The second" at the beginning of paragraph (3) should be changed to "A".

7. The CHAIRMAN said he took it that the Commission wished to adopt the amendments to paragraphs (2) and (3) of the commentary.

*It was so agreed.*

8. Mr. PELLET (Special Rapporteur) said that the words "The commentary" at the beginning of the footnote after the title of the draft guideline should be replaced by the words "An initial commentary".

9. Mr. TOMKA said that the word *extrêmement* in the French version of paragraph (5) was too strong and proposed that it should be deleted.

10. Mr. PELLET (Special Rapporteur) said that he would not object to Mr. Tomka's proposal, although he was convinced that the word was appropriate in the French version.

11. The CHAIRMAN said he took it that the Commission wished to delete the word *extrêmement* in paragraph (5) of the French version.

*It was so agreed.*

12. Mr. ELARABY asked whether the Special Rapporteur might explain the meaning of the word "particular" in paragraph (5).

13. Mr. PELLET (Special Rapporteur), replied that "particular" signified that there had been no objection relating particularly to the across-the-board nature of the reservation.

14. Mr. SIMMA said that, as the practice of across-the-board reservations was not considered to be very desirable, it was strange to say, in paragraph (8), that across-the-board reservations indicated a social need. He proposed that the word "social" in paragraph (8) should be replaced by the word "practical".

15. Mr. TOMKA proposed that the word "strongly" in the phrase "the International Court of Justice has strongly underlined" in paragraph (8) should be deleted.

16. The CHAIRMAN said he took it that the Commission agreed to the amendments to paragraph (8).

*It was so agreed.*

*The commentary to guideline 1.1.1 [1.1.4], as amended, was adopted.*

*Commentary to guideline 1.1.5 [1.1.6]* (A/CN.4/L.583/Add.3)

17. Mr. GAJA said he wondered whether it was advisable to speak at length in the commentary about extensive reservations when the guideline in question did not deal directly with the subject. Extensive reservations had their place in the draft, but not necessarily at that point.

18. He also wondered about the example given in the footnote at the end of paragraph (10), which in his view confused the point the Special Rapporteur was making in that paragraph of the commentary, namely, that a State could not take the opportunity offered by the treaty to try, by means of a reservation, to acquire more rights than those to which it could claim to be entitled under general international law.

19. Mr. PELLET (Special Rapporteur) said that the draft guideline under consideration was in any event a harmless provision. The footnote at the end of paragraph (10) simply reflected a lengthy discussion between two former members of the Commission at an earlier session. The Commission could always come back to that part of the commentary when it came to consider draft guideline 1.4.2.

*The commentary to guideline 1.1.5 [1.1.6] was adopted.*

*Commentaries to guidelines 1.1.6, 1.2, 1.2.1 [1.2.4], 1.2.2 [1.2.1], 1.3, 1.3.1, 1.3.2 [1.2.2] and 1.3.3 [1.2.3]*

*The commentaries to guidelines 1.1.6, 1.2, 1.2.1 [1.2.4], 1.2.2 [1.2.1], 1.3, 1.3.1, 1.3.2 [1.2.2] and 1.3.3 [1.2.3] were adopted.*

*Commentary to guideline 1.4* (A/CN.4/L.583/Add.4)

*The commentary to guideline 1.4 was adopted.*

*Commentary to guideline 1.4.1 [1.1.5]*

20. Mr. SIMMA proposed that the word "famous" at the beginning of paragraph (1) should be replaced by the word "well-known".

21. Mr. PELLET (Special Rapporteur) noted that, in the last sentence of the French version of paragraph (1), the phrase *l'existence de réserves de cas* should read *l'existence de cas où la réserve*.

*The commentary to guideline 1.4.1 [1.1.5], as amended, was adopted.*

*Commentary to guideline 1.4.2 [1.1.6]*

22. Mr. GAJA said that the commentary reflected the problem he had raised in connection with draft guideline 1.1.5 [1.1.6]. The goal was to avoid a State using unilateral statements in order to increase the obligations of the other contracting parties. It would be preferable to replace the words "any obligations which do not arise under general international law" at the end of the first sen-

tence of paragraph (1) by the words "any obligations which do not arise under the treaty".

23. Mr. PELLET (Special Rapporteur) said that it was nevertheless important to retain the idea contained in that phrase, namely, that a State could not add to general international law by means of a universal statement. Perhaps the end of the sentence could read: "any obligations which do not arise under general international law or the treaty".

24. Mr. GAJA said he found that wording even less clear.

25. Mr. ROSENSTOCK (Rapporteur) proposed that the sentence should say "any obligations", without further specification.

26. Mr. HAFNER said he wondered what would happen in cases where a treaty provided for just the kind of universal statement to which the commentary referred. The proposed wordings did not cover that possibility.

27. Mr. ECONOMIDES said that emphasis should be placed on the treaty, which was the subject of the guideline. For that reason, he would prefer to speak of "any obligations which do not arise under the treaty".

28. The CHAIRMAN said he took it that the Commission was prepared to accept the wording "any obligations which do not arise either under the treaty or under general international law".

*It was so agreed.*

*The commentary to guideline 1.4.2 [1.1.6], as amended, was adopted.*

*Commentary to guideline 1.4.3 [1.1.7]*

29. Mr. SIMMA said that the question of non-recognition of a Government should be given more direct and thorough treatment than was provided in paragraph (11) of the commentary, especially as many of the examples cited related to cases of non-recognition of a Government. He therefore proposed that the Commission should add to the text of draft guideline 1.4.3 [1.1.7] the phrase "or recognition of the Government of a State", following the words "as a State".

30. The CHAIRMAN noted that the text of draft guideline 1.4.3 [1.1.7] had been adopted and in principle could not be reconsidered.

31. Mr. LUKASHUK endorsed Mr. Simma's comment. On reading paragraph (3), it might be asked whether the Commission was able to distinguish between recognition of a State and recognition of a Government. Nevertheless, as the draft guideline had already been adopted, the question might be settled through an addition to the commentary.

32. Mr. PELLET (Special Rapporteur) acknowledged that Mr. Lukashuk's and Mr. Simma's comments were justified; he had erred in limiting the draft guideline to recognition of a State, as that made it impossible to formulate an appropriate commentary. Despite the inconvenience involved in making a correction at such a late stage in a draft guideline which had already been adopted, he believed that was where the solution lay. He could, however, propose a change which was simpler than the one suggested by Mr. Simma and which would be to delete the words "as a State". The last sentence of paragraph (11) could then be deleted.

33. Mr. ROSENSTOCK (Rapporteur) proposed that the Special Rapporteur's amendment should be submitted to the members, on the understanding that, if there was any opposition, it would be rejected.

34. Mr. CANDIOTI (Chairman of the Drafting Committee) endorsed the proposals of both the Rapporteur and the Special Rapporteur.

35. Mr. LUKASHUK endorsed the Special Rapporteur's proposal.

36. Mr. GOCO endorsed the Rapporteur's proposal and said he believed that the Special Rapporteur's proposed amendment would solve the problem.

37. The CHAIRMAN said that he would be prepared, exceptionally, to submit the Special Rapporteur's proposal to the members of the Commission because it would help improve the quality of the report of the Commission. He asked whether the members agreed to the proposal that the words "as a State" in draft guideline 1.4.3 [1.1.7] and the last sentence of paragraph (11) of the commentary should be deleted.

38. Mr. SIMMA, supported by Mr. PAMBOU-TCHIVOUNDA, said that the deletion of the last sentence of paragraph (11) alone would not suffice; the entire organization of the paragraph should be reviewed by the Special Rapporteur.

39. Mr. ECONOMIDES noted that the relevant entity in practice was most often a State, and occasionally a Government. If the Commission decided to delete the words "as a State", the text of the guideline would refer only to a non-recognized entity, which would broaden the concept considerably. In his view, the provision should, rather, be made more specific and include non-recognition of a Government.

40. Mr. AL-BAHARNA said that, although he would prefer to keep the text of the draft guideline as adopted, he was prepared to accept Mr. Economides' proposal, which would have the advantage of avoiding changes in the commentary.

41. Mr. PAMBOU-TCHIVOUNDA said that he understood the approach Mr. Economides was suggesting; however, as possible entities for recognition included not only States and Governments, but insurgent national liberation movements, for example, he had doubts about specifying the categories covered by the concept of entity in the text of the guideline. Such a specification would be better placed in the commentary.

42. Mr. PELLET (Special Rapporteur) said that, although agreement seemed to be emerging, he endorsed Mr. Pambou-Tchivounda's comment. Including the words "as a State or as a Government" in the text of the guideline would amount to the same error, although slightly less serious, as the one the Commission was attempting to correct. However, deleting the words "as a State" would be

sufficient to cover all situations, on the understanding that paragraph (11) of the commentary would explain what was covered by the word "entity".

43. Consequently, he proposed that the words "as a State" in draft guideline 1.4.3 [1.1.7] should be deleted, on the understanding that he would reformulate paragraph (11) of the commentary and submit it to the Commission after it had been reviewed by the Rapporteur.

44. The CHAIRMAN suggested the following compromise: the Commission would amend the text of draft guideline 1.4.3 [1.1.7] by deleting the words "as a State" and ask the Special Rapporteur to reformulate paragraph (11) of the commentary to reflect the tenor of the debate, in particular Mr. Economides' idea that draft guideline 1.4.3 [1.1.7] was aimed principally at recognition of a State.

45. He said that, if he heard no objection, he would take it that the Commission accepted that suggestion.

*It was so agreed.*

*Guideline 1.4.3 [1.1.7], as amended, was adopted.*

*The commentary to guideline 1.4.3 [1.1.7] was adopted subject to the reformulation of paragraph (11).*

*Commentary to guideline 1.4.4 [1.2.5]*

*The commentary to guideline 1.4.4 [1.2.5] was adopted.*

*Commentary to guideline 1.4.5 [1.2.6]*

46. Mr. GAJA, referring to the end of paragraph (11), proposed that the word "general" before the words "international law" should be deleted. Although it was true that the internal rules of international organizations were rooted in international law, guideline 1.4.5 [1.2.6] referred primarily to treaty law, even though it might include some rules of general international law.

47. Mr. LUKASHUK said that the question whether the internal rules of international organizations were within the purview of international law was a highly controversial one; the last phrase of paragraph (11) should be deleted altogether.

48. Mr. ECONOMIDES said that the internal rules of international organizations were essentially, if not exclusively, based on the treaties establishing the organizations, but general international law had been playing a role for some time. That having been said, the question was not directly relevant in the context of the commentary. He therefore endorsed Mr. Lukashuk's proposal that the last phrase of paragraph (11), should be deleted. In that case, the footnote should be placed after the words "international organization".

49. The CHAIRMAN said he took it that the Commission accepted the proposed amendment, namely, that the phrase "even if it is rooted in general international law" should be deleted from paragraph (11) and that the footnote should be placed after the words "international organization".

*It was so agreed.*

*The commentary to guideline 1.4.5 [1.2.6], as amended, was adopted.*

## CHAPTER V. *State responsibility* (A/CN.4/L.582 and Add.1-4)

50. The CHAIRMAN invited the Commission to consider chapter V paragraph by paragraph.

### A. Introduction (A/CN.4/L.582)

Paragraphs 1 to 4

*Paragraphs 1 to 4 were adopted.*

Paragraph 5

51. Mr. CRAWFORD (Special Rapporteur) said that the original understanding had been that part three might include provisions on the settlement of disputes, but would essentially be about the implementation of international responsibility. As the emphasis had certainly not been on the settlement of disputes, he proposed that the words "the settlement of disputes and" should be deleted from the end of paragraph 5.

52. Mr. PAMBOU-TCHIVOUNDA said that he wondered whether it was advisable to dispose in such a manner of a question which had arisen and which had not been examined by the Commission.

53. Mr. KATEKA noted that the phrase which the Special Rapporteur was proposing to delete was a direct quotation from the report of the Commission on the work of its twenty-seventh session.[1]

54. Mr. CRAWFORD (Special Rapporteur) said that, if the phrase in question was in fact a direct quotation, he would withdraw his proposal. He noted, however, that, throughout the discussion of the structure of the draft report, part three had until very recently been entitled, in French, *la mise en oeuvre de la responsabilité internationale*; that had been the original understanding. Another option would be to delete the phrase in question and add the words "including the settlement of disputes" in brackets at the end of the paragraph. He did not believe that implementation had ever been regarded by the former Special Rapporteur, Mr. Ago, as being limited to the settlement of disputes. It was a purely historical question rather than one of substance and he was simply trying to recall what the original position had been.

55. Mr. ECONOMIDES endorsed Mr. Crawford's proposal that paragraph 5 should end with the words "the question of the implementation of international responsibility (including the settlement of disputes)".

56. Mr. AL-KHASAWNEH said that, if he remembered correctly, there had always been a reference to a part three which would relate to the implementation of international responsibility, but he was less certain whether the settlement of disputes had been mentioned. In any case, the

[1] See *Yearbook ... 1975*, vol. II, p. 56, document A/10010/Rev.1, subheading (3).

statement was in the conditional, hence, not categorical. He believed it would be preferable to keep the sentence as it stood.

57. Mr. PAMBOU-TCHIVOUNDA endorsed the Special Rapporteur's second proposal, namely, to state explicitly that the settlement of disputes was one means of implementing international responsibility, by placing the words "including the settlement of disputes" in brackets at the end of the paragraph.

58. The CHAIRMAN suggested that the Commission should postpone its consideration of paragraph 5 until a later meeting, pending the necessary verifications by the secretariat.

*It was so agreed.*

Paragraphs 6 to 13

*Paragraphs 6 to 13 were adopted.*

Paragraph 14

59. The CHAIRMAN said that the words "At its fifty-third session" at the beginning of the paragraph should be replaced by the words "At its fiftieth session".

*Paragraph 14, as amended, was adopted.*

Paragraph 15

*Paragraph 15 was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.582 and Add.1-4)**

Paragraph 16 (A/CN.4/L.582)

*Paragraph 16 was adopted.*

Paragraph 17

60. Mr. SIMMA said that the word "retain" in the footnote to paragraph 17 did not appear to be correct, as the Commission had in fact agreed to defer any decision concerning draft article 30 bis.

61. Mr. CRAWFORD (Special Rapporteur) said he agreed that it would be better to replace the words "retain proposed draft article 30 bis" by the words "suspend consideration of proposed draft article 30 bis".

62. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission accepted the amendment proposed by the Special Rapporteur.

*It was so agreed.*

*Paragraph 17, as amended, was adopted.*

Paragraph 18

63. Mr. CRAWFORD (Special Rapporteur) said that the footnote to article 22 might be misleading: it stated part of the truth, but not the whole truth. He had thought that draft article 26 bis had been referred to the Drafting Committee on the understanding that there would be an article dealing with exhaustion of local remedies. An uninformed reader might think that the Commission had agreed to delete any article on the exhaustion of local remedies. Inserting "the content of" between "discussion on" and "the article" would make it clear that the Commission was retaining the article.

64. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission accepted the amendment proposed by the Special Rapporteur.

*It was so agreed.*

*Paragraph 18, as amended, was adopted.*

65. The CHAIRMAN invited the Commission to consider document A/CN.4/L.582/Add.1 paragraph by paragraph.

Paragraphs 1 and 2 (A/CN.4/L.582/Add.1)

*Paragraphs 1 and 2 were adopted.*

Paragraph 3

66. Mr. CRAWFORD (Special Rapporteur) said that the word "and" before the words "the fourth was an annex" should be deleted and the following words should be added to the end of the paragraph: "and the fifth related to certain questions of principle concerning countermeasures."

67. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission accepted the amendment proposed by the Special Rapporteur.

*It was so agreed.*

*Paragraph 3, as amended, was adopted.*

Paragraph 4

68. Mr. CRAWFORD (Special Rapporteur) said that, in the French version, the words *qu'il s'agisse d'un fait ou d'une omission, devait être imputable à l'État* should be replaced by the words *qu'il s'agisse d'une action ou d'une omission, devait être attribuable à l'État*.

69. The CHAIRMAN said that the linguistic correction in question would be made by the secretariat.

*Paragraph 4 was adopted.*

Paragraphs 5 to 17

*Paragraphs 5 to 17 were adopted.*

Paragraph 18

70. Mr. SIMMA said that the first sentence of paragraph 18 should be redrafted, as it implied that the Special Rapporteur had been requesting clarifications for

assistance in taking a decision rather than simply raising a question before the Commission.

71. Mr. CRAWFORD (Special Rapporteur) proposed that the first sentence of paragraph 18 should be replaced by the following sentence: "A number of Governments had raised the problem of conflicting obligations", which, in his view, was historically more accurate.

72. Mr. CANDIOTI (Chairman of the Drafting Committee) said that, as a logical consequence of that change, the words "In his opinion" at the beginning of the following sentence should be replaced by the words "In the opinion of the Special Rapporteur".

73. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission accepted the proposed amendments.

*It was so agreed.*

*Paragraph 18, as amended, was adopted.*

Paragraphs 19 to 28

*Paragraphs 19 to 28 were adopted.*

*The meeting rose at 1 p.m.*

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## 2609th MEETING

*Wednesday, 21 July 1999, at 3.05 p.m.*

*Chairman*: Mr. Zdzislaw GALICKI

*Present*: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

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### Draft report of the Commission on the work of its fifty-first session (*continued*)

**CHAPTER V. *State responsibility* (continued) (A/CN.4/L.582 and Add.1-4)**

**A. Introduction (*concluded*) (A/CN.4/L.582)**

Paragraph 5 (*concluded*)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of chapter V of the draft report. He had received confirmation from the secretariat that the Commission had decided at its twenty-seventh session, in 1975, to include the question of the settlement of disputes and the implementation of international responsibility in part three of the draft articles. If he heard no objection, he would take it that the Commission wished to adopt paragraph 5.

*It was so agreed.*

*Paragraph 5 was adopted.*

*Section A, as amended, was adopted.*

**B. Consideration of the topic at the present session (*continued*) (A/CN.4/L.582 and Add.1-4)**

2. The CHAIRMAN invited the members of the Commission to continue their consideration of chapter V, section B, starting with paragraph 29.

Paragraph 29 (A/CN.4/L.582/Add.1)

*Paragraph 29 was adopted.*

Paragraph 30

3. Mr. CRAWFORD (Special Rapporteur) proposed that, in the second sentence, the word "sources" should be replaced by the word "norms".

*Paragraph 30, as amended, was adopted.*

Paragraphs 31 to 53

*Paragraphs 31 to 53 were adopted.*

Paragraph 54

4. Mr. CRAWFORD (Special Rapporteur) proposed that the word "positive" should be deleted before the word "guarantee".

*Paragraph 54, as amended, was adopted.*

Paragraphs 55 to 59

*Paragraphs 55 to 59 were adopted.*

Paragraph 60

5. Mr. TOMKA requested the secretariat to adopt a uniform method of referring to the judgments of ICJ in footnotes.

6. Mr. SIMMA proposed that, in the first sentence, the words "it was to be pointed out" should be replaced by the words "it was pointed out".

*Paragraph 60, as amended, was adopted.*

Paragraphs 61 to 73

*Paragraphs 61 to 73 were adopted.*

Paragraph 74

7. Mr. SIMMA said that he objected to the words "had nothing to do with" in the second sentence.

8. Mr. CRAWFORD (Special Rapporteur) and Mr. ROSENSTOCK (Rapporteur) proposed that, in the second sentence, the phrase after the colon should read "the subsequent offer of compensation could not erase the breach".

*Paragraph 74, as amended, was adopted.*

Paragraphs 75 to 119

*Paragraphs 75 to 119 were adopted.*

Paragraph 120

9. Mr. ROSENSTOCK (Rapporteur) proposed that, at the end of the paragraph, the words "seemed to share" should be replaced by the word "shared".

*Paragraph 120, as amended, was adopted.*

Paragraphs 1 to 21 (A/CN.4/L.582/Add.2)

*Paragraphs 1 to 21 were adopted.*

Paragraph 22

10. Mr. HAFNER suggested that, in the last sentence, the words "it had been unable" should be replaced by the words "it was obviously impossible".

11. Mr. CRAWFORD (Special Rapporteur) said that the word "obviously" was not necessary.

*Paragraph 22, as amended, was adopted.*

Paragraph 23

12. Mr. HAFNER suggested that, in the last sentence, the words "would amount to" should be replaced by the words "could amount to".

13. Mr. CRAWFORD (Special Rapporteur) said that he preferred the original wording which better reflected the intention to adopt a neutral position.

*Paragraph 23 was adopted.*

Paragraph 24

*Paragraph 24 was adopted.*

Paragraph 25

14. Mr. ECONOMIDES suggested that, in the second part of the first sentence of the French text, the words *une partie de la discussion* should be replaced by the words *l'essentiel de la notion*.

15. Mr. CRAWFORD (Special Rapporteur) said that he agreed with the proposal, as it reflected the debate which had taken place. The equivalent in English might be "the essence of this idea".

16. Mr. ROSENSTOCK (Rapporteur) suggested that the clause should be further amended to read: "..., although it was noted that the essence of that view should be retained in the commentary". The role of the commentary was to say that some members expressed one opinion and some another, rather than to endorse a particular viewpoint.

17. Mr. ECONOMIDES said that the first sentence would make no sense if its second part was amended along the lines just proposed. In his view, the second clause could be deleted altogether. He proposed that only the first part of the sentence should be retained, with a full stop after the word "Commission".

18. Mr. CRAWFORD (Special Rapporteur) said that he accepted that proposal.

*Paragraph 25, as amended, was adopted.*

Paragraphs 26 and 27

*Paragraphs 26 and 27 were adopted.*

Paragraph 28

19. Mr. BROWNLIE said he was uneasy about the implication in the paragraph that one murder could not constitute genocide. For example, a case in which documents were published relating to the intention behind the first murder would constitute at least an attempt at genocide. Perhaps the remedy would be to include a footnote.

20. Mr. CRAWFORD (Special Rapporteur) said he took that point and recalled that he had referred to the notion of attempt in the discussions on the article. Attempted genocide was, moreover, specifically mentioned in the Convention on the Prevention and Punishment of the Crime of Genocide. Although he found it difficult to imagine that a lone individual who killed one other person was committing genocide regardless of his intent, it was clear that, in theory at least, he could be deemed to be attempting genocide in pursuit of some grandiose scheme. Technically, he agreed with Mr. Brownlie that, in a case in which a properly documented plan to commit a series of murders was thwarted at a very early stage, the first murder in the series, if committed, could certainly constitute attempted genocide and possibly genocide itself in conjunction with the other evidence. In order to meet the objection which had been raised, he proposed that the word "necessarily" should be added after the word "not" in the third sentence.

*Paragraph 28, as amended, was adopted.*

Paragraphs 29 to 50

*Paragraphs 29 to 50 were adopted.*

Paragraph 51

21. Mr. CRAWFORD (Special Rapporteur) proposed that the word "individual" should be deleted from the phrase "individual violations under customary international law", as it was clear from the context that such violations were committed by States.

*Paragraph 51, as amended, was adopted.*

Paragraphs 52 to 66

*Paragraphs 52 to 66 were adopted.*

Paragraph 67

22. Mr. SIMMA said that, in the first sentence, it would be better style to refer to *pacta tertiis nec nocent nec prosunt* as a Latin maxim, rather than as a Latin tag.

*Paragraph 67, as amended, was adopted.*

Paragraphs 68 to 71

*Paragraphs 68 to 71 were adopted.*

Paragraph 72

23. Mr. AL-BAHARNA said that, in the second sentence, the word "has" should replace the word "have" before the word "knowledge".

24. Mr. CRAWFORD (Special Rapporteur) said that he had deliberately used the subjunctive mode. He was happy to use the indicative in the context, but the phrase in question would then have to read: "that it had knowledge of the fact".

*Paragraph 72, as amended, was adopted.*

Paragraphs 73 to 75

*Paragraphs 73 to 75 were adopted.*

Paragraph 76

25. Mr. GAJA proposed that, in the penultimate sentence, the words "of general international law" should be replaced by the words "of obligations under other rules". He also proposed that the last sentence should be deleted.

26. Mr. CRAWFORD (Special Rapporteur) said that he agreed with the sense of the proposal and suggested the following wording: "but also of obligations under other rules to which both States were subject."

*Paragraph 76, as amended, was adopted.*

Paragraph 77

27. Mr. CRAWFORD (Special Rapporteur) said that, in the second sentence, to refer to "set conditions of liability" in the context of the topic was likely to lead to complications. He proposed that the word "liability" should be replaced by the word "responsibility".

*Paragraph 77, as amended, was adopted.*

Paragraphs 78 to 86

*Paragraphs 78 to 86 were adopted.*

Paragraph 87

28. Mr. HAFNER proposed that, in the first sentence, the word "risk" should be deleted and that, in the last sentence, the words "as an alternative condition to that of unlawful use of force" should be inserted after "to article 28".

29. Mr. CRAWFORD (Special Rapporteur) said the second proposal was acceptable and reflected a suggestion made by Mr. Yamada in the Drafting Committee.

*Paragraph 87, as amended, was adopted.*

Paragraph 88

30. Mr. HAFNER said that, since the first and second sentences dealt with two wholly unrelated matters, the word "also" should be inserted in the second sentence between the words "The question was" and "not".

31. Mr. CRAWFORD (Special Rapporteur) said he agreed that there was a need to show that the two subjects were different, but proposed that the words "In any event" should be added at the beginning of the second sentence and the words "it was said" deleted.

*Paragraph 88, as amended, was adopted.*

Paragraphs 89 and 90

*Paragraphs 89 and 90 were adopted.*

Paragraph 91

32. Mr. SIMMA said that, in the second sentence, the word "savings" should be replaced by "saving".

*Paragraph 91, as amended, was adopted.*

Paragraph 92

*Paragraph 92 was adopted.*

Paragraphs 1 to 4 (A/CN.4/L.582/Add.3)

*Paragraphs 1 to 4 were adopted.*

Paragraph 5

33. Mr. KUSUMA-ATMADJA suggested that, in the first sentence, the words "or something else" should be replaced by more precise wording.

34. Mr. CRAWFORD (Special Rapporteur) endorsed that suggestion and proposed that the words "for example" should be added between the words "in considering" and "whether"; that the word "or" should be added between the words "of necessity" and force majeure; and that the words "or something else" should be deleted.

35. Mr. SIMMA asked why the word "displaced" was used in the second sentence.

36. Mr. CRAWFORD (Special Rapporteur) explained that it meant that an obligation was no longer extant at the time in question, without prejudice to the question of its future termination. There was a distinction between an excuse for non-performance of a subsisting obligation, the termination of the obligation entirely and an intermediate case when the obligation was displaced or excluded. He proposed that the word "displaced" should be replaced by the words "set aside" and that the word "Instead" at the beginning of the third sentence should be deleted.

*Paragraph 5, as amended, was adopted.*

Paragraphs 6 to 12

*Paragraphs 6 to 12 were adopted.*

Paragraph 13

37. Mr. SIMMA suggested that, in the fifth sentence, the word "displaced" should also be replaced by the words "set aside".

38. Mr. CRAWFORD (Special Rapporteur) said that he was uncomfortable with that replacement in that particular context. No one was suggesting that a norm of *jus cogens* could be set aside by consent. There were some norms of *jus cogens*, such as the rules relating to the use of force, to the application of which the consent of a particular State was relevant. Mr. Economides had, moreover, drawn attention to the need for great care on that subject. He therefore suggested that the words "the operation of the norm" should be replaced by the word "consent".

39. Mr. AL-BAHARNA asked whether the last part of the fifth sentence should be retained or deleted.

40. Mr. ECONOMIDES suggested that it should be deleted, together with the first part of the sentence amended by the Special Rapporteur, as the example given was inaccurate.

41. Mr. CRAWFORD (Special Rapporteur) said that the example given in the last part of the sentence was accurate. Consent to the use of armed force on the territory of the consenting State would normally be effective, even though the underlying norm of *jus cogens* continued to exist. Mr. Economides argued that that was because the norm relating to the use of force allowed for consent by the State concerned, and he agreed with that argument, because that was precisely the sort of case in which consent would be permitted by the norm. He had therefore proposed the deletion of consent in chapter V, but the Commission had decided otherwise. Since the subject of paragraph 13 was article 29 on consent, and not article 29 bis on compliance with a peremptory norm, however, he was prepared to agree with the suggestion made by Mr. Economides.

42. Mr. TOMKA said that paragraph 13 merely reflected the contents of the second report of the Special Rapporteur on State responsibility[1] and not the views of the members of the Commission. The last part of the fifth sentence should therefore be retained.

43. Mr. SIMMA said that he agreed with Mr. Tomka. It was not for the Commission to edit what the Special Rapporteur had written in his report. The last part of the fifth sentence accurately reflected the report's contents and clarified a very important point. It must therefore be retained.

44. Mr. ECONOMIDES said he would not press for the adoption of his proposal. Paragraph 13 reflected the views of the Special Rapporteur, but his own opinion was that displacement was impossible except on the basis of new rules of *jus cogens*. If that was not the case, then the hypothesis was not in keeping with international law.

45. Mr. CRAWFORD (Special Rapporteur) said his position was that a norm of *jus cogens* could not be displaced in the relations between two States other than by a later norm of *jus cogens*. There were some norms of *jus cogens*, however, whose application was affected by the consent, either of a State in the case of the rule on the use of force, which was a norm of *jus cogens*, or by the consent of another group. For example, the consent of a people was relevant in the application of the principle of self-determination, which was a norm of *jus cogens*. He therefore suggested that in the last sentence the word "displaced" should be replaced by the words "relevant in the application of such norms".

*Paragraph 13, as amended, was adopted.*

Paragraphs 14 to 27

*Paragraphs 14 to 27 were adopted.*

Paragraph 28

46. Mr. TOMKA, referring to the fifth sentence, requested clarification of the reference to the "1938 treaty between the Third Reich and Czechoslovakia".[2] If the treaty in question was the Munich agreement, then it was an agreement between four Powers that had later been accepted by Czechoslovakia under duress. The issue of nullity had been a matter of controversy in the 1970s and a compromise formula had been found which had been interpreted differently by Germany and Czechoslovakia.

47. Mr. CRAWFORD (Special Rapporteur) said his understanding was that Germany had expressly recognized the treaty in the post-war period, but, if the reference was problematic, it could be deleted. He therefore proposed that the words "The 1938 treaty between the

[1] *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/498 and Add.1-4.

[2] See 2587th meeting, footnote 17.

Third Reich and Czechoslovakia was a case in point, but" should be deleted.

*Paragraph 28, as amended, was adopted.*

Paragraph 29

48. Mr. CRAWFORD (Special Rapporteur) proposed that, in the first sentence, the word "apparently" should be inserted between the words "implication" and "being that" and that the word "had" should be replaced by the words "might have".

49. Mr. GAJA suggested that, in the first sentence, the phrase "regime the responsibility for invoking the inconsistency of a treaty with *jus cogens* lay with the parties themselves" should be replaced by the phrase "only the parties to a treaty are entitled to invoke inconsistency of the treaty with *jus cogens*".

50. Mr. LUKASHUK said that the second sentence could be construed to mean that the rules of *jus cogens* were not rules of general international law. That was surely not the intention. He therefore proposed that the word "other" should be added before the word "obligations".

51. Mr. CRAWFORD (Special Rapporteur) endorsed that proposal and suggested that the words "of inconsistency" should be added between the words "That problem" and "could also".

52. Mr. SIMMA said that the Special Rapporteur apparently believed that, if a treaty was inconsistent with *jus cogens*, the parties had a genuine choice of electing in favour of the treaty and against the norm. The phrase "the potential invalidating effects of *jus cogens* on the underlying obligation seemed excessive" in the penultimate sentence created the impression that the Special Rapporteur shared the view expressed in the implication in the first sentence. He sought clarification from the Special Rapporteur.

53. Mr. CRAWFORD (Special Rapporteur) said that that was why he had proposed the change. The text now read: "the implication apparently being that parties might have the choice." That was not his view; he merely drew attention to the dichotomy between the apparently absolute effect of *jus cogens* under the primary rule in the 1969 Vienna Convention and its apparently bilateral and specific consequences under the dispute settlement provisions of that instrument. It was simply pointing out an inconsistency; he was not the first to do so.

*Paragraph 29, as amended, was adopted.*

Paragraphs 30 to 32

*Paragraphs 30 to 32 were adopted.*

Paragraph 33

54. Mr. SIMMA asked whether the Commission was really certain that ICJ had never used the term *jus cogens*.

55. Mr. CRAWFORD (Special Rapporteur) said that he was not aware that the Court had ever used the terms *jus cogens* or "peremptory norms". It was perfectly clear that, in order to achieve a consensus, the words "intransgressible norms" had been used in its advisory opinion in the case of the *Legality of the Threat or Use of Nuclear Weapons* to avoid speaking of "peremptory norms". There were probably other examples of recent judgments in which allusions to that category had been made, without the term actually being employed. Hence, he thought that the statement in paragraph 33 was accurate.

56. Mr. ECONOMIDES said that the wording could be softened by saying that the Court had not used the term *jus cogens* up to now.

57. Mr. CRAWFORD (Special Rapporteur) said that he endorsed that proposal.

58. Mr. BROWNLIE said that the term *jus cogens* had certainly been used by individual members of the Court in separate opinions.

59. Mr. CRAWFORD (Special Rapporteur) said that Mr. Brownlie's point was well taken. The problem was that, as Mr. Economides had pointed out, the statement had been made and was literally accurate. The difficulty was that the Commission was trying to amend the debate retrospectively so as to make the debate better than it had been. The Commission should probably leave it unchanged because Mr. Brownlie's point had not been made at the time, although it probably should have been.

60. Mr. SIMMA said that, as he understood it, the Special Rapporteur had indicated that he favoured the wording agreed just before Mr. Brownlie had taken the floor, namely, that "the International Court of Justice had up to now not used the term *jus cogens*", on the understanding that that meant majority judgments and not individual dissenting opinions. That seemed quite practical.

61. Mr. CRAWFORD (Special Rapporteur) suggested that the words "in any judgment or opinion" should be added after the words "had up to now not used the term *jus cogens*" to make it clear that it was the judgment or opinion of the Court, and not of the individual members.

62. Mr. CANDIOTI suggested saying "advisory opinion" to avoid confusion with individual or dissenting opinions.

63. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the paragraph with the suggested amendments.

*It was so agreed.*

*Paragraph 33, as amended, was adopted.*

Paragraph 34

64. Mr. LUKASHUK said that he was somewhat troubled about the reference at the beginning of the second sentence to "Any State". No one had said that any State could do that: only certain States could arrogate that right to themselves. Also, would not the Sixth Committee regard that phrase as a kind of indirect reference to one

particular State? Perhaps the sentence could simply be deleted.

65. Mr. CRAWFORD (Special Rapporteur) suggested that the words "Third States" could be used because the sentence would then refer back to the earlier comment about the bilateral provisions of the 1969 Vienna Convention.

66. Mr. SIMMA said that he had a conceptual difficulty with using the term "third State" in cases of human rights violations simply because there was no "second State". He therefore proposed that the second sentence should begin: "The provision could be read as implying that any State."

*Paragraph 34, as amended, was adopted.*

Paragraphs 35 to 37

*Paragraphs 35 to 37 were adopted.*

Paragraph 38

67. Mr. CRAWFORD (Special Rapporteur) said that, in the last sentence, the word "whereby" was a mistake and should be replaced by the word "because" and "would have eliminated" should read "would eliminate".

68. Mr. GAJA said that, first, he did not understand why the first sentence referred to article 29 on consent, which was not really the topic of discussion. Secondly, paragraph 35 had already raised the problem of what happened if an obligation was in conflict with obligations under the Charter of the United Nations. The answer which had been given by the Special Rapporteur and which was not recorded was that there would be a provision somewhere else dealing with the relationship to the Charter. That was an important point because, otherwise, it looked as though the Commission was foregoing Article 103 of the Charter.

69. Mr. CRAWFORD (Special Rapporteur), referring to Mr. Gaja's first point, said that the word "indicated" in the first sentence should be replaced by the word "recalled" because, during the debate, he had drawn a distinction between the discussion on the place of consent and the discussion on the place of *jus cogens*. That amendment would show why reference was being made to article 29.

*Paragraph 38, as amended, was adopted.*

Paragraph 39

70. Mr. CRAWFORD (Special Rapporteur), referring to Mr. Gaja's second point, suggested that the following phrase should be added at the end of the second sentence: "and this would be covered by article 39 of the draft, on the assumption that that article would apply to the draft as a whole."

71. Mr. ECONOMIDES said that the words "all States were called upon to prevent" at the end of the third sentence were much too weak and should be amended to read: "all States were required to prevent."

72. Mr. SIMMA said that he had a problem with the first sentence, which sounded like a highly undesirable consequence. According to the 1969 Vienna Convention, if a treaty was in conflict with *jus cogens*, the entire treaty was invalid; individual provisions could not be dealt with separately.

73. Mr. CRAWFORD (Special Rapporteur) said that the problem was that a treaty dealing with a whole range of issues might contain just one minor potential inconsistency in a sub-clause: in such a case, it was excessive to invalidate the whole treaty. Perhaps the first sentence could be rephrased to read: "Another difficulty that had been pointed out was that *jus cogens* invalidated the whole treaty even in the event of an occasional inconsistency with a single provision."

74. Mr. SIMMA said that that point had not been mentioned during the debate and it was thus a bit strange for the Special Rapporteur, in summarizing the debate, to say that the problem had arisen.

75. Mr. CRAWFORD (Special Rapporteur) said that, actually, the first sentence could be deleted because the following sentence would then flow more clearly from the preceding paragraph. To provide a link, the words "In fact" could be added at the beginning of the second sentence.

*Paragraph 39, as amended, was adopted.*

Paragraph 40

*Paragraph 40 was adopted.*

Paragraph 41

76. Mr. ECONOMIDES said that, in the second sentence of the French text, the words *de droit international* should be amended to read: *selon le droit international*.

*Paragraph 41, as amended in the French version, was adopted.*

Paragraphs 42 to 49

*Paragraphs 42 to 49 were adopted.*

Paragraph 50

77. Mr. HAFNER suggested that the words ", in particular, if connected with the word 'measures,'" should be added after the word "lawful".

*Paragraph 50, as amended, was adopted.*

Paragraphs 51 and 52

*Paragraphs 51 and 52 were adopted.*

Paragraph 53

78. Mr. SIMMA said that he did not understand what was meant by the first sentence. He thought that self-defence was a circumstance precluding wrongfulness in relation to the use of force.

79. Mr. CRAWFORD (Special Rapporteur) said that the problem could be solved by inserting the word "only" before the words "in relation to".

*Paragraph 53, as amended, was adopted.*

*The meeting rose at 6.05 p.m.*

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## 2610th MEETING

*Thursday, 22 July 1999, at 10 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

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

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### Draft report of the Commission on the work of its fifty-first session (*continued*)

**CHAPTER V. *State responsibility* (concluded) (A/CN.4/L.582 and Add.1-4)**

**B. Consideration of the topic at the present session (*concluded*)**

1. The CHAIRMAN invited the Commission to resume its consideration of chapter V, section B, starting with subsection 29.

Subsections 29 and 30 (A/CN.4/L.582/Add.3)

*Subsections 29 and 30 were adopted.*

Subsection 31

2. Mr. SIMMA said that the word "apparently" in the penultimate sentence of paragraph 63 should be deleted.

3. Mr. PAMBOU-TCHIVOUNDA, noting that some words had been omitted from the French version of paragraph 64, requested that the secretariat should correct the drafting.

4. Mr. CRAWFORD (Special Rapporteur), referring to the suggestion by Mr. GAJA, proposed that the second sentence of paragraph 65 should be amended to read: "Moreover, the purpose of countermeasures, as expressed in article 47, was very different from the purpose of the proposed article embodying a narrow *exceptio*."

*Subsection 31, as amended, was adopted.*

Subsections 32 to 38

*Subsections 32 to 38 were adopted.*

Subsection 39

5. Mr. TOMKA said that the third sentence of paragraph 96 was not correct, in that the necessity argument had been taken up by only one of the parties in the *Gabčíkovo-Nagymaros Project* case and the other party had expressed its views on that argument.

6. Mr. CRAWFORD (Special Rapporteur) proposed that the third sentence of paragraph 96 should consequently be amended to read: "Article 33 was referred to by both parties in the *Gabčíkovo-Nagymaros Project* case, and the International Court of Justice expressly endorsed it as a statement of general international law."

7. Mr. DUGARD said that the second sentence of paragraph 101 did not capture the original intention, which had been to state that, as a result of the amendment to article 33, the finding of ICJ in the *South West Africa* cases would no longer prevail.

8. Following an exchange of views in which Messrs DUGARD, PAMBOU-TCHIVOUNDA and TOMKA, took part, Mr. CRAWFORD (Special Rapporteur) proposed that the second sentence of paragraph 101 should be redrafted to read:

> "For example, in the *South West Africa* cases, the implicit argument for South Africa was that the policy of apartheid in South West Africa was necessary for the good governance of the territory. However, the question did not affect the individual interests of Ethiopia or Liberia but the interests of the people of South West Africa."

*Subsection 39, as amended, was adopted.*

Subsection 40

*Subsection 40 was adopted.*

Subsection 41

9. Mr. CRAWFORD (Special Rapporteur) said that the first sentence of paragraph 111 would be clearer if, beginning with the word "because" it was amended to read: "because paragraph 2 excluded the violation of a peremptory norm of general international law", with the words "from circumstances precluding wrongfulness" deleted at the end of the sentence.

*Subsection 41, as amended, was adopted.*

Subsection 42

10. Mr. PAMBOU-TCHIVOUNDA said that the word "invoked" was better than the words "relied on" in the first sentence of paragraph 114.

*Subsection 42, as amended, was adopted.*

Subsection 43

11. Mr. PAMBOU-TCHIVOUNDA said that he was disturbed by the expression *refroidir l'ardeur des États* in the French version of paragraph 117. He would prefer an expression that was closer to the English, such as *tempérer l'enthousiasme*.

12. Mr. BROWNLIE said that he found that wording a bit too general and suggested that the word "occasional" should be inserted before the word "enthusiasm".

13. Mr. CRAWFORD (Special Rapporteur) endorsed Mr. Brownlie's and Mr. Pambou-Tchivounda's proposals.

14. The CHAIRMAN said he took it that the Commission wished to replace the words "curb the enthusiasm of States" by the words "temper the occasional enthusiasm of States" in paragraph 117.

*It was so agreed.*

15. Mr. GAJA said that, as a matter of consistency, the Special Rapporteur's concluding remarks on article 34 bis should appear in a separate subsection, 43 bis, which would be composed of paragraphs 120 to 123.

16. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission accepted that proposal.

*It was so agreed.*

*Subsection 43, as amended, was adopted.*

Subsection 44

*Subsection 44 was adopted.*

Subsection 45

17. Mr. GAJA said that subsection 45 should be divided in the same way as subsection 43, with paragraph 132 constituting a separate subsection 45 bis, entitled "Concluding remarks of the Special Rapporteur on article 35".

*Subsection 45, as amended, was adopted.*

Subsection 46

18. Mr. SIMMA proposed that the word "However" at the beginning of the second sentence of paragraph 136 should be deleted, as the sentence was the logical continuation of the first sentence and not at all in opposition to it.

19. The second solution mentioned in paragraph 140 and proposed by Mr. Hafner and himself had not referred to article 31, but only to chapter V. He therefore proposed that the words "by way of an addition to article 31" should be deleted from the end of the second sentence.

20. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt subsection 46 with the amendments proposed by Mr. Simma.

*It was so agreed.*

*Subsection 46, as amended, was adopted.*

Subsection 47 (A/CN.4/L.582/Add.4)

*Subsection 47 was adopted.*

*Section B, as amended, was adopted.*

*Chapter V, as a whole, as amended, was adopted.*

21. The CHAIRMAN said that the Commission had concluded its consideration of chapter V of its draft report and expressed thanks to the Special Rapporteur for enabling the Commission to submit a coherent set of draft articles and comments to the General Assembly.

22. Mr. CRAWFORD (Special Rapporteur) thanked the secretariat and also expressed appreciation to the précis-writers, who often went unrecognized, for the high professional quality of their work throughout the session.

**CHAPTER VII. *Jurisdictional immunities of States and their property* (A/CN.4/L.584 and Add.1)**

*Chapter VII, as a whole, was adopted.*

## Programme, procedures and working methods of the Commission, and its documentation (*continued*)* (A/CN.4/496, sect. G, A/CN.4/L.577 and Add.1, A/CN.4/L.589)

[Agenda item 10]

REPORT OF THE PLANNING GROUP

23. Mr. GOCO (Chairman of the Planning Group), introducing the report of the Planning Group (A/CN.4/L.577 and Add.1), said that the various sections were self-explanatory. He drew attention to section 6 (A/CN.4/L.577/Add.1) containing the Planning Group's recommendation on the dates of the fifty-second session, which would be a split session in view of the fact that conference services would not be available to the Commission during the week of 24 April 2000.

24. Mr. LUKASHUK said that paragraph 5 of the report of the Planning Group dealt with the complex question of States' replies to the questionnaires they received from the Commission. Even the best-equipped ministers for

* Resumed from the 2575th meeting.

foreign affairs were often unable to reply to such complex questionnaires. The Commission might therefore suggest that States which had a shortage of personnel should join efforts, for example, in the framework of regional organizations such as the League of Arab States and OAU, in replying to the questionnaires. That approach would have the advantage of familiarizing the Commission with the practice in certain regions.

25. He believed there was an omission from section 2 of the report of the Planning Group on the Commission's relationship with other bodies concerned with international law, as that relationship was most often limited to hearing representatives of those bodies speak before the Commission. In his view, the Commission should communicate its drafts and final texts to scientific agencies and institutions and request their comments, giving special attention to comments from institutions and agencies in regions whose practice might not be given sufficient consideration.

26. The split session was a very sound idea.

27. Mr. SIMMA noted that, on the day of the Planning Group's meeting, the secretariat had announced that the Commission would not have conference services during the week of 24 April 2000, for which reason he had suggested to the Planning Group that the first half of the session should begin one week later and last only five weeks. That would have been a way of indicating to the General Assembly that the Commission was willing to take budgetary considerations seriously.

28. Mr. DUGARD said that the Commission had in the past held 11-week sessions, which had been productive; he found Mr. Simma's proposal acceptable.

29. Mr. ROSENSTOCK (Rapporteur) said that the question had been discussed at length in the Planning Group at both the fiftieth and fifty-first sessions and that a clear majority had emerged in favour of the last two sessions of the quinquennium being 12-week sessions given the volume of work to be completed during the remainder of the quinquennium. The Commission had endorsed that decision in paragraph 562 of its report on the work of its fiftieth session.[1]

30. Mr. TOMKA asked whether, in view of the considerable progress achieved, the Commission might not reconsider that decision and possibly change it.

31. Mr. PAMBOU-TCHIVOUNDA said that cost should not be the only consideration. Clarifications from the secretariat on the technical operation of sessions, such as the time needed for receiving, translating and publishing reports of the special rapporteurs, would be useful. Moreover, the reference to "experience" in paragraph 25 was not very felicitous, given that the only split session ever held by the Commission had not been particularly productive.

32. Mr. PELLET noted that his name had been omitted from the list of members of the Planning Group. Although the members of the Group had been unanimous in acknowledging the need for the Commission to hold a split session, they had been divided on the issue of how that should be done within the resources available. The question should be discussed by the members of the Commission as a whole. He therefore proposed that the Commission should consider paragraphs 23 to 28 of the report of the Planning Group, which dealt with that question, in a closed meeting.

33. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to consider paragraphs 23 to 28 of the report of the Planning Group in a closed meeting, in accordance with Mr. Pellet's proposal.

*It was so agreed.*

34. The CHAIRMAN invited the members of the Commission to consider the report of the Planning Group section by section.

Section 1. The relations between the Commission and the Sixth Committee (A/CN.4/L.577)

35. Mr. SIMMA, referring to paragraph 3, said that it was not appropriate to begin the paragraph with the words: "The Commission started implementing what it had proposed in 1996", without explaining the reference. The footnote to that sentence simply referred the reader to a document which might not be immediately available. The sentence should be clarified.

36. Mr. AL-BAHARNA endorsed Mr. Simma's comment.

37. Mr. MIKULKA (Secretary to the Commission) explained that it was not possible to make changes in the report of the Planning Group. Members would be able to do so when the Commission took up chapter X of its draft report, which would include the Planning Group's conclusions.

38. Mr. KATEKA and Mr. TOMKA questioned the advisability of a procedure which consisted of adopting a report in order to correct it later on.

39. The CHAIRMAN said that Mr. Simma's comment dealt with a question of form and could be accommodated on the basis of a simple drafting change.

*It was so agreed.*

Section 2. The Commission's relationship with other bodies concerned with international law

40. Mr. PELLET asked why paragraph 15 cited the British Institute of International and Comparative Law, while its equivalent, the Société française pour le droit international, was relegated to a footnote. The two institutions should receive equal treatment.

41. Mr. CRAWFORD and Mr. SIMMA endorsed Mr. Pellet's comment.

42. The CHAIRMAN said that Mr. Pellet's comment would be reflected in the wording of the corresponding passage in the report of the Commission to the General Assembly.

[1] *Yearbook ... 1998*, vol. II (Part Two), p. 112.

Section 3. Split sessions

43. The CHAIRMAN noted that section 3 was to be the subject of further consultations.

Section 4. Work programme of the Commission for the quinquennium (A/CN.4/L.577/Add.1)

44. Mr. SIMMA, referring to the work programme for the year 2000, said that the work programme for the topic "International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)" was not properly presented: the document before the Commission would be the third report of the Special Rapporteur, and not "Comments by Governments on the draft articles on 'prevention'", as indicated.

45. Mr. HAFNER, supported by Mr. KUSUMA-ATMADJA, proposed that the entries in question should be reversed.

46. Mr. GAJA noted that paragraph 29 failed to mention "Reservations to treaties" as one of the topics on which substantial progress had been made. Much progress had been achieved on that topic and it should be included in the list.

47. Mr. KATEKA said that paragraph 31 was pessimistic in stating that the completion of the first reading of certain topics would "take place during the next quinquennium". That prejudged the pace of work of the special rapporteurs, and hence of the Commission. Although some special rapporteurs' work did spill over into the following quinquennium, the impression must not be given that they were deliberately proceeding at a snail's pace.

48. Mr. PELLET noted that, if certain special rapporteurs were behind with respect to their own estimates, that was due to the volume and difficulty of their work.

49. The CHAIRMAN noted that the special rapporteurs themselves had supplied the information on which that projection was based.

50. Mr. ECONOMIDES said that he shared Mr. Kateka's concerns. It was premature to state what would take place during the following quinquennium. He proposed that paragraph 31 should be deleted.

51. Mr. SIMMA said that paragraph 31 merely stated the obvious, as the work programme for 2000 and 2001 was contained in the preceding paragraph. Moreover, it was inappropriate to state that the Commission would not conclude a particular item.

52. Mr. ROSENSTOCK said that, although he shared the concerns expressed, it was not within the Commission's power to change the report of a subsidiary body, much less delete a paragraph.

53. Mr. LUKASHUK said that he shared Mr. Rosenstock's view. He proposed that the report of the Commission should simply state that the special rapporteurs on the topics of unilateral acts of States and reservations to treaties were encouraged to complete their work before the end of the current quinquennium.

54. The CHAIRMAN said that, if the members of the Commission so wished, the contents of paragraph 31 would not be reflected in the report of the Commission.

55. Mr. KATEKA said that he had been raising a matter of principle and had not had a particular special rapporteur in mind. He would be prepared to accept the Chairman's solution.

56. Mr. MIKULKA (Secretary to the Commission) said that, if the Commission decided not to include the contents of paragraph 31 in its report, the secretariat would issue a corrigendum to chapter X (A/CN.4/L.587 and Add.1) of the draft report.

57. Mr. TOMKA said that, if chapter X of the draft report of the Commission was amended as proposed, the legitimate questions of the members of the Sixth Committee and of States concerning the three items referred to in paragraph 31 of the report of the Planning Group would not receive replies until 2000 or even 2001.

58. Mr. SIMMA said that the reference in the Commission's work programme for the year 2000 (para. 30) to "Comments by Governments on the draft articles on 'prevention'", under the topic "International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)", was inappropriate and should not appear in the report of the Commission.

59. The CHAIRMAN suggested that the reference to comments by Governments on the draft articles on "prevention" and the contents of paragraph 31 would not appear in chapter X of the report of the Commission.

*It was so agreed.*

Section 5. Long-term programme of work

60. The CHAIRMAN invited the members of the Commission to consider the interim report of the Working Group on the Long-Term Programme of Work (A/CN.4/L.589) which made up section 5.

61. Mr. ECONOMIDES said that he deeply regretted the decision of the Working Group on the Long-Term Programme of Work not to retain his proposal that the Commission should undertake a study of the law of collective security, especially as that question had not yet been dealt with from a legal standpoint within the United Nations. The decision was all the more regrettable in that a very serious and unprecedented crisis in international law was currently taking place, as ICJ had clearly acknowledged in its orders of 2 June 1999 in the cases concerning *Legality of Use of Force*, in which it stated that the use of force in Yugoslavia raised very serious issues of international law.

62. Mr. BAENA SOARES said that he shared Mr. Economides' regrets. He would continue to support Mr. Economides' proposal, which he hoped would receive more favourable consideration at the fifty-second session of the Commission.

63. Mr. LUKASHUK said that he feared the report of the Commission would make a negative impression on the members of the Sixth Committee: the Commission was proposing nothing substantial for the future, no issues of truly general interest. He noted that the Commission's statute required it to survey the whole field of international law with a view to selecting topics for study. If it did not, it would be forced to choose from topics proposed by certain of its members in accordance with their own interests, and that would do nothing to strengthen its authority as far as the Sixth Committee was concerned.

64. Mr. BROWNLIE (Chairman of the Working Group on the Long-Term Programme of Work) said that he had also found the results of the Working Group disappointing. The reality was that the Working Group was a collective body and that topics which were not favoured by the majority of members were rejected. He personally endorsed Mr. Economides' comments, although his *dédoublement fonctionnel* in that department prevented him from making extensive comments.

65. Mr. PELLET said he did not have the same idea as some members about the role of the Working Group on the Long-Term Programme of Work. The Working Group's responsibility was to find one or perhaps two topics to be taken up when the consideration of the current topics had been completed, not to provide an endless list of topics.

66. Mr. LUKASHUK said that he disagreed with Mr. Pellet's point of view; topics should be chosen with the long-term programme of work in mind, as the Working Group's title indicated.

67. Mr. HAFNER proposed that the footnote in the first sentence of paragraph 3 should make a distinction between the topics which had already been accepted and those which had not in order to give the Sixth Committee a clear idea of the views which had been expressed during the discussion.

68. The CHAIRMAN said that, as indicated in paragraph 10, the Working Group would continue its work at the fifty-second session of the Commission and that the report of the Commission would include all the opinions expressed during the discussion.

*It was so agreed.*

*The meeting rose at 12.20 p.m.*

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## 2611th MEETING

*Friday, 23 July 1999, at 10.05 a.m.*

*Chairman*: Mr. Zdzislaw GALICKI

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

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### Draft report of the Commission on the work of its fifty-first session (*continued*)

**CHAPTER VI. *Reservations to treaties* (concluded)* (A/CN.4/L.583 and Add.1-5)**

**C. Draft guidelines on reservations to treaties (*concluded*)* (A/CN.4/L.583/Add.1-5)**

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-FIRST SESSION (*concluded*)* (A/CN.4/L.583/ADD.2-5)

*Commentary to section 1.5* (A/CN.4/L.583/Add.5)

*The commentary to section 1.5 was adopted.*

*Commentary to guideline 1.5.1 [1.1.9]*

1. Mr. GAJA said that paragraph (6) gave the impression that a choice had been made by the 1978 Vienna Convention between multilateral treaties and bilateral treaties, whereas, in fact, notification of succession was applicable only to multilateral treaties. He therefore suggested that the following phrase should be added at the end of paragraph (6): "the notification of succession being generally admitted in respect of open multilateral treaties."

*The commentary to guideline 1.5.1 [1.1.9], as amended, was adopted.*

*Commentary to guideline 1.5.2 [1.2.7]*

2. Mr. GAJA said that, for the sake of clarity, the word *elles* in the first sentence of paragraph (1) of the French text should be replaced by the words *les Conventions*.

3. Mr. PELLET (Special Rapporteur) said that it might be better to say *ces Conventions*. He also pointed out that it had already been decided that the reference to [1.2.4] should be deleted in the draft guideline.

*The commentary to guideline 1.5.2 [1.2.7], as amended, was adopted.*

Commentary to guideline 1.5.3 [1.2.8]

4. Mr. GAJA said that, in the penultimate sentence of paragraph (2), the words "article 31" should be inserted between the words "in the sense of" and the words "paragraphs 2 and 3 (*a*)".

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* Resumed from the 2608th meeting.

5. Mr. SIMMA said that, in the footnote concerning the form of an interpretation, in paragraph (2), the word "verbal" should be replaced by the word "oral".

6. Mr. ROSENSTOCK (Rapporteur) said that he agreed with Mr. Simma: there was no point in referring to a verbal agreement, since all agreements were verbal. The words "simple oral agreement" should be used in that footnote.

7. Mr. PAMBOU-TCHIVOUNDA asked whether it would not be preferable to find better wording for the phrase "and itself takes on the nature of a treaty" in paragraph (2). The nature of a treaty had nothing to do with the interpretation of a treaty.

8. Mr. PELLET (Special Rapporteur) said that he disagreed with Mr. Pambou-Tchivounda. A treaty could take any form, including an oral agreement. When both parties agreed on an interpretation, their agreement took on the nature of a treaty. There was an agreement on an interpretation. That was made clear in the sentence that followed: it became an agreement collateral to the treaty which formed part of its context.

*The commentary to guideline 1.5.3 [1.2.8], as amended, was adopted.*

*Commentary to guideline 1.6 [1.4]*

9. Mr. PAMBOU-TCHIVOUNDA said that the words "draft articles" in paragraph (2) should read "draft guidelines".

*The commentary to guideline 1.6 [1.4], as amended, was adopted.*

*Section C.2, as amended, was adopted.*

*Chapter VI, as a whole, as amended, was adopted.*

**CHAPTER VIII. *Unilateral acts of States* (A/CN.4/L.585 and Add.1)**

**A. Introduction (A/CN.4/L.585)**

Paragraphs 1 to 8

*Paragraphs 1 to 8 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session**

Paragraph 9

*Paragraph 9 was adopted.*

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS SECOND REPORT

Paragraphs 10 to 42

*Paragraphs 10 to 42 were adopted.*

*Section B.1 was adopted.*

2. SUMMARY OF THE DEBATE

Paragraphs 43 to 92

*Paragraphs 43 to 92 were adopted.*

*Section B.2 was adopted.*

3. ESTABLISHMENT OF A WORKING GROUP (A/CN.4/L.585/ADD.1)

10. Mr. SIMMA said that it was difficult to distinguish between what had been said in the Commission and in the Working Group. Paragraph 22 should perhaps specify at which meeting the Commission had adopted the report of the Working Group.

11. Mr. PELLET said that he had the same problem as Mr. Simma. Actually, everything that preceded paragraph 22 was, in fact, the report of the Working Group, along with the changes made. It would be better to say so. He therefore suggested that paragraph 22 should be amended to read: "At the same meeting, the Commission adopted the report of the Working Group as amended by the Commission."

*Section B.3, as amended, was adopted.*

*Chapter VIII, as a whole, as amended, was adopted.*

**CHAPTER I. *Organization of the session* (A/CN.4/L.578 and Corr.1)**

*Chapter I was adopted.*

**CHAPTER II. *Summary of the work of the Commission at its fifty-first session* (A/CN.4/L.579)**

12. Mr. PELLET (Special Rapporteur) requested that a reference to his fourth report on reservations to treaties (A/CN.4/499 and A/CN.4/478/Rev.1)[1] should be included in paragraph 3 and suggested that the consideration of countermeasures by the Commission should be mentioned in paragraph 2.

13. Mr. ROSENSTOCK (Special Rapporteur) said that he had no objection to the inclusion of a reference to the discussion of countermeasures in paragraph 2.

14. Mr. TOMKA said that, in paragraph 13, the number of participants should be corrected to read "23".

15. The CHAIRMAN stated that a decision had not yet been taken on the dates of the next session and suggested that paragraph 14 should be adopted on the understanding that the decision would be taken when the Commission considered chapter X.

*It was so agreed.*

*Chapter II, as amended, was adopted.*

**CHAPTER III. *Specific issues on which comments would be of particular interest to the Commission* (A/CN.4/L.580)**

*Chapter III was adopted.*

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

**Programme, procedures and working methods of the Commission, and its documentation (*concluded*) (A/CN.4/496, sect. G, A/CN.4/L.577 and Add.1, A/CN.4/L.589)**

[Agenda item 10]

REPORT OF THE PLANNING GROUP (*concluded*)

16. The Chairman said that, if he heard no objection he would take it that the Commission wished to endorse the report of the Planning Group (A/CN.4/L.577 and Add.1) including the interim report of the Working Group on the Long-Term Programme of Work (A/CN.4/L.589), which had been considered by the Commission under section 5 of the report of the Planning Group.

*It was so agreed.*

## Draft report of the Commission on the work of its fifty-first session (*concluded*)

**CHAPTER X. *Other decisions and conclusions of the Commission* (A/CN.4/L.587 and informal corrigendum and Add.1 and informal corrigendum)**

**A. Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/L.587/Add.1 and informal corrigendum)**

3. WORK PROGRAMME OF THE COMMISSION FOR THE REMAINDER OF THE QUINQUENNIUM

*Section A.3, as amended by the informal corrigendum, was adopted.*

**B. Cooperation with other bodies (A/CN.4/L.587 and informal corrigendum)**

17. Mr. PELLET said that paragraph 6 should be corrected as he had addressed the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe in September 1998.

*Section B, as amended, was adopted.*

**C. Date and place of the fifty-second session**

*Section C, as amended by the informal corrigendum, was adopted.*

**E. International Law Seminar**

18. Mr. PELLET stressed that the Commission should have a say in the selection of participants in the International Law Seminar. That matter should be discussed in the Planning Group.

19. Mr. CRAWFORD said that, although the Seminar had sometimes been very well attended, he also thought that a brief exchange of views should be held by the Planning Group early in the next session.

20. The CHAIRMAN, referring to the footnote in paragraph 13, said that "Mrs." would be replaced by "Ms." in accordance with the standard practice of the United Nations. In paragraph 21, "Germany" should be added between "Finland" and "Hungary".

*Section E, as amended, was adopted.*

**A. Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/L.587/Add.1 and informal corrigendum) (*concluded*)**

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

1. PROCEDURES AND WORKING METHODS OF THE COMMISSION, AND ITS DOCUMENTATION

Paragraph 3

*Paragraph 3 was adopted.*

Subsection (*a*)

*Subsection (a) was adopted.*

Subsection (*b*)

*Subsection (b) was adopted.*

Subsection (*c*)

21. Mr. PAMBOU-TCHIVOUNDA said that he was not sure whether enough consideration had been given to the possible effects that the innovations planned under the proposed split session might have on people's perceptions of the Commission. In particular, it seemed to him that the General Assembly regarded the Commission as a homogeneous body, whereas the penultimate sentence of subsection (*c*) (iv) implied that the Commission was to become more fragmented.

22. The Commission first had to explain to the General Assembly what the new way of working would involve. A footnote to that effect could be included. It then had to reassure its members about the terms of their involvement in its work. To that end, he proposed that the sentence he had referred to should be amended to read: "limited numbers of members of the Commission, without prejudice to the right of all members to participate in the work of the 10 remaining bodies."

23. Mr. KABATSI said the sense of subsection (*c*) (iv) was that savings could be made through the introduction of meetings that required the attendance of limited numbers of the Commission's members. The implication of the proposal just made seemed to be that attendance should be an open-ended matter. He was not necessarily opposed to that, but wished to point out that acceptance of the proposal would necessitate the redrafting of the whole subsection (*c*) (iv).

24. Mr. ROSENSTOCK (Rapporteur) said that the matter had been discussed at length, most recently during informal consultations in which virtually all members had expressed their opinions in good faith and conclusions

had been reached by the appropriate means. He saw no point in reopening the debate.

25. Mr. PAMBOU-TCHIVOUNDA said it was not his intention to break with the good faith shown during those informal discussions. However, he had originally made his comment at that time, only to be told that his point could not be taken as there was no longer any interpretation available. He did not see why, in the context of the Commission's current discussion of a chapter of its report, the Commission could not decide to reflect in the text points raised by him or other members.

26. The CHAIRMAN said that the matter had been thoroughly discussed, firstly in the working group on the split session and then in the Planning Group. Those exchanges of opinions had led to the production of the text now before the members. He asked the members to indicate by a show of hands whether they accepted Mr. Pambou-Tchivounda's proposal.

*The proposal was rejected by 12 votes to 1, with 3 abstentions.*

27. Mr. ECONOMIDES said that the Planning Group would need to meet at the very beginning of the next session in order to ensure that all the necessary arrangements relating to the split session had been made.

28. The CHAIRMAN drew attention to the last sentence of subsection (*c*) (iv), which read: "The Commission would put into effect such arrangements already in the year 2000."

29. Mr. PELLET said he still had a problem with the third paragraph of subsection (*c*). At the Planning Group's meeting, he had proposed that the end of the second sentence should be changed from "budgetary considerations may be regarded by some as a factor" to "budgetary considerations are a factor".

30. Mr. ROSENSTOCK said that the matter was of little consequence in the current context. He would not object to the proposal, but did not find it compelling and did not agree that it had been accepted during the Planning Group's meeting. It did not seem unreasonable to him to say that some members regarded the cost implications of a split session as a factor, while others did not. To say that everybody accepted the fact that cost was a factor which should automatically be considered was neither accurate nor necessary.

31. Mr. AL-KHASAWNEH said he did not consider that the Commission should be discussing any further modifications.

32. The CHAIRMAN reminded the members that it had been agreed during the meeting to endorse the report of the Planning Group, that, at the current meeting, the floor would be open for members to make contributions on substantive points to be included in chapter X.

33. Mr. AL-KHASAWNEH said it was simply illogical to state that budgetary considerations must in effect be regarded as a factor. He was opposed to Mr. Pellet's proposal.

34. Mr. AL-BAHARNA said he preferred the version that conformed with the informal corrigendum, i.e. with only the words "by some" being deleted. To accept Mr. Pellet's proposal would be to formulate a sentence implying that the Commission wished to make a judgement which in fact came within the Secretariat's sphere of competence.

35. Mr. ADDO said he agreed with Mr. Rosenstock that the issue was not one on which the Commission should spend time quibbling. He also agreed with Mr. Al-Baharna that the sentence should be retained in its current form, as already amended by the deletion of the words "by some".

36. Mr. PELLET said that he withdrew his proposal.

*Subsection (c) was adopted.*

2. Long-term programme of work

37. Mr. ECONOMIDES said that the Commission had before it an informal corrigendum to chapter X, section A.2, of its report containing three paragraphs on the long-term programme of work. That represented a departure from established practice, since the long-term programme of work had always been the subject of a separate section of chapter X of the report. The three paragraphs did not mention the topics on which feasibility studies had been requested and on which the possibility of carrying out studies had been discussed, but not decided on. That information should be included in the report for the benefit of the Sixth Committee. It was in the interests of the Commission to ensure that as much information as possible was disseminated on all aspects of its work.

38. The CHAIRMAN said that the substance of the long-term programme of work, as described in the informal corrigendum to chapter X, section A.2, was taken from the interim report of the Working Group on the Long-Term Programme of Work. The Working Group itself had indicated that it had not completed its task and only the work done so far was summarized in its report, without prejudice to the final result of that work, which would be continued at the fifty-second session of the Commission. On the basis of a recommendation by the Planning Group, the Rapporteur had decided to include in the report the information now available on the long-term programme of work, but that in no way diminished the significance of the Working Group's ongoing efforts or implied that those efforts would be abandoned.

39. Mr. BROWNLIE (Chairman of the Working Group on the Long-Term Programme of Work) said that a cross-reference to the interim report in the proposed corrigendum to chapter X, section A.2, might be helpful.

40. Mr. MIKULKA (Secretary of the Commission) said that, since the interim report was in a limited distribution document, a cross-reference was impossible.

*Section A.2 was adopted.*

*Section A, as amended, was adopted.*

**D. Representation at the fifty-fourth session of the General Assembly (A/CN.4/L.587)**

41. The CHAIRMAN said that the names of members of the Commission who would assist him in representing it at the fifty-fourth session of the General Assembly had to be added to paragraph 11. According to tradition, one or more of the special rapporteurs performed that function. He understood from his consultations that it might be possible for two Special Rapporteurs, Mr. Sreenivasa Rao and Mr. Rodríguez Cedeño, to attend the Assembly, on the understanding that the costs of their travel would be shared by the Commission and one of their Governments, so as to avoid financial outlay in excess of that for a single special rapporteur.

42. After a procedural discussion in which Mr. AL-KHASAWNEH, Mr. KATEKA and Mr. Sreenivasa RAO took part, Mr. MIKULKA (Secretary of the Commission) explained that the basis for the participation of special rapporteurs in the General Assembly was Assembly resolution 44/35, paragraph 5, which indicated that the Commission could "request a special rapporteur" to attend a session and that the Secretary-General should make the necessary arrangements "within existing resources". The Commission thus had a budgetary mandate for the participation of one special rapporteur, subject to the availability of resources. Whether or not such resources would be available would become clear only once the costs of the current session had been calculated.

43. Mr. PELLET said that there was no need for an unduly formalistic interpretation of the Commission's budgetary mandate. There was nothing to prevent the Commission from indicating in paragraph 11 that it wished to request two special rapporteurs to attend the fifty-fourth session of the General Assembly. Appropriate financial arrangements could certainly be worked out.

44. The Sixth Committee's new practice of permitting any special rapporteur present during the General Assembly to speak on his area of expertise was welcome. By extension, the Chairman of the Working Group on jurisdictional immunities of States and their property should also be entitled to speak. He understood that the Chairman and the members of the Sixth Committee would welcome such participation in their consideration of that complex topic.

45. Mr. CRAWFORD said he agreed that the new practice was a valuable addition to the working methods of the Sixth Committee that would enable special rapporteurs to respond to comments on their topics. He would welcome an opportunity to participate in the work of the Sixth Committee at the fifty-sixth session of the General Assembly, in 2001, when the draft articles on State responsibility were scheduled to be adopted on second reading.

46. Mr. Sreenivasa RAO said that, as Mr. Pellet had pointed out, the Sixth Committee's new approach to its work made it possible for any special rapporteur to participate in the discussion of his topic. Since that was the case, there was no need to designate more than one special rapporteur to represent the Commission and he proposed that the designee should be Mr. Rodríguez Cedeño.

47. The CHAIRMAN said that the assistance of any special rapporteur who was available at the fifty-fourth session of the General Assembly would be most welcome. If he heard no objection, he would take it that the Commission wished to adopt paragraph 11, with the insertion of the name of Mr. Rodríguez Cedeño.

*It was so agreed.*

*Section D was adopted.*

*Chapter X, as a whole, as amended, was adopted.*

*The draft report of the Commission on the work of its fifty-first session, as a whole, as amended, was adopted.*

## Letter from the United Nations High Commissioner for Refugees

48. The CHAIRMAN read out the following letter received from Mrs. Ogata, United Nations High Commissioner for Refugees:

I am pleased to refer to the work undertaken by the United Nations International Law Commission during its fifty-first session just completed in Geneva, during which the draft articles on Nationality of Natural Persons in relation to the Succession of States and related commentary have been adopted. As you are aware, my Office has been following the elaboration of these articles closely, and is pleased to have participated in consultations that concerned the problem of statelessness. Problems relating to nationality following the succession of States have been of major concern to UNHCR in the past decade, and many of our programmes in newly independent States centre on this issue. It is without doubt that the ILC's contributions towards the codification and progressive development of international law in the field of nationality, and on questions pertaining to the avoidance and reduction of cases of statelessness, are of great service to my Office in our work on these challenging issues.

As you will recall, there are many past examples of fruitful cooperation between UNHCR and the ILC. The ILC drafted the 1961 Convention on the Reduction of Statelessness, in which UNHCR is designated as a mediating body to which individuals and States may turn for assistance in resolving cases of statelessness. UNHCR participated in the conference which adopted the 1961 Convention and, as has been the case in the Commission's current work concerning State succession, has shared the benefit of our experience in legal and practical problems of statelessness which confront the Office regularly in the course of our work. In 1996 the General Assembly, by way of resolution 50/152, requested UNHCR to significantly expand its work in this field, by providing technical and advisory services on national and international law to States, and by undertaking other activities to promote the reduction and avoidance of statelessness. In support of these efforts, my Office has established special expertise in this field within the Department of International Protection, which I trust will facilitate our cooperation with the Commission in any future work on nationality questions.

## Closure of the session

49. After the usual exchange of courtesies, the CHAIRMAN declared the fifty-first session of the International Law Commission closed.

*The meeting rose at 1 p.m.*