

# YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

## 2001

*Volume I*

*Summary records  
of the meetings  
of the fifty-third session  
23 April–1 June and  
2 July–10 August 2001*

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## NOTE

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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-third session of the Commission (A/CN.4/SR.2665-A/CN.4/SR.2710), 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

<i>Name</i>	<i>Country of nationality</i>	<i>Name</i>	<i>Country of nationality</i>
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*Second Vice-Chairman:* Mr. Enrique CANDIOTI  
*Chairman of the Drafting Committee:* Mr. Peter TOMKA  
*Rapporteur:* Mr. Qizhi HE

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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 2665th meeting, held on 23 April 2001:

1. Organization of work of the session.
2. State responsibility.
3. Diplomatic protection.
4. Unilateral acts of States.
5. Reservations to treaties.
6. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities).
7. Programme, procedures and working methods of the Commission, and its documentation.
8. Cooperation with other bodies.
9. Date and place of the fifty-fourth session.
10. Other business.

## ABBREVIATIONS

ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
IMO	International Maritime Organization
ITLOS	International Tribunal for the Law of the Sea
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
UNCC	United Nations Compensation Commission
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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AJIL	<i>American Journal of International Law</i>
<i>I.C.J. Reports</i>	<i>ICJ, Reports of Judgments, Advisory Opinions and Orders</i>
ILM	<i>International Legal Materials</i> (Washington, D.C.)
ILR	<i>International Law Reports</i>
<i>ITLOS Reports</i>	<i>ITLOS, Reports of Judgments, Advisory Opinions and Orders</i>
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1-24: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (Nos. 40-80: beginning in 1931)
RGDIP	<i>Revue générale de droit international public</i>
UNRIAA	United Nations, <i>Reports of International Arbitral Awards</i>

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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](http://www.un.org/law/ilc/index.htm).

## CASES CITED IN THE PRESENT VOLUME

<i>Case</i>	<i>Nature and source of the decision</i>
<i>Administrative Decision No. V</i>	Administrative Decision No. V, of 31 October 1924, United States–Germany Mixed Claims Commission (UNRIAA, vol. VII (Sales No. 1956.V.5), p. 119).
<i>Aegean Sea Continental Shelf</i>	<i>Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978</i> , p. 3.
<i>Aerial Incident of 27 July 1955</i>	<i>I.C.J. Pleadings, Aerial Incident of 27 July 1955 (Israel v. Bulgaria; United States of America v. Bulgaria; United Kingdom v. Bulgaria)</i> .
<i>Air Service Agreement</i>	<i>Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France</i> , decision of 9 December 1978 (UNRIAA, vol. XVIII (Sales No.E/F.80.V.7), p. 415).
<i>“Alabama”</i>	The Geneva Arbitration (The “Alabama” case) ( <i>United States of America v. Great Britain</i> ), decision of 14 September 1872 (J. B. Moore, <i>History and Digest of the International Arbitrations to which the United States has been a Party</i> (Washington, D.C., United States Government Printing Office, 1898), vol. I, p. 572).
<i>Ambatielos</i>	<i>Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports 1952</i> , p. 28. <i>Merits, Judgment, I.C.J. Reports 1953</i> , p. 10. The Ambatielos Claim, award of 6 March 1956 (UNRIAA, vol. XII (Sales No. 63.V.3), p. 91).
<i>Anglo-Iranian Oil Co.</i>	<i>Anglo-Iranian Oil Co., Judgment, I.C.J. Reports 1952</i> , p. 93.
<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide</i>	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996</i> , p. 595.  <i>Order of 11 December 1998</i> , p. 743.  ( <i>Croatia v. Yugoslavia</i> ), <i>Order of 27 June 2000, I.C.J. Reports 2000</i> , p. 108.
<i>Arbitral Award Made by the King of Spain on 23 December 1906</i>	<i>Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960</i> , p. 192.
<i>Armed Activities on the Territory of the Congo</i>	<i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000</i> , p. 111.
<i>Arrest Warrant</i>	<i>Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Order of 27 June 2001, I.C.J. Reports 2001</i> , p. 559.
<i>Banković</i>	<i>Banković and Others v. Belgium and Others</i> , European Court of Human Rights, Grand Chamber, 2001, Application No. 52207/99.

<i>Case</i>	<i>Nature and source of the decision</i>
<i>Barcelona Traction</i>	<i>Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 3.</i>
<i>Celebici</i>	<i>Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as “Pavo”, Hazim Delic, Esad Landzo also known as “Zenga”, International Tribunal for the Former Yugoslavia, case No. IT-96-21, judgement of 16 November 1998.</i>
<i>Certain Property</i>	<i>Certain Property (Liechtenstein v. Germany), Order of 28 June 2001, I.C.J. Reports 2001, p. 565.</i>
<i>Chorzów Factory</i>	<i>Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9.</i> <i>Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17.</i>
<i>Chrysostomos et al.</i>	<i>Metropolitan Chrysostomos, Archimandrite Georgios Papachrysostomou and Titina Loizidou v. Turkey, European Commission of Human Rights, Applications Nos. 15299/89, 15300/89 and 15318/89, decision of 4 March 1991, Yearbook of the European Convention on Human Rights, 1991, vol. 34, pp. 35-60.</i>
<i>Consular Relations</i>	<i>Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998, p. 248.</i> <i>Order of 10 November 1998, I.C.J. Reports 1998, p. 426.</i>
<i>Continental Shelf</i>	<i>Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 18.</i>
<i>Corfu Channel</i>	<i>Corfu Channel, Merits, Judgment, I.C.J. Reports 1949, p. 4.</i> <i>Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949, p. 244.</i>
<i>Diallo</i>	<i>Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Order of 8 September 2000, I.C.J. Reports 2000, p. 146.</i>
<i>Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights</i>	<i>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.</i>
<i>Donoghue v. Stevenson</i>	<i>Donoghue v. Stevenson, United Kingdom, House of Lords, The Law Reports 1932), p. 562.</i>
<i>East Timor</i>	<i>East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 90.</i>
<i>Eastern Greenland</i>	<i>Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53, p. 22.</i>
<i>ELSI</i>	<i>Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989, p. 15.</i>
<i>Eritrea/Yemen</i>	<i>Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), decision of 9 October 1998 (UNRIAA, vol. XXII, Part III (Sales No. E/F.00.V.7), p. 211).</i>

<i>Finnish Ships Arbitration</i>	Claim of Finnish Shipowners against Great Britain in respect of the Use of certain Finnish Vessels during the War, decision of 9 May 1934 (UNRIAA, vol. III (Sales No. 1949.V.2), p. 1479).
<i>Fisheries Jurisdiction</i>	<i>Fisheries Jurisdiction (Spain v. Canada)</i> , <i>Jurisdiction of the Court, Judgment</i> , I.C.J. Reports 1998, p. 432.
<i>Forests of Central Rhodopia</i>	<i>Affaire des Forêts du Rhodope Central (fond)</i> , decision of 29 March 1933 (UNRIAA, vol. III (Sales No. 1949.V.2), p. 1405)
<i>Free Zones of Upper Savoy and the District of Gex</i>	<i>Free Zones of Upper Savoy and the District of Gex, Judgment</i> , 1932, P.C.I.J., Series A/B, No. 46, p. 96.
<i>Frontier Dispute</i>	<i>Frontier Dispute, Judgment</i> , I.C.J. Reports 1986, p. 554.
<i>Gabčíkovo-Nagymaros Project</i>	<i>Gabčíkovo-Nagymaros Project (Hungary/Slovakia)</i> , <i>Judgment</i> , I.C.J. Reports 1997, p. 7.
<i>Great Belt</i>	<i>Passage through the Great Belt (Finland v. Denmark)</i> , <i>Provisional Measures, Order of 29 July 1991</i> , I.C.J. Reports 1991, p. 12.
<i>Grisbadarna</i>	Arbitral award of 23 October 1909 on the question of the maritime boundary between Norway and Sweden (UNRIAA, vol. XI (Sales No. 61.V.4), p. 147). English translation in J. B. Scott, <i>The Hague Court Reports</i> (1916), p. 129.
<i>Interhandel</i>	<i>Interhandel, Judgment</i> , I.C.J. Reports 1959, p. 6.
<i>Ireland v. United Kingdom</i>	<i>Case of Ireland v. the United Kingdom</i> , European Court of Human Rights, <i>judgement of 18 January 1978</i> , Series A No. 25.
<i>Island of Palmas</i>	Island of Palmas (Netherlands/United States of America), award of 4 April 1928 (UNRIAA, vol. II (Sales No. 1949.V.1), p. 829).
<i>Kren</i>	<i>Kren Claim</i> , United States, International Claims Commission 1951-1954, ILR, vol. 20, p. 233.
<i>La Bretagne</i>	<i>Dispute concerning Filleting within the Gulf of St. Lawrence ("La Bretagne") (Canada/France)</i> , ILR, vol. 82, p. 590.
<i>LaGrand</i>	<i>LaGrand (Germany v. United States of America)</i> , <i>Provisional Measures, Order of 3 March 1999</i> , I.C.J. Reports 1999, p. 9. <i>Judgment</i> , I.C.J. Reports 2001, p. 466.
<i>Laguna del Desierto</i>	<i>Dispute concerning the Course of the Frontier between BP 62 and Mount Fitzroy (Argentina/Chile) ("Laguna del Desierto")</i> , Arbitral Tribunal (Argentina/Chile), <i>judgement of 21 October 1994</i> , ILR, vol. 113, p. 1.
<i>Land and Maritime Boundary between Cameroon and Nigeria</i>	<i>Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)</i> , <i>Order of 20 February 2001</i> , I.C.J. Reports 2001, p. 9.
<i>Land Sale to Alien</i>	<i>Land Sale to Alien Case (1)</i> , Austria, Constitutional Court, <i>judgement of 13 March 1973</i> , ILR, vol. 77, p. 433.
<i>Legality of the Threat or Use of Nuclear Weapons</i>	<i>Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion</i> , I.C.J. Reports 1996, p. 226.

<i>Legality of Use of Force</i>	<p><i>Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 124.</i></p> <p><i>(Yugoslavia v. Spain), ibid., p. 761.</i></p> <p><i>(Yugoslavia v. United States of America), ibid., p. 916.</i></p> <p><i>(Yugoslavia v. Belgium), Order of 21 February 2001, I.C.J. Reports 2001, p. 13.</i></p> <p><i>(Yugoslavia v. Canada), ibid., p. 16.</i></p> <p><i>(Yugoslavia v. France), ibid., p. 19.</i></p> <p><i>(Yugoslavia v. Germany), ibid., p. 22.</i></p> <p><i>(Yugoslavia v. Italy), ibid., p. 25.</i></p> <p><i>(Yugoslavia v. Netherlands), ibid., p. 28.</i></p> <p><i>(Yugoslavia v. Portugal), ibid., p. 31.</i></p> <p><i>(Yugoslavia v. United Kingdom), ibid., p. 34.</i></p>
<i>Lithgow</i>	<i>Lithgow and Others, European Court of Human Rights, judgement of 8 July 1986, Series A No. 102.</i>
<i>Lockerbie</i>	<p><i>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</i></p> <p><i>(Libyan Arab Jamahiriya v. United States of America), p. 114.</i></p> <p><i>Libyan Arab Jamahiriya v. United Kingdom), Order of 6 September 2000, I.C.J. Reports 2000, p. 140.</i></p> <p><i>(Libyan Arab Jamahiriya v. United States of America), ibid., p. 143.</i></p>
<i>Loizidou</i>	<i>Loizidou v. Turkey, European Court of Human Rights, judgment of 23 March 1995 (Preliminary Objections), Series A No. 310 and judgment of 18 December 1996 (Merits), Reports of Judgments and Decisions 1996-VI.</i>
“ <i>Lotus</i> ”	“ <i>Lotus</i> ”, Judgment No. 9, 1927, P.C.I.J., Series A, No. 10.
<i>Maritime Delimitation in the Area between Greenland and Jan Mayen</i>	<i>Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993, p. 38.</i>
<i>Maritime Delimitation between Nicaragua and Honduras</i>	<i>Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Order of 21 March 2000, I.C.J. Reports 2000, p. 6.</i>
<i>Maritime Delimitation and Territorial Questions between Qatar and Bahrain</i>	<p><i>Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Order of 11 October 1991, I.C.J. Reports 1991, p. 50</i></p> <p><i>Merits, Judgment, I.C.J. Reports 2001, p. 40.</i></p>
<i>Matthews</i>	<i>Matthews v. the United Kingdom, European Court of Human Rights, Grand Chamber, Application No. 24833/94, judgment of 18 February 1999.</i>
<i>Mavrommatis</i>	<i>Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2.</i>
<i>Military and Paramilitary Activities in and against Nicaragua</i>	<i>Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14.</i>

<i>Minquiers and Ecrehos</i>	<i>Minquiers and Ecrehos</i> , Judgment, I.C.J. Reports 1953, p. 47.
<i>M/V “Saiga” (No. 2)</i>	<i>M/V “Saiga” case (No. 2) (Saint Vincent and the Grenadines v. Guinea)</i> , Judgment, ITLOS Reports 1999, p. 10.
<i>Namibia</i>	<i>Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)</i> , Advisory Opinion, I.C.J. Reports 1971, p. 16.
<i>Nielsen v. Denmark</i>	<i>B. Schouw Nielsen v. Government of Denmark</i> , European Commission and European Court of Human Rights, application No. 343/57, decision of 2 September 1959 ( <i>Yearbook of the European Convention on Human Rights</i> 1958-1959, p. 412).
<i>North Sea Continental Shelf</i>	<i>North Sea Continental Shelf</i> , Judgment, I.C.J. Reports 1969, p. 3.
<i>Nottebohm</i>	<i>Nottebohm, Second Phase</i> , Judgment, I.C.J. Reports 1955, p. 4.
<i>Nuclear Tests</i>	<i>Nuclear Tests (Australia v. France)</i> , Judgment, I.C.J. Reports 1974, p. 253. ( <i>New Zealand v. France</i> ), <i>ibid.</i> , p. 457.
<i>Oil Platforms</i>	<i>Oil Platforms (Islamic Republic of Iran v. United States of America)</i> , Order of 4 September 2000, I.C.J. Reports 2000, p. 137.
<i>Pablo Nájera</i>	<i>Pablo Nájera (France) v. United Mexican States</i> , French-Mexican Claims Commission, decision No. 30-A of 19 October 1928 (UNRIAA, vol. V (Sales No. 1952.V.3), p. 466).
<i>Panevezys-Saldutiskis Railway</i>	<i>Panevezys-Saldutiskis Railway</i> , Judgment, 1939, P.C.I.J., Series A/B, No. 76, p. 4.
<i>Pinochet</i>	<i>Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex Parte Pinochet Ugarte (No. 3)</i> England, House of Lords, 24 March 1999, ILR, vol. 119.
<i>“Rainbow Warrior”</i>	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 <i>Rainbow Warrior</i> affair (UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215).
<i>Rawle Kennedy</i>	<i>Rawle Kennedy v. Trinidad and Tobago (Official Records of the General Assembly, Fifty-fifth session, Supplement No. 40 (A/55/40), vol. II, annex XI, communication No. 845/1999</i> , p. 258).
<i>Reparation for Injuries</i>	<i>Reparation for Injuries Suffered in the Service of the United Nations</i> , Advisory Opinion, I.C.J. Reports, 1949, p. 174.
<i>Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case</i>	<i>Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case</i> , Order of 22 September 1995, I.C.J. Reports 1995, p. 288.



<i>Reservations to the Convention on Genocide</i>	<i>Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 15.</i>
<i>Senator Lines</i>	<i>Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom, European Court of Human Rights, Application No. 56672/00.</i>
<i>Southern Bluefin Tuna</i>	<i>Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, p. 280.</i>
<i>South West Africa</i>	<i>South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 319.</i> <i>Second Phase, Judgment, I.C.J. Reports 1966, p. 6.</i>
<i>Sovereignty over Pulau Ligitan and Pulau Sipadan</i>	<i>Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Order of 19 October 2000, I.C.J. Reports 2000, p. 173.</i>
<i>S.S. “Wimbledon”</i>	<i>S.S. “Wimbledon”, Judgments, 1923, P.C.I.J., Series A, No. 1.</i>
<i>State Border Service</i>	<i>Bosnia and Herzegovina, Constitutional Court, Case U 9/00 on the Law on the State Border Service, decision of 3 November 2000.</i>
<i>Stevenson</i>	<i>Stevenson (UNRIAA, vol. IX (Sales No. 59.V.5), p. 385).</i>
<i>Tadić</i>	<i>Prosecutor v. Duško Tadić, International Tribunal for the Former Yugoslavia, case No. IT-94-1-A, judgement of 15 July 1999, ILR, vol. 112, p. 369.</i>
<i>Temple of Preah Vihear</i>	<i>Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962, p. 6.</i>
<i>Texaco</i>	<i>Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic (1977), ILR, vol. 53, p. 389.</i>
<i>Tinoco</i>	<i>Aguilar-Amory and Royal Bank of Canada Claims, award of 18 October 1923 (UNRIAA, vol. I (Sales No. 1948.V.2), p. 369).</i>
<i>United States Diplomatic and Consular Staff in Tehran</i>	<i>United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3.</i>
<i>Velásquez Rodríguez</i>	<i>Velásquez Rodríguez v. Honduras Case, Inter-American Court of Human Rights, Preliminary Objections, judgement of 26 June 1987, Series C No. 1.</i> <i>Judgement of 29 July 1988, Series C No. 4</i> <i>Compensatory Damages (Art. 63 (1) American Convention on Human Rights), judgement of 21 July 1989, Series C No. 7.</i>

## MULTILATERAL INSTRUMENTS CITED IN THE PRESENT VOLUME

*Source*

### Friendly relations and cooperation

- |   |  |
|---|--|
| North Atlantic Treaty (Washington, 4 April 1949)  | United Nations, <i>Treaty Series</i> , vol. 34, No. 541, p. 243. |
| Framework Treaty on Democratic Security in Central America (San Pedro Sula, 15 December 1995) | A/51/67, annex II.   |

### Privileges and immunities, diplomatic and consular relations

- |  |   |
|--|---|
| Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)  | United Nations, <i>Treaty Series</i> , vol. 500, No. 7310, p. 95.             |
| Vienna Convention on Consular Relations (Vienna, 24 April 1963)  | <i>Ibid.</i> , vol. 596, No. 8638, p. 261.                                    |
| Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) | United Nations, <i>Juridical Yearbook 1975</i> , (Sales No. E.77.V.3), p. 87. |
| Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (Vienna, 8 April 1983)                                      | <i>Ibid.</i> , <i>Juridical Yearbook 1983</i> (Sales No. E.90.V.1), p. 139.   |

### Human rights

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|--|--|
| Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)   | United Nations, <i>Treaty Series</i> , 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, <i>European Treaty Series</i> , No. 155.        |
| Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 2000)  | <i>Ibid.</i> , No. 177.  |
| International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)  | United Nations, <i>Treaty Series</i> , vol. 993, No. 14531, p. 3.  |
| International Covenant on Civil and Political Rights (New York, 16 December 1966)  | <i>Ibid.</i> , vol. 999, No. 14668, p. 171.                        |
| American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)   | <i>Ibid.</i> , vol. 1144, No. 17955, p. 123.                       |

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	<i>Ibid.</i> , vol. 1465, No. 24841, p. 85.
Convention on the Rights of the Child (New York, 20 November 1989)	<i>Ibid.</i> , vol. 1577, No. 27531, p. 3.
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)	Council of Europe, <i>European Treaty Series</i> , No. 168.
Charter of fundamental rights of the European Union (Nice, 7 December 2000)	<i>Official Journal of the European Communities</i> , No. C 364 (18 December 2000), p. 1.

### **Nationality and statelessness**

Convention relative to the Rights of Aliens (Mexico City, 29 January 1902)	<i>The International Conferences of American States, 1889-1928</i> (New York, Oxford University Press, 1931), p. 91.
European Convention on Nationality (Strasbourg, 6 November 1997)	Council of Europe, <i>European Treaty Series</i> , No. 166.

### **Narcotic Drugs and Psychotropic Substances**

Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	United Nations, <i>Treaty Series</i> , vol. 1582, No. 27627, p. 95.
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### **International trade and development**

General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	United Nations, <i>Treaty Series</i> , vol. 55, No. 814, p. 187.
Food Aid Convention, 1971 (opened for signature at Washington from 29 March 1971 until 3 May 1971)	<i>Ibid.</i> , vol. 800, No. 11400, p. 162.

### **Civil aviation**

Convention on International Civil Aviation (Chicago, 7 December 1944)	United Nations, <i>Treaty Series</i> , vol. 15, No. 102, p. 295.
Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 14 September 1963)	<i>Ibid.</i> , vol. 704, No. 10106, p. 219.
Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970)	<i>Ibid.</i> , vol. 860, No. 12325, p. 105.
Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 23 September 1971)	<i>Ibid.</i> , vol. 974, No. 14118, p. 177.

## Navigation

Convention on the International Maritime Organization  
(Geneva, 6 March 1948)

United Nations, *Treaty Series*, vol. 289,  
No. 4214, p. 3.

## Educational and cultural matters

European Convention on the Protection of the Archaeological  
Heritage (London, 6 May 1969)

United Nations, *Treaty Series*, vol. 788,  
No. 11212, p. 227.

## Miscellaneous penal matters

Rome Statute of the International Criminal Court (Rome, 17  
July 1998)

A/CONF.183/9.

Criminal Law Convention on Corruption (Strasbourg,  
27 January 1999)

Council of Europe,  
*European Treaty Series*, No. 173.

International Convention for the Suppression of the Financing of  
Terrorism (New York, 9 December 1999)

*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 49*, vol. I, resolution 54/109, annex.

United Nations Convention against Transnational Organized  
Crime (Palermo Convention) (New York, 15 November  
2000)

*Ibid.*, *Fifty-fifth Session, Supplement No. 49*, vol. I, resolution 55/25, annex I.

Protocol to Prevent, Suppress and Punish Trafficking in  
Persons, Especially Women and Children,  
supplementing the United Nations Convention  
against Transnational Organized Crime (New York,  
15 November 2000)

*Ibid.*, annex II.

Protocol against the Smuggling of Migrants by Land,  
Sea and Air, supplementing the United Nations  
Convention against Transnational Organized Crime  
(New York, 15 November 2000)

*Ibid.*, annex III.

Protocol against the Illicit Manufacturing of and  
Trafficking in Firearms, Their Parts and Components  
and Ammunition, supplementing the United Nations  
Convention against Transnational Organized Crime  
(New York, 31 May 2001)

*Ibid.*, vol. III, resolution 55/255, annex.

## Law of the sea

Geneva Conventions on the Law of the Sea

Convention on the Continental Shelf (Geneva, 29 April  
1958)

United Nations, *Treaty Series*, vol. 499,  
No. 7302, p. 311.

Convention on the Territorial Sea and the Contiguous Zone  
(Geneva, 29 April 1958)

*Ibid.*, vol. 516, No. 7477,  
p. 205.

Convention on the High Seas (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 450, No. 6465, p. 11.
Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 559, No. 8164, p. 285.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Ibid.</i> , vol. 1833, No. 31363, p. 3.
Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995)	<i>International Fisheries Instruments with Index</i> (United Nations publication, Sales No. E.98.V.11), sect. I; see also A/CONF.164/37.

### Law applicable in armed conflict

Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919)	<i>British and Foreign State Papers, 1919</i> , vol. CXII (London, H. M. Stationery Office, 1922), p. 1.
Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949)	United Nations, <i>Treaty Series</i> , vol. 75, No. 973, p. 287.
State Treaty for the Re-establishment of an Independent and Democratic Austria (Vienna, 15 May 1955)	<i>Ibid.</i> , vol. 217, No. 2949, p. 223.

### Law of treaties

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, <i>Treaty Series</i> , vol. 1155, No. 18232, p. 331.
Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978)	<i>Ibid.</i> , vol. 1946, No. 33356, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.

### Telecommunications

International Radiotelegraph Convention (Washington, D.C., 25 November 1927)	League of Nations, <i>Treaty Series</i> , vol. LXXXIV, No. 1905, p. 97.
International Convention concerning the Use of Broadcasting in the Cause of Peace (Geneva, 23 September 1936)	<i>Ibid.</i> , vol. CLXXXVI, No. 4319, p. 301.

### Disarmament

Comprehensive Nuclear-Test-Ban Treaty (New York, 10 September 1996)	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)	CD/1478, annex.

## Environment and natural resources

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|---|---|
| International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969)   | United Nations, <i>Treaty Series</i> , vol. 973, No. 14097, p. 3.   |
| Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985)   | <i>Ibid.</i> , vol. 1513, No. 26164, p. 293.  |
| 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) | <i>International Legal Materials</i> (Washington, D.C.), vol. 30, No. 3 (May 1991), p. 775.                                   |
| Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)  | ECE, <i>Environmental Conventions</i> , United Nations publication, 1992, p. 95.  |
| United Nations Framework Convention on Climate Change (New York, 9 May 1992)  | United Nations, <i>Treaty Series</i> , vol. 1771, No. 30822, p. 107.  |
| Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997)   | FCCC/CP/1997/7/Add.1, decision 1/CP.3.  |
| Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)  | United Nations, <i>Treaty Series</i> , vol. 1760, No. 30619, p. 79.   |
| Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997)  | <i>Official Records of the General Assembly, Fifty-first session, Supplement No. 49</i> , vol. III, resolution 51/229, annex. |

## Fiscal matters

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|---|---|
| Convention on Mutual Administrative Assistance in Tax Matters (Strasbourg, 25 January 1988) | Council of Europe, <i>European Treaty Series</i> , No. 127. |
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## Miscellaneous

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|---|--|
| Charter of the Organization of American States (Bogotá, 30 April 1948)                            | United Nations, <i>Treaty Series</i> , vol. 119, No. 1609, p. 3. |
| Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) | <i>Ibid.</i> , vol. 330, No. 4739, p. 3.                         |
| Antarctic Treaty (Washington, 1 December 1959)  | <i>Ibid.</i> , vol. 402, No. 5778, p. 71.                        |
| Treaty on European Union (Maastricht Treaty) (Maastricht, 7 February 1992)                        | <i>Ibid.</i> , vol. 1757, No. 30615, p. 3.                       |

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. 1.

Civil Law Convention on Corruption (Strasbourg, 4 November 1999)

Council of Europe, *European Treaty Series*, No. 174.

## CHECKLIST OF DOCUMENTS OF THE FIFTY-THIRD SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/512	Provisional agenda	Mimeographed. For agenda as adopted, see p. x above.
A/CN.4/513	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-fifth session of the General Assembly	Mimeographed.
A/CN.4/514 [and Corr.1]	Second report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur	Reproduced in <i>Yearbook ... 2001</i> , vol. II (Part One).
A/CN.4/515 and Add.1–3	State responsibility: comments and observations received from Governments	<i>Idem.</i>
A/CN.4/516	International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities): comments and observations received from Governments	<i>Idem.</i>
A/CN.4/517 and Add.1	Fourth report on State responsibility, by Mr. James Crawford, Special Rapporteur	<i>Idem.</i>
A/CN.4/518 and Add.1–3	Sixth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/519	Fourth report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.601 [and Corr.1 and 2]	International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities). Draft preamble and draft articles adopted by the Drafting Committee on second reading	Mimeographed. See summary record of the 2675th meeting (para. 3).
A/CN.4/L.602 [and Corr.1 and Rev.1]	Draft articles on responsibility of States for internationally wrongful acts. Titles and texts of the draft articles adopted by the Drafting Committee on second reading	Mimeographed. The final text appears in <i>Yearbook ... 2001</i> , vol. II (Part Two).
A/CN.4/L.603 [and Corr.1 and 2]	Reservations to treaties. Titles and texts of the draft guidelines adopted by the Drafting Committee: 2.2.1, 2.2.2 [2.2.3], 2.2.3 [2.2.4], 2.3.1, 2.3.2, 2.3.3, 2.3.4, 2.4.3, 2.4.4 [2.4.5], 2.4.5 [2.4.4], 2.4.6 [2.4.7] and 2.4.7 [2.4.8]	Mimeographed. See summary record of the 2694th meeting (para. 1).
A/CN.4/L.604	Draft report of the International Law Commission on the work of its fifty-third session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10</i> (A/56/10). The final text appears in <i>Yearbook ... 2001</i> , vol. II (Part Two).
A/CN.4/L.605	<i>Idem.</i> : chapter II (Summary of the work of the Commission at its fifty-third session)	<i>Idem.</i>
A/CN.4/L.606 and Add.1 and 2	<i>Idem.</i> : chapter III (Specific issues on which comments would be of particular interest to the Commission)	<i>Idem.</i>



<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.607 and Add.1 [and Add.1/Corr.1]	<i>Idem.</i> : chapter IV (International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities))	<i>Idem.</i>
A/CN.4/L.608 [and Corr.1] and Add.1 [and Add.1/ Corr.1] and Add. 2–10	<i>Idem.</i> : chapter V (State responsibility)	<i>Idem.</i>
A/CN.4/L.609 and Add.1–5	<i>Idem.</i> : chapter VI (Reservations to treaties)	<i>Idem.</i>
A/CN.4/L.610	<i>Idem.</i> : chapter VII (Diplomatic protection)	<i>Idem.</i>
A/CN.4/L.611	<i>Idem.</i> : chapter VIII (Unilateral acts of States)	<i>Idem.</i>
A/CN.4/L.612	<i>Idem.</i> : chapter IX (Other decisions and conclusions of the Commission)	<i>Idem.</i>
A/CN.4/SR.2665–A/CN.4/ SR.2710	Provisional summary records of the 2665th to 2710th meetings	Mimeographed. The final text appears in the present volume.

# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE FIRST PART OF THE FIFTY-THIRD SESSION

*Held at Geneva from 23 April to 1 June 2001*

### 2665th MEETING

*Monday, 23 April 2001, at 3.10 p.m.*

*Outgoing Chairman:* Mr. Chusei YAMADA

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Idris, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

#### Opening of the session

1. The OUTGOING CHAIRMAN declared open the fifty-third session of the International Law Commission and extended a warm welcome to all members.

2. Having represented the Commission at the fifty-fifth session of the General Assembly, he was able to say that the report of the Commission on the work of its fifty-second session<sup>1</sup> had been well received by the Sixth Committee, which had held a substantive and useful debate. The General Assembly, in paragraph 2 of its resolution 55/152 of 12 December 2000, had endorsed the Commission's proposal to complete the second reading of the

draft articles on State responsibility and on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) at its fifty-third session, in 2001. It also expected the Commission to make progress on the topics of reservations to treaties, diplomatic protection and unilateral acts of States. A very heavy workload thus awaited the Commission, which could not afford to waste time.

3. He wished to draw attention to the important fact that, while approving the split session for the fifty-third session, the General Assembly had reiterated its request that the Commission should implement cost-saving measures, which were an important element of the Assembly's consent to such a session in the current biennium. He hoped that the Commission would take a viable decision on that question as soon as possible. Otherwise, it could well lose a great deal of credibility with the Sixth Committee.

4. Lastly, he wished to express gratitude for the valuable assistance given to him during his tenure as Chairman.

#### Election of officers

*Mr. Kabatsi was elected Chairman by acclamation.*

*Mr. Kabatsi took the Chair.*

5. The CHAIRMAN thanked the members of the Commission for the trust they had placed in him and said he would make every effort to deserve it. With their cooperation, he hoped to make the current session a successful and productive one that would achieve all its objectives, despite the heavy workload. He wished to pay tribute to the outgoing Chairman and the Bureau for a job well done.

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

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

<sup>1</sup>Yearbook . . . 2000, vol. II (Part Two).

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

*Mr. He was elected Rapporteur by acclamation.*

### **Adoption of the agenda (A/CN.4/512)**

6. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/512).

*The agenda was adopted.*

### **Organization of work of the session**

[Agenda item 1]

7. The CHAIRMAN invited the members of the Commission to inform Mr. Tomka, Chairman of the Drafting Committee, of their interest in participating in the Committee on the topics of State responsibility or international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), with which it would be concerned initially.

### **State responsibility<sup>2</sup> (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,<sup>3</sup> A/CN.4/517 and Add.1,<sup>4</sup> A/CN.4/L.602 and Corr.1 and Rev.1)**

[Agenda item 2]

#### **FOURTH REPORT OF THE SPECIAL RAPPORTEUR**

8. Mr. CRAWFORD (Special Rapporteur), introducing his fourth report on State responsibility (A/CN.4/517 and Add.1), said he wished to pay tribute to the previous Chairman for his efforts over the past year. The consultations on the draft articles led by the previous Chairmen had been of particular importance since the complete text adopted at the fifty-second session differed in important respects, especially regarding Part Two and Part Two bis, from the text adopted on first reading.<sup>5</sup> Important issues had found a new articulation, but much remained to be said about them. Governments had had an opportunity to express initial views, both during the discussions in the Sixth Committee and in writing. It had been said in the past that only a few States provided comments on the Commission's drafts, but that was not true in the current instance. Statements, often very well thought out, had been made in the Sixth Committee by countries from all sectors. Some Governments had further refined their

remarks through detailed written comments. The process of consultation had thus been extensive and was reflected in the topical summary of the discussion in the Sixth Committee on the report of the Commission during the fifty-fifth session of the General Assembly (A/CN.4/513, sect. A), and in the comments and observations received from Governments (A/CN.4/515 and Add.1–3).

9. His original intention had been to introduce the fourth report in terms of two major issues, settlement of disputes and the form of the draft articles, and to move on to the remaining questions of substance. It had been pointed out, however, that all three areas were closely intertwined, so that one's position on form or on dispute settlement might affect one's attitude to some of the substantive issues outstanding, especially countermeasures. The advantage of an early informal exchange of views to explore the possibility of achieving consensus had likewise been mentioned. He was therefore revising his approach and would present a general introduction to the entire report so as to provide a basis for the informal consultations.

10. He would introduce what seemed to be the remaining issues of principle, relating both to form and to substance, and would then deal with suggested changes to the text. Some of them related solely to drafting, while others were more substantive, yet did not raise issues of general principle. As some of the articles in Part One were non-controversial, he anticipated that the Drafting Committee could be usefully employed, even before completion of the work of the Commission in plenary, on the rest of the text, in dealing with Part One.

11. One other preliminary remark concerned the commentaries, which had in the past become the last refuge of the disaffected, a place where members who had lost on a matter of substance could at least have their point made. Such an approach would have to come to a halt. In recent months, he had circulated a preliminary version of the commentaries to some of the articles, asking members for opinions on overall style. It was a difficult issue because, from the Commission's point of view, the commentaries by the Special Rapporteur Roberto Ago were unusual both in their detail and their excellence. There was a marked difference between the Ago commentaries to Part One and the existing commentaries to Part Two or the commentaries prepared by the Commission on other draft articles. The question had arisen whether it was desirable to adopt the Commission's standard approach to commentaries or some form of the Ago model. He had proposed a compromise between, on the one hand, the model of the Vienna Convention on the Law of Treaties (hereinafter "the 1969 Vienna Convention"), as it were, which consisted of brief commentaries essentially confined to explaining the language of the text without going into matters of substance to any great degree and, on the other hand, Ago's lengthy and somewhat academic commentaries. The final proposed text of the commentaries to chapters I and II, which would soon be available in English as a working document, represented his effort to strike a balance between the two models. His commentaries were considerably longer than the 1969 Vienna Convention model, but not as long as those of Special Rapporteur Ago. For example, the Ago commentary to former article 10 (new article 9) was 28 pages long. The commentaries to the draft articles as a whole would probably be about

<sup>2</sup>For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

<sup>3</sup>Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

<sup>4</sup>*Ibid.*

<sup>5</sup>For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), chap. III, sect. D.

150 pages long. It amounted to only three pages an article, although admittedly it was longer than the Commission's standard model. Of course, the commentaries would not be considered for adoption by the Commission until the articles had returned from the Drafting Committee, presumably during the second half of the session. It would nonetheless be helpful to have feedback on the commentaries as they were produced, so as to address any questions members might have and make it easier to deal with the substantial body of material along with the articles in the second part of the session. If possible, it would be useful to establish a working group to that end.

12. His fourth report dealt, apart from the drafting matters taken up in the annex, with the five remaining general issues of principle. They were matters that either had not yet been discussed in plenary—for example, Part Three on dispute settlement—or, although they had been debated, sometimes at great length, were still somewhat controversial. That was certainly true of aspects of the provisions on countermeasures and, in fact, the whole approach to countermeasures in the draft. It was also true of Part Two, chapter III, on serious breaches. Governments had made many comments on both those issues. Apart from the questions of countermeasures and serious breaches, the general tenor of the observations had been very positive. Governments had felt that the text had made significant progress and strongly endorsed the Commission's wish to complete it at the current session. Although individual drafting suggestions had been made, there had been a high level of support for the text's general balance and even for the approach adopted to the two remaining controversial questions.

13. Three general questions of principle still called for further discussion. The first was the cluster of issues associated with the concepts of injury, damage and the injured State, and in particular the wording of articles 43 and 49. Incidentally, he proposed in the report to use the numbering of the articles as provisionally adopted by the Drafting Committee at the fifty-second session, referring to the earlier numbering only where necessary for the sake of clarity. The term "damage" cropped up in various places and seemed to raise difficulties, as did the precise formulation of the distinction between "injured State" and "other States", although he was pleased to say that there had been a high degree of support in the Sixth Committee and in the comments and observations received from Governments for making the basic distinction between article 43 and article 49. Indeed, he could not recall a single proposal to revert to the old, undifferentiated approach to the injured State taken in article 40. That could be regarded as an *acquis*.

14. There had been a comparable level of support for the idea that any differentiation between general breaches of international law incurring responsibility and serious breaches should be reflected in Part Two rather than in Part One. There had been no significant support, either in the Sixth Committee or in the comments and observations received from Governments, for a reversion to an article 19 [in Part One]. It was hoped that that, too, could be taken as an *acquis*.

15. If he had to single out one question as the most difficult in the entire text, it would undoubtedly be counter-

measures, because it was a sensitive issue, and also because article 54, on countermeasures by States other than the injured State, caused particular controversy. That extremely difficult matter would require further attention. All questions other than those three outstanding questions of principle could, in his view, be resolved in the Drafting Committee.

16. Two underlying questions of form had been deliberately set to one side by the Commission during its consideration of the articles on first reading, namely, the dispute settlement provisions in Part Three and the form of the draft articles. There was a clear link between them, as one could not sensibly include provisions on dispute settlement if the draft was to take the form of a declaration or some other non-treaty form. However—and to simplify somewhat—there were at least three options regarding the relationship between dispute settlement and the form of the draft. First, it could be maintained that the draft should become a convention because the Commission had done its best work in treaty form: for instance, the 1969 Vienna Convention, the Vienna Convention on Diplomatic Relations, and the Geneva Conventions on the Law of the Sea. One could quite coherently propose the convention form without any provision for dispute settlement: it was the form in which the Commission had proposed the draft articles on the law of treaties<sup>6</sup> prior to the insertion of article 66 at the United Nations Conference on the Law of Treaties.<sup>7</sup>

17. Secondly, one could coherently take the view that the international community had become weary of codifying conventions, or, in any event, that the existing codifying text was of a quite different character from the other, more specific, texts; that, by reason of its generality, its focus on secondary rules and the underlying importance of the issues it dealt with, it should take the form of a declaratory text rather than of a convention. Those who held to that view would, of course, oppose dispute settlement simply because it would not fit into the framework of their preferred option.

18. The third position was that there should be a convention, and that it should include provision for the settlement of disputes, at least on cardinal questions such as countermeasures, much as the 1969 Vienna Convention contained provisions for dispute settlement on the cardinal issue of article 53. That was an intermediate position, and again entirely defensible. Indeed, some members might take the perfectly tenable position that dispute settlement was so important to the adequate resolution of questions of State responsibility that it determined the other question: that the reason for preferring a convention was to ensure the inclusion of dispute settlement.

19. Accordingly, it would be best to deal first with the question of dispute settlement on its own terms, irrespec-

<sup>6</sup> See *Yearbook . . . 1966*, vol. II, p. 177, document A/6309/Rev.1, para. 38.

<sup>7</sup> See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968* (United Nations publication, Sales No. E.68.V.7); *ibid.*, *Second Session, Vienna, 9 April–22 May 1969* (United Nations publication, Sales No. E.70.V.6); and *ibid.*, *First and Second Sessions, Vienna, 26 March–24 May 1968 and Vienna, 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5).

tive of other arguments about the final form of the draft; otherwise that intermediate position would be unfairly excluded.

20. The first question to be considered was thus the desirability of the retention—on the assumption that the text was to become a convention—of Part Three in some form, focusing initially on the principle of compulsory dispute settlement in respect of State responsibility disputes, or at least of a significant sub-sector of such disputes.

21. There seemed to be no merit in proposing yet another system of non-binding dispute settlement. Simply specifying that States should or might settle their disputes by some other procedure would add nothing to the text. It might of course be desirable to include in Part Four some general provision on the settlement of disputes, but it would not be helpful to propose an optional form of dispute settlement. States already had a full range of choices, whether under the optional clause or otherwise, for the settlement of disputes involving State responsibility. There was no need to add to them. The case for dealing with dispute settlement was different, namely, the claim that disputes about responsibility—or at any rate those relating to countermeasures, to serious breaches, and possibly to breaches of obligations *erga omnes*—were so important that some compulsory system of dispute settlement should be available.

22. Indeed, even sceptics might adopt that position. It was those who had expressed scepticism about *jus cogens* who had wanted article 66, not its advocates; it was those who had felt that article 53 of the 1969 Vienna Convention could be used to unsettle treaty relations who had wanted to link the *jus cogens* provision with compulsory dispute settlement. That had been the basis for objections made by some States when others had ratified the Convention with a reservation as to article 66. They had claimed that a specific linkage between the two articles had been intended in order to make article 53, as it were, “safe for humanity”. One might take the same view about chapter III of Part Two: if it was to be “safe for humanity”, given the almost necessarily vague and general language it had to adopt, it must at some level be a chapter of indeterminate reference. Progressives and sceptics alike could thus consider that the articles did require provision for dispute settlement. He had tried to put that case fairly, although it was not his own view, as was clear from his fourth report.

23. The argument against that case was, briefly, that, if the draft was to take the form of a treaty, adopting compulsory dispute settlement would be a step too far, rendering the text as a whole unacceptable. In some respects, the draft was clearly progressive, extending the boundaries of international law, dealing with all, rather than merely with bilateral, obligations, and adopting quite advanced positions on certain questions. While such a text might prove acceptable, it was debatable whether it would be acceptable where dispute settlement was concerned.

24. Moreover, the generality of the text, which was one of its great virtues—the central feature of the Ago principle, that the text dealt with the whole of the law of the secondary rules of State responsibility, both treaty and

non-treaty—had been consolidated and was at the current time generally accepted in the jurisprudence, not merely in the Commission. That was a major advance. But it carried with it the proposition that compulsory dispute settlement in respect of the draft articles would be compulsory dispute settlement in respect of most of international law, because issues of international law were currently about, or could in some sense be reduced to, compliance with obligations.

25. It was thus clear that questions of dispute settlement in relation to the text as a whole had a very comprehensive range. His own, entirely personal, judgement was that to try to associate the articles as a whole with dispute settlement was more than the international diplomatic marketplace would currently stand, and that to do so might indeed imperil some of the significant advances made elsewhere in the text. Without prejudice to that general assessment, it might be possible to identify subsets of issues within the draft articles where dispute settlement might be envisaged, in the event that the text was to take the form of a convention. However, a general system of dispute settlement in respect of State responsibility would amount to the adoption of a general principle of dispute settlement for questions of international law more or less at large—a very progressive step in a general sense, but the international community was not, in his view, quite ready for it.

26. Moreover, the significant progress currently being made on dispute settlement was being made incrementally, by introducing systems of dispute settlement in particular fields. On balance, it seemed better to allow that progress to continue, and to allow the articles, whatever their final form, to infiltrate the general process of international law-making, as they were currently doing to no insignificant degree, in the work of ICJ, that of the WTO Appellate Body, and elsewhere. The time was ripe for an exchange of views in informal consultations, with a view to reaching a conclusion on the matter. His own proposal was that Part Three should be deleted.

27. The form of the draft articles should be discussed independently of the question of dispute settlement, given the three options available in that regard. It was still open, even to those who wished to delete Part Three, to favour adopting the draft articles in the form of a treaty; at various stages in the proceedings, that had actually been his own position. It was plain that, notwithstanding certain difficulties it posed, the 1969 Vienna Convention had contributed more to international law as a convention than it would have done as a set of articles attached to a resolution. In convention form, it quite clearly possessed more life and solidity than would otherwise have been the case. The same was true of other sets of articles, such as those on diplomatic immunity. Should not the same advantage be pursued in the field of State responsibility? It should be borne in mind that the consolidating effect of the Convention had not been felt solely with respect to parties thereto. As yet, only a minority of States were parties to the Convention, but it was universally accepted as the starting point, and for most purposes as the finishing point, on questions of the law of treaties. There was hardly a multilateral treaty in existence to which the Convention applied as a convention, because the conditions for its applicability set out in article 4 were so stringent.

Admittedly, it applied to some bilateral treaties, but probably only a minority of the bilateral treaties concluded were as yet governed by the Convention as a convention. Yet that formal point had had no significance at all in terms of the weight of the Convention—it carried weight by virtue of the mere fact of its existence and fairly widespread ratification, and was accordingly taken as an authoritative standard. The same could become true of the articles on State responsibility, always assuming that they were concluded in a satisfactory form.

28. What was the case against a convention? That was an issue on which he was somewhat more neutral than on certain other questions associated with the text, and one on which, as Special Rapporteur, he held no particular brief. First of all, it could be claimed that, because of its comprehensiveness—a feature to which he had already referred—the text dealt with so much of international law that it was inappropriate for it to take the form of a treaty. The text would have more influence—the proponents of a non-treaty form argued—as a set of articles endorsed in some way and associated with the commentary approved by the Commission than it would have as a treaty. If—it was claimed—the Commission proposed the draft articles as a text that would be endorsed in some way by the General Assembly and would thereafter simply become part of the customary law-making process in the field of responsibility, even Governments that were relatively unhappy with particular aspects of the text would be likely to accept it, on the grounds that to revisit it might make matters worse rather than better. The choice was between adoption of a relatively uncontentious text, and adoption by a consensus different from the one that had emerged in the Commission of a text revisited by a Sixth Committee preparatory committee: a text bearing little relationship to the one currently before the Commission; perhaps, even, a garbled text.

29. That, essentially, was the case for the declaratory form. The details of such a form—whether the General Assembly would endorse it, take note of it, welcome it, refer it to courts, or some other formula—were much less significant than the basic choice between a convention that would inevitably involve a preparatory committee and a subsequent diplomatic conference, on the one hand, and on the other, some form of endorsement by the Assembly.

30. In the process of reform over the past 10 years, the Commission had become much more open to the variety of forms its work might take. State practice was more likely to be influenced by a text endorsed by the General Assembly than by a convention which remained largely unratified, such as the Vienna Convention on Succession of States in Respect of Treaties (hereinafter “the 1978 Vienna Convention”) and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (hereinafter the “1983 Vienna Convention”) which had preceded the articles on the nationality of natural persons in relation to the succession of States.<sup>8</sup> On balance, he believed the non-treaty form was to be preferred for the articles on State responsibility, though some delegations in the Sixth Committee, when consulted, had expressed the view that so much progress had been made

on the topic that a convention form could be envisaged at the current time.

31. As to the three issues of substance still to be dealt with, it was currently generally agreed that the distinction of principle between articles 43 and 49 was valuable and should be retained. There was a problem with the language of article 43, subparagraph (b) (ii), because of a tendency to confuse integral obligations with those obligations which were seen as being of general interest to the international community. The Drafting Committee should re-examine those articles, but it was important to retain the basic structure of the two articles. It was clear that there could be obligations towards the international community as a whole or to all States in which individual States had a particular interest, because they were singularly affected by a breach. That was true of obligations in the environmental field, for instance, and perhaps certain areas relating to the law of the sea. Accordingly, article 43 States, in other words, injured States, must be able to be covered by the whole range of obligations. However, the language in which integral obligations were framed should be looked at afresh, if only because the question of integral obligations raised in turn the question whether a breach would be of such a magnitude as to threaten the obligation as a whole.

32. Of greater concern was the formulation of “injury” and “damage”, especially in article 31, paragraph 2, which had been adopted in the Drafting Committee for the sake of compromise. It was desirable to clarify the relationship between injury and damage, because at the current time the equation between the two went too far, and the language of paragraph 2 was defective in that respect. In paragraph 33 of his fourth report he had suggested an alternative wording.

33. On the general question of reparation, the distinction adopted in the draft articles between the obligations associated with cessation and those associated with reparation had been generally endorsed. The subject of assurances and guarantees of non-repetition was an issue for ICJ in the *LaGrand* case. Its decision would be relevant to the Commission’s treatment of the subject.

34. As for the questions associated with Part Two, chapter III, on serious breaches of essential obligations to the international community, some Governments had interpreted “the international community” as meaning the community of States as a whole. There was of course precedent for both interpretations: in the *Barcelona Traction* case, the *fons et origo* of the concept, the term used was “the international community as a whole” [p. 32], and the same phrase appeared in the preamble to the Rome Statute of the International Criminal Court. Yet the United Nations Conference on the Law of Treaties, when adopting article 53 of the 1969 Vienna Convention, had referred to “the international community of States as a whole”. He had explained in the report why that term was not desirable. One reason was that the European Union was regarded by many as a part of the international community, although it was not a State. International organizations with international legal personality, such as ICRC, also participated in the international community in a direct and substantive way and precisely in relation to the very obligations with which the Commission was

<sup>8</sup> See *Yearbook* . . . 1999, vol. II (Part Two), para. 47.

concerned, focusing especially on compliance with international humanitarian law.

35. There had been a vigorous debate on Part Two, chapter III, described in paragraphs 43 to 53 of the report. In his opinion, chapter III was harmless, but it did contain an important concession to the emerging truth that there were obligations of concern to the international community as a whole whose effect was felt within the field of responsibility. There was a case for recognizing a category of serious breaches, although the form of language used in chapter III required discussion in the Drafting Committee. To delete the chapter at the current time would wholly unbalance the text and create very considerable difficulties in achieving consensus. He hoped that any proposals would be designed to improve chapter III, and not to exacerbate the problem of which it was a manifestation.

36. The issue of countermeasures was still extremely delicate, because of its relationship to questions of the allocation or misallocation of powers in the international community and the prospects opened up for their widespread use, especially in the context of article 54. The Commission's excellent work had contributed to the development of standards in the field of countermeasures, but it had to be asked whether full-scale treatment of the subject in the draft articles would be conducive to an overall consensus. He would prefer to keep chapter II of Part Two bis as a separate chapter, subject to drafting improvements. He was particularly unhappy with article 51, containing the list of prohibited countermeasures, which was not based on any principle and had been the subject of some justified criticism. A simpler version would definitely be desirable. The articles adopted on first reading containing lists, such as article 19 or 40, had been a catastrophe. Article 54, too, raised a number of problems. The principles in it were quite defensible, but they raised various questions which neither the proponents nor the opponents of countermeasures seemed happy to treat. One solution would be to retain the treatment of countermeasures, while substituting some kind of saving clause for article 54. It was not possible to say that, in the light of State practice, only article 43 States could take countermeasures. Countermeasures by States under article 49, in other words, States other than the injured State, would be exceptional. They raised questions of the relationship between the draft articles and the international arrangements for the maintenance of peace and security under the Security Council and regional organizations that went beyond the scope of the text. An alternative solution would be to transfer the uncontroversial limits on countermeasures, such as proportionality, to article 23 in Part One, chapter V (Circumstances precluding wrongfulness). A number of Governments had supported that option, which would involve having a Part Three dealing only with the invocation of responsibility. In any event, in the light of the balance of opinion in the Commission and in the Sixth Committee, it was necessary to rule out a passing reference to countermeasures in article 23; that would be taken by those who were concerned about the proliferation of countermeasures as a form of unqualified licence. Something, and something reasonably substantial, would have to be inserted in article 23. It was not feasible to delete countermeasures entirely: the Governments

most hostile to chapter II of Part Two bis were the most enthusiastic about article 23. One option was to retain the general balance between article 23 and chapter II of Part Two bis, but with significant drafting improvements, and a possible reconsideration of article 54 to make it less controversial. Article 54 was perhaps the article that called for the most attention. The other option was the longer version of article 23. Countermeasures could not be deleted, but some changes were probably needed in the way they were treated.

*The meeting rose at 5.40 p.m.*

## 2666th MEETING

*Tuesday, 24 April 2001, at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Idris, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

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

[Agenda item 1]

1. The CHAIRMAN said that the meeting would be devoted to the announcement of the final composition of the Drafting Committee for the topic of international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities).

2. Mr. TOMKA (Chairman of the Drafting Committee) announced that the Drafting Committee for the topic of international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) would be composed of the following members: Mr. Sreenivasa Rao (Special Rapporteur), Mr. Baena Soares, Mr. Brownlie, Mr. Gaja, Mr. Galicki, Mr. Hafner, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Melescanu, Mr. Opertti Badan, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada and Mr. He (ex officio).

3. The CHAIRMAN said that the meeting would be adjourned to enable members to hold informal consultations.

*The meeting rose at 10.15 a.m.*

## 2667th MEETING

*Wednesday, 25 April 2001, at noon*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

**State responsibility<sup>1</sup> (continued)\* (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,<sup>2</sup> A/CN.4/517 and Add.1,<sup>3</sup> A/CN.4/L.602 and Corr.1 and Rev.1)**

[Agenda item 2]

### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)\*

1. The CHAIRMAN invited members to begin their consideration of the fourth report of the Special Rapporteur (A/CN.4/517 and Add.1), with particular reference to dispute settlement and the form of the draft articles.

2. Mr. YAMADA said that dispute settlement could be discussed on its own merits, but it was preferable to comment first on the form of the draft articles, a question with which it was so closely linked. Under article 23 of its statute, the Commission was expected to make a recommendation to the General Assembly on the form its work should take. It had done so in every instance so far, although in some cases the Assembly had not accepted its recommendation. In the case of the draft articles on

State responsibility, the form was dependent on the content of the final product. If there were to be a substantial law-making element, the appropriate form would be a multilateral convention, but if the draft articles merely codified existing rules, there would be no real need for a convention. The concept of codification was defined in article 15 of the statute as “the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine”.

3. The draft articles adopted on first reading<sup>4</sup> had attracted much criticism from Governments. Many of the provisions were inconsistent and went well beyond prevailing State practice, and were not therefore acceptable to many Governments. For the second reading, the Commission had taken the unusual step of provisionally adopting an entire text, and had canvassed the views of Governments, in order to reflect those views fully in its final product. As he understood it, the Commission was currently endeavouring to produce a text that would be readily acceptable to a majority of Governments. However, the text of the draft provisionally adopted by the Drafting Committee on second reading at the previous session contained provisions that in his own view went beyond a codification of existing rules, especially as regards serious breaches and countermeasures. Many Governments had made comments to that effect. The Commission must at the current time concentrate on achieving a codification of State responsibility. Once it had succeeded in that, it could, under article 23, paragraph 1 (b), of its statute recommend to the General Assembly to adopt its report by resolution. The report of the Commission on the work of its fifty-third session would then be an authoritative study of current rules, State practice and doctrine in the field of State responsibility, which the Assembly could endorse in the form of a resolution. Such a resolution would provide sufficient guidance to States on their rights and responsibilities in that field, and would clearly establish the circumstances in which an injured State could invoke the responsibility of another State, thus contributing to legal stability and predictability in international relations. It would serve as a general standard for international courts in settling international disputes, since almost all international disputes entailed State responsibility.

4. He was not, however, seeking to foreclose the possibility of a convention on the topic. If it so wished, the Commission could recommend that form to the General Assembly in accordance with paragraph 1, subparagraph (c) or (d), of article 23 of its statute. That had been the chosen form of the Commission's work on the law of the non-navigational uses of international watercourses, which had become the Convention on the Law of the Non-navigational Uses of International Watercourses. It was a highly specific technical subject, yet the process of framing a convention had nonetheless taken several years after the Commission's report to the Assembly. Even at the current time, there was no prospect of the Convention coming into force soon. He therefore had serious doubts as to the advisability of opting for a convention on State responsibility.

\* Resumed from the 2665th meeting.

<sup>1</sup> For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

<sup>2</sup> Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

<sup>3</sup> *Ibid.*

<sup>4</sup> See 2665th meeting, footnote 5.



5. As for the issue of dispute settlement, if the Commission decided to remain within the bounds of codification there would be no need for any drafting exercise, since the subject was already sufficiently covered by conventional and customary rules.

6. Mr. KUSUMA-ATMADJA said his recollection was that, when the Special Rapporteur was introducing the fourth report, mention had been made of a number of unfinished aspects of the topic and of the possibility of members having a reasonable time to reflect on them. To that end, he would have liked to have the opportunity, in the meantime, to discuss other topics on the agenda of the current session.

7. Mr. LUKASHUK said that the Commission's current session would take a special place in history, because no legal system could function properly without a law on responsibility. Issues of State responsibility were at the current time being resolved on an extremely primitive level, and small States especially suffered as a result. That placed a special burden of responsibility on the Commission, which must exert all its efforts to discharge the duty of completing the draft articles. If it was to do so successfully, certain factors must be borne in mind. For almost half a century in which the Commission had been working on the topic, eminent jurists had served as rapporteurs, and the work of the Special Rapporteur had been endorsed and praised by Governments. It should be emphasized that comments and observations received from Governments had always been carefully noted by the Commission, and that the draft articles as they currently stood reflected the views not only of experts, but also of a wide range of States. That circumstance was especially significant at the current concluding stage of the work.

8. From a study of the discussions in the Sixth Committee of the General Assembly (A/CN.4/513, Sect. A) and the comments and observations received from Governments (A/CN.4/515 and Add.1-3) it was possible to reach certain conclusions. First, it was evident that Governments attached great importance to the work on the draft articles, while pointing to the complexity of the problems still to be resolved. Secondly, they mentioned the advanced state of the work and emphasized the Commission's duty to complete it at the current session. The statement by South Africa on behalf of the South African Development Community<sup>5</sup> encapsulated those views. Other States, such as India and the Nordic countries, emphasized that the Commission should have every opportunity to complete the second reading of the text during the current session. The considerable improvements in the draft articles and their advanced state of preparation had been favourably commented on, and it had been noted that, to a large extent, the progress in the work was a result of the special attention paid to the comments and observations received from Governments and to State practice.

9. As to the final form of the draft, some States favoured a binding convention, while others preferred a resolution or declaration by the General Assembly. The preference of some Governments for a convention was quite understandable, but it conflicted with the desire of a majority of States to adopt rules on State responsibility as soon as possible. However, there was no real contradiction in principle: the Commission could recommend adoption of a declaration and the subsequent elaboration of a convention. As a word of warning, he would urge the Commission, in its report, to avoid presenting a divided view to the Sixth Committee by describing the two options as mutually exclusive. Like any other jurist, he would himself prefer a convention, but he certainly would not wish to see the adoption of rules on the subject postponed for decades. As the Government of Cyprus had pointed out, the work of international law-making was the "art of the possible"; although it would prefer a convention, it did not as a result object to an alternative form.

10. The second general issue to be resolved was that of countermeasures, which were essential to international legality. Countermeasures were not the same as sanctions, which international organizations were entitled to impose within the limits of their competence, whereas only States could take countermeasures. The views of Governments on countermeasures were divided. Some Governments were altogether opposed to the inclusion of an article on them. Others felt it was very important to make provision for countermeasures, because placing limits on them could help to protect the rights of less powerful States. The importance of countermeasures was recognized both by States and by international legal institutions. It was felt that, although there were customary rules of international law governing countermeasures, they were so vague and indeterminate as to open the door to widespread abuse, as could be seen from the countless examples in State practice. It was therefore the Commission's duty to place such limits on countermeasures as would serve to prevent such abuse. The views of the developing countries were especially important in that respect, because they were so often the victims of misconceived countermeasures. The United Republic of Tanzania, for instance, argued that the countermeasures were used chiefly by a group of Western countries. Thus it was possible that some non-Western countries might regard the draft articles as being primarily designed to legitimize the practice. There was, however, general recognition of the need to frame rules to limit the use of countermeasures.

11. Summing up the factors that should be in the forefront of the Commission's thinking at the present juncture, he would emphasize the advanced stage in the work on the topic and the absence of any real dissension among Governments. However, it would be no easy task to complete the work, in view of the lack of time. Serious steps must be taken to organize the Commission's work in such a way that it could discharge the duty placed on it by the General Assembly.

12. Mr. HE congratulated the Special Rapporteur on his excellent fourth report, which, in addition to dealing with other outstanding issues, summarized the important substantive problems that had to be settled before amendments were made to the entire set of draft articles.

<sup>5</sup> See *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee, 14th meeting (A/C.6/55/SR.14)*, and corrigendum, paras. 24-26.

13. The question of the form to be taken by the draft was an important one, requiring an early decision at the current session. A wide range of views had been expressed, both in the Commission and in the Sixth Committee. The crux of the problem was whether the Commission should opt for a binding legal instrument in the form of a treaty or something non-binding like a General Assembly resolution. The advantages and disadvantages were fairly evenly balanced.

14. In view of the reluctance of States to ratify treaties, particularly when they contained as many controversial issues as did the draft articles, and of the time-consuming preliminaries to any diplomatic conference that would lead to a treaty, he was inclined to the view that a General Assembly resolution was the more practical approach. He agreed, however, that the Assembly should do more than simply take note of the text. The status of the instrument should be enhanced, but whether that could be done by endorsement or consensus without lengthy and divisive discussion in the Sixth Committee was hard to predict. It would depend on many factors, including whether the draft articles struck the proper balance. The Commission could make recommendations on the form of the draft articles, but how the substance of the text was reviewed was entirely in the hands of the Sixth Committee. He would like to hear the views of other members of the Commission on that subject.

15. The Commission had so far refrained from proposing in the articles any provisions on dispute settlement. If the draft was envisaged as an international convention, then there was some point to including such provisions. It had been suggested that the question of dispute settlement should be reviewed on its own merits, and paragraph 20 of the fourth report set out another idea that was worthy of consideration.

16. Part Three of the draft as adopted on first reading had consisted of a set of articles on dispute settlement, but the procedures had involved excessive detail and had in many respects been unbalanced. They had drawn criticism from Governments and had been discarded on second reading. States were in general reluctant to accept compulsory dispute settlement, but the total absence of such provisions in a legal instrument such as the one on State responsibility was not appropriate. State responsibility was a topic of exceptional importance, involving the rights and obligations of States as well as their vital interests. It covered a broad and sensitive area of international law in which disputes could easily arise. To deal with that situation, it seemed proper to include in Part Four a general provision on dispute settlement, modelled on Article 33 of the Charter of the United Nations and laying emphasis on the principles of free choice and peaceful settlement. Such an addition would make the whole set of draft articles more complete, even if it took the form not of a treaty but of a General Assembly resolution.

17. Mr. BROWNLIE, addressing the question of form, said that two specific factors strongly militated against adopting a convention. The draft articles included major elements of progressive development and the response of a number of States would clearly be problematic. In fact, not only major Powers but also small States would have

reasons for caution. The proposed adoption of a convention could be expected to result in the convening of a preparatory conference or some other arrangement that might seriously threaten to unravel the carefully devised scheme of the draft.

18. Two further considerations were in order. The 1969 Vienna Convention did not provide a useful or, indeed, accurate analogy to the draft articles. Its adoption as a convention had been impressive at the time, but its content could not be likened to that of the draft articles. Just as the Commission did not ignore the views of individual Governments, it should certainly not ignore the possible reaction of the collectivity of Governments known as the General Assembly.

19. He agreed with the Special Rapporteur's conclusions on the question of dispute settlement, especially as set out in paragraphs 17 to 19 of the fourth report. In general terms, he did not consider that there was a practical necessity to include provisions on compulsory settlement. Such inclusion would not change the attitude of States in general or of individual States to compulsory jurisdiction by ICJ or other tribunals. A provision along the lines of Article 33 of the Charter of the United Nations was an attractive option but not strictly necessary, since the position under the Charter was preserved by article 59 of the draft.

*The meeting rose at 12.45 p.m.*

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## 2668th MEETING

*Thursday, 26 April 2001, at 10 a.m.*

*Chairman: Mr. Peter KABATSI*

*Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Idris, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Operti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.*

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**State responsibility<sup>1</sup> (*continued*) (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,<sup>2</sup> A/CN.4/517 and Add.1,<sup>3</sup> A/CN.4/L.602 and Corr.1 and Rev.1)**

[Agenda item 2]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of the Special Rapporteur's fourth report (A/CN.4/517 and Add.1).

2. Mr. HAFNER, congratulating the Special Rapporteur on his fourth report and referring to the form the draft articles should take, said that the Commission must make a decision on that question and submit a recommendation to the General Assembly in accordance with article 22 of its statute.

3. He did not think the Commission should recommend that the text should take the form of a convention. As Mr. Brownlie had noted, there was no comparison to be drawn with the 1969 Vienna Convention because it dealt with matters of formal structure of international law, whereas the topic of State responsibility had more to do with the essence of international law. It was difficult to see how the basic elements of international law could be stated in a convention. Moreover, if the instrument on State responsibility was a convention ratified by about one third of the world's States, it was unclear what the effects would be, both for the States which had ratified it and for the majority of States which had not. The formulation of reservations would also give rise to problems because it would be unthinkable for reservations to be permissible in a field such as that of State responsibility.

4. If the Commission's draft on State responsibility were to take the form of a convention, moreover, the text would have to be subjected to the scrutiny of States, which might amend it to the extent of substantially changing over 40 years' work by the Commission and producing an instrument which would scarcely resemble the text the Commission had adopted. The outcome of negotiations on a draft convention was never certain. A good reminder was that the system of reservations which was provided for in the 1969 Vienna Convention and which was currently giving rise to so many problems was the result of negotiations. More recently, it had been seen to what extent the Rome Statute of the International Criminal Court differed considerably from the draft prepared by the Commission. If the aim was to prevent the text on State responsibility from subsequently being redrafted, it would therefore be better not to plan on it becoming a convention.

5. Another question that arose was whether the Commission should work without regard for the views expressed in the General Assembly. It was possible that, if the Commission took no notice of the past and future reactions of States in the Assembly, it might lose the support of the international community and eventually de-

prive its work of any chance of success. To ensure that that did not happen, it was therefore important for the Commission to anticipate the possible reactions of States in the Assembly on the basis of the comments they had already submitted.

6. Another possible scenario, in order to win the support of States more readily, would be for the Commission to propose a text from which all the points in dispute or still in abeyance had been removed. That was the so-called "two-track" approach recommended by Austria a few years previously. He thought that it was too late to use it at the current time because the Commission had already spent an enormous amount of time studying all the issues arising in connection with State responsibility and States themselves would not accept a truncated text. That approach would also mean continuing to discuss the unresolved issues after defining the ones on which agreement existed and the Commission no longer had time to do that.

7. It should also not be forgotten that the topic of State responsibility was to some extent a grey area of international law and a person would have to be very shrewd indeed to say with any certainty what the existing generally accepted law was. To focus the draft articles on existing law might therefore be an impossible task.

8. The only way to keep intact the text on State responsibility adopted by the Commission would be for the General Assembly to take note of it by recommending, for example, that States should take it into consideration in individual cases. On the basis of the text, State practice would then show what they thought international law was or should be.

9. In some quarters, an instrument such as a declaration inevitably carried less weight than a convention. He emphasized, however, that even a declaration gave rise to a *praesumptio juris*, so that States which were opposed to it, had the burden of proving that it was not binding. It should also not be forgotten that soft law instruments had a decisive impact on international relations and the conduct of States. ICJ had demonstrated that by referring in its decisions to General Assembly resolution 2625 (XXV) of 24 October 1970, on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, and resolution 3314 (XXIX) of 14 December 1974, on the Definition of Aggression. The thrust of those resolutions reflected customary international law, although to some extent it could be argued that they departed from traditional concepts of existing law.

10. It might also be thought that the 1969 Vienna Convention would have had almost the same effect and the same success if it had been adopted as a declaration annexed to a General Assembly resolution. Although it had been ratified by fewer than 100 States, its influence was at least as far-reaching as that of the Convention on the Rights of the Child, which had been ratified by almost all States. The number of ratifications of a convention and whether an instrument was a convention or a declaration were thus perhaps not key factors in the influence it was likely to have on international relations. He reiterated his own view that there would be no harm in the Commission

<sup>1</sup> For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

<sup>2</sup> Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

<sup>3</sup> *Ibid.*

recommending that the Assembly should not consider the draft articles on State responsibility as a draft convention.

11. He did not think there was any reason to include the question of the settlement of disputes in an instrument on State responsibility, and not only because of his objection to the text taking the form of a convention. As the Special Rapporteur had pointed out, any conflict could be said to incur the responsibility of States. If a system or mechanism was provided for the settlement of disputes, it had to be applicable to disputes of any kind. The question that would then arise was which mechanism was most appropriate, bearing in mind that it would follow on many others that already existed. In recent years, mechanisms had been established by a number of conventions (for example, the conciliation commissions in the annexes to the Vienna Conventions, which were also provided for in many other codification conventions, the mechanism in the United Nations Convention on the Law of the Sea or the Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe, which had never yet been applied) and were adapted to certain kinds of disputes and particular cases. It would therefore be difficult to find a system of settlement, which suited all kinds of disputes among States. It had been suggested that the problem could be dealt with by using a general formulation, such as that contained in Article 33 of the Charter of the United Nations, but, on close reading, it was obvious that the scope of that Article was not contributing very much. In conclusion, it would not be desirable to contemplate a dispute settlement mechanism except for countermeasures, a matter on which he reserved the possibility of speaking later.

12. Mr. ECONOMIDES thanked the Special Rapporteur for his fourth report, which was as stimulating as the previous ones, and for his efforts, which gave the Commission the hope of completing its work on State responsibility before the end of the current session.

13. With regard to the form of the draft articles, he had always argued, both in the Commission and in the Sixth Committee of the General Assembly, that the most appropriate form would be an international convention. There were several reasons in favour of that solution. First, as Mr. Momtaz had pointed out during the informal consultations on the subject, the Commission stated the law and that could only be done through binding texts of a conventional nature, not through mere declarations, which at best could provide only some approximate indications of the content of a legal rule. Secondly, the Commission's firmly established tradition pointed to the same conclusion: all its major drafts had become international conventions, including the 1969 Vienna Convention. The draft on State responsibility was even more important than that Convention and amply deserved the same treatment, namely, to acquire the status of an international convention.

14. Where State responsibility was concerned, moreover, there was a regrettable gap in international law that ought to be filled—and that was why the General Assembly had entrusted the consideration of the question to the Commission. The gap could be filled only by a binding convention, not by a declaration in the nature of a recom-

mendation. It was well known that the impact of a convention, even unratified, on the practice of States was far more significant than a mere declaration by the Assembly could ever be. He was convinced that the draft articles on State responsibility, which had definite merits deriving from several decades of work and would obviously be very useful, would gradually be ratified by States if they became a convention. There was no common ground between the draft articles on State responsibility on the one hand, and the 1978 and 1983 Vienna Conventions on the other, or the draft articles on nationality of natural persons in relation to the succession of States adopted by the Commission on second reading at its fifty-first session;<sup>4</sup> it was a mistake to compare things which were radically different.

15. Another argument along the same lines was that many States had already said that they were in favour of an international convention. The ground was therefore prepared for the Commission to submit a recommendation on a convention. A recommendation in favour of a non-conventional form would have a doubly negative effect: it would detract from the importance of a crucial question of international law, that of State responsibility, and would indicate that the Commission itself lacked confidence in the value of its work.

16. The proponents of a text in the form of a declaration used political arguments, rather than legal ones, which were not convincing: first, questions involving the progressive development of international law could not be separated in any firm and absolute way from those relating to codification. In all the Commission's drafts, there were inevitably provisions falling into both categories at the same time. For the sake of security in legal relations, it was essential to have written rules, which were either customary or new, as specific as possible and binding in character. Secondly, the draft on State responsibility did not *a priori* come more within the realm of progressive development than the 1969 Vienna Convention, which had, however, been the first instrument to embody the fundamental—and at the time revolutionary—concept of a peremptory norm of international law in articles 53, 64 and 71.

17. In his view, the Commission was, as an independent legal body, bound to opt for a binding legal form. If the General Assembly did not follow its recommendation and chose the solution of a resolution, that would not be surprising. It was obvious that, as a political body, the Assembly would take the final decision, but, even in that case, the Commission's draft would have greater status, since it would be a draft convention proposed by the Commission, and not just a draft resolution. If however the opposite were to happen, i.e. if the Commission decided in favour of a resolution and the Assembly opted for a convention, a political body would be giving a lesson in law to an independent legal body.

18. With regard to the question of the settlement of disputes, since he was in favour of the adoption of an international convention on State responsibility, he was also in favour of the adoption of a general system for the settlement of any disputes that might arise out of the

<sup>4</sup> See 2665th meeting, footnote 8.

interpretation and implementation of the future convention. He also thought that it would be useful at the same time to introduce a flexible and speedy system for the settlement of disputes relating to countermeasures, which would be similar to the system used by States to evaluate the lawfulness of interim emergency measures. On that question, he could therefore not agree with the Special Rapporteur and, unlike him, believed that it was necessary to improve and strengthen Part Three of the draft adopted on first reading,<sup>5</sup> for the following reasons.

19. The first was that the draft dealt with a number of difficult and complex issues. A mechanism for the settlement of disputes would therefore be extremely useful. Secondly, it would be valuable to have the capacity to develop the law of State responsibility further through jurisprudence. Thirdly, the General Assembly had often recommended that any significant convention, as the one on State responsibility would be, should itself provide the means of settling disputes that might arise from the interpretation or implementation of its provisions. Fourthly, the fact that the draft articles on State responsibility could cover a large number of questions of international law, including those not governed by particular rules, warranted giving a place to conciliators, arbitrators or courts. It was time to introduce some democracy in the international system. A society without a binding system of justice, as international society was at present, was anti-democratic and primitive and based primarily on force rather than on law.

20. Mr. GOCO said that he would like Mr. Economides and Mr. Hafner to indicate what criteria made an instrument a convention or a declaration. In an attempt to see whether the content of conventions and declarations differed, he listed a number of declarations and conventions contained in a recent United Nations publication.<sup>6</sup> Noting that there was the Convention on Offences and Certain Other Acts Committed On Board Aircraft, the Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, as well as the Declaration on Measures to Eliminate International Terrorism,<sup>7</sup> he wondered whether it should be concluded that a convention was intended to cover a more restricted field than a declaration and that a declaration had to be broader and more general in scope.

21. Mr. ECONOMIDES, speaking metaphorically, said that, if a convention and a declaration were two women to be wooed by a lawmaker, his preference would have to be for a convention as being more settled and beautiful and having more of a future than a declaration. If, however, it proved impossible to adopt a convention, then a declaration might be a satisfactory solution.

22. Mr. HAFNER said that the difference between a convention and a declaration lay mainly in their effects. A declaration had an immediate effect, even in respect of States that had not endorsed it. A convention, on the other

hand, created obligations only for the States that had ratified it. At the same time, a declaration had less legal force: a domestic court would not apply a text annexed to a General Assembly resolution, whereas it would apply a convention. There were many examples in United Nations history of cases when a topic had first been the subject of a declaration and then of a convention. The successive documents were sometimes slightly different in content—as in the case of the Universal Declaration of Human Rights<sup>8</sup> and the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights—and sometimes they were nearly identical.

23. Mr. SIMMA said that the Special Rapporteur had produced an excellent, concise and clear report. As to the form of the draft articles, ideally, a convention would be preferable, but, in view of all the problems and difficulties to which a convention would inevitably give rise, he took the view that the text should take the form of a General Assembly resolution or declaration.

24. It was true that the General Assembly would have the last word on the fate of the draft, but it was expecting to receive recommendations from the Commission in that regard. Mr. Tomka had already mentioned several cases when the Assembly had not followed the Commission's recommendations concerning form. In all the cases cited, the Assembly's decision had not gone quite as far as the recommendation made. There was therefore no need to expect, as Mr. Economides did, that the Assembly might reproach the Commission for not having proposed a convention.

25. With regard to the connection between the innovative nature of the text and its form, some members had suggested that, since the text contained elements of progressive development of international law, a convention was necessary. On the other hand, Mr. Brownlie had stated that, precisely because the text did contain such elements, caution was required and a convention should not be proposed. The argument that the form of the text depended on the absence or presence of innovative elements was thus not valid.

26. Referring to the analogy with the Rome Statute of the International Criminal Court, he pointed out that, since the aim in that case had been to establish an international organization, recourse to a non-binding instrument had not been possible. In the case of State responsibility, however, no member of civil society or non-governmental organization would exert pressure in favour of a binding text. The analogy with the 1969 Vienna Convention was also not relevant. That instrument should be regarded as a guide.

27. The Sixth Committee was unlikely to be enthusiastic about the draft, but the General Assembly should, at worst, take note of it or, at best, endorse it. That would be enough for the text to play its role.

28. Turning to dispute settlement machinery, he said he held the same view as the Special Rapporteur and thought that, on the assumption that new procedures could be created, they must be specially adapted to specific conven-

<sup>5</sup> *Ibid.*, footnote 5.

<sup>6</sup> *International Instruments related to the Prevention and Suppression of International Terrorism* (United Nations publication, Sales No. E.01.V.3).

<sup>7</sup> General Assembly resolution 49/60 of 9 December 1994, annex.

<sup>8</sup> General Assembly resolution 217 A (III) of 10 December 1948.

tions. A new across-the-board jurisdiction did not have to be established. ICJ already played that role.

29. Mr. GALICKI said that, with regard to the form of the text, the choice was between a legally binding convention and a non-binding document, some types of which were mentioned in article 23 of the statute of the Commission. The choice made by the Commission would be without prejudice to the final decision by the Sixth Committee and the General Assembly, which would reflect the political will of Governments. The reaction of Governments, which were not entirely in favour of the drafting of a convention, must not be ignored, however. Both legal idealism and political realism had to be taken into account. Ideally, the Commission's work should result in a draft convention combining elements of the codification and progressive development of international law. It was true that article 1 of the statute of the Commission drew a distinction between "progressive development of international law" and its "codification" and that that distinction was developed in article 15, where the term "progressive development" was associated with the preparation of draft conventions, while the idea of "codification" was associated with "the more precise formulation and systematization of rules of international law in fields where there has already been extensive State practice, precedent and doctrine". However, as the Commission had already pointed out in its report to the General Assembly on the work of its forty-eighth session, "the distinction between codification and progressive development is difficult if not impossible to draw in practice, especially when one descends to the detail which is necessary in order to give more precise effect to a principle. Moreover it is too simple to suggest that progressive development, as distinct from codification, is particularly associated with the drafting of conventions. Flexibility is necessary in the range of cases and for a range of reasons."<sup>9</sup> The report's conclusion that "The Commission has inevitably proceeded on the basis of a composite idea of 'codification and progressive development'"<sup>10</sup> applied to its work on State responsibility, which was a good example of what had been described as "the elaboration of multilateral texts on general subjects of concern to all or many States, such texts seeking both to reflect accepted principles of regulation and to provide such detail, particularity and further development of the ideas as may be required".<sup>11</sup>

30. A real danger deriving from the choice of a convention was the possible negative reaction of Governments, especially in respect of the elements of progressive development of international law contained in the text. Practice showed that States were in general not in favour of such elements being included in internationally binding instruments and preferred the Commission to play its codification role. It was highly likely that elements of progressive development would be eliminated from the draft convention by any future preparatory committee or working group established by the Sixth Committee. If the Commission chose the form of a convention for the draft and in order to avoid lengthy preparatory work, it should consider eliminating the most controversial provisions, such as those on countermeasures. To retain the

form of a convention would be to stress the importance of the topic, but the process might be a very prolonged one and the Commission's draft would probably be changed by the bodies responsible for examining it. After so much work by legal experts within the Commission, the draft was worthwhile retaining in its original form insofar as possible.

31. That was why a non-binding document such as a General Assembly resolution seemed to be the most appropriate form for the text. That in no way diminished the value and importance of its content, namely, the legal principles concerning State responsibility. Many Assembly declarations and resolutions, starting with the Universal Declaration of Human Rights, had played a fundamental role in the development of international law. It seemed that such a role could be played much better by an Assembly resolution or declaration adopted unanimously than by a convention adopted after many years of preparatory work and ratified by a small number of States. Furthermore, it would be easier to retain all the elements, both of codification and of progressive development, in the form of a resolution rather than of a convention, providing an opportunity to develop the work further in future.

32. He hoped that a consensus could soon be reached between those in favour of a realistic approach and those who had more idealistic views, so that the Commission could continue its work.

33. Mr. LUKASHUK said that, while he understood the importance of the question of form, the discussion must come to an end at the current time so that the content of the draft articles could be addressed.

34. Mr. OPERTTI BADAN said that the form to be taken by the text was a political choice, which must be made by a political body, the General Assembly, based on the history of the issue and the consensus that seemed to be taking shape on the text. The Commission was a technical body that must remain impervious to the political impact of its work. It must find a balance between technical and political aspects and leave the responsibility of making the text into a convention or a resolution to the Assembly. Furthermore, it seemed unacceptable to state the principle that the United Nations considered the possibility of drafting conventions only when non-governmental organizations and civil society were likely to exert pressure on States. That would amount to saying that Member States were less important than civil society, yet it was precisely they that had the primary responsibility for the elaboration of instruments. To give the Commission the job of deciding whether there was enough consensus on a text for it to be made into a convention would be to devalue the Commission's role. It should leave the task of choosing one of the possible forms to the Assembly and must not prejudge a decision that was essentially political in nature. Lastly, it was not appropriate to distinguish between codification and progressive development or to diminish the value of a text whose drafting had taken many years by a recommendation that it should simply be turned into a resolution.

35. Mr. MOMTAZ said that the time had come for the Commission to decide on two questions: the form in

<sup>9</sup> *Yearbook* . . . 1996, vol. II (Part Two), para. 156.

<sup>10</sup> *Ibid.*, para. 157.

<sup>11</sup> *Ibid.*

which it wished the draft articles to be adopted and the substantive issue of whether to include provisions on dispute settlement in the draft. The first question was also a political issue, on which it would thus be for the General Assembly to decide; but, under article 23 of its statute, the Commission was empowered to make recommendations, which were not devoid of weight. The Commission was still divided between proponents of two possible forms: that of a resolution adopted by the Assembly and that of a convention adopted by a conference of plenipotentiaries. The latter course was undoubtedly lengthy, fraught with hazards and unpredictable in outcome and was liable to result in the delicate balance of the text being called into question and its innovative aspects eliminated. That notwithstanding, the adoption of the draft articles in the form of an Assembly resolution, besides providing no sure protection against those dangers, would be tantamount to a devaluation of the results of the Commission's work. Even if adopted by consensus in the form of a declaration, an Assembly resolution could not have the same normative value as a treaty. ICJ had had to rule on the normative value of Assembly resolutions on two occasions. In 1986, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court had found, with regard to the normative value of Assembly resolution 2625 (XXV) adopted by consensus in 1970 in the form of a declaration, that "the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question" [para. 191] and that "this *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions" [para. 188]. The Court had thus showed extreme caution and refused to recognize a parity between resolutions and conventions. Ten years later, called upon to give an advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court had broadly reiterated its previous findings, even though on that occasion it had assigned a greater role to General Assembly resolutions in the formation of law than it had previously done, since, in its view, a resolution could only provide indications or evidence. By confining itself to providing indications or evidence regarding State responsibility, the Commission would be failing in its mission, which was to say what the law was and to guide States through the labyrinthine subject of State responsibility. By recommending that the Assembly should adopt the draft articles in the form of a resolution, the Commission would implicitly acknowledge that it had not been able to ascertain the law in that field and its recommendation might be interpreted as an admission of failure.

36. The substantive question of the desirability of including provisions on dispute settlement in the draft articles was closely linked to the question of countermeasures. Given that countermeasures could be legitimate only if they were directed against the State that had committed the wrongful act, they could not be based on a unilateral subjective assessment by the allegedly injured State. Countermeasures were inconceivable without an objective mechanism making possible a prior determination with all the necessary guarantees, of a breach of a rule of international law, together with the establishment of equality between the allegedly injured State and the State alleged by the latter to be responsible for the breach.

Provisions on dispute settlement would make it possible to establish such a mechanism.

37. Mr. KATEKA said that he favoured making the draft articles a binding instrument, for the reasons set forth in paragraph 22 of the fourth report. Opponents of that approach claimed that the Sixth Committee might unravel the work the Commission had taken nearly 50 years to accomplish, but the Sixth Committee was in any case free to take what action it chose in response to the recommendations made by the Commission. Others cited the element of progressive development of international law included in the draft articles, but progressive development was only one of the two parts of the Commission's mandate and the Commission would render the international community a disservice by confining itself to codifying existing State practice. Others again expressed concern that that approach might result in the adoption of an instrument that influential States might not be prepared to ratify. Yet, in the first place, the Commission was a subsidiary body of the General Assembly and was thus duty bound to take account of the interests of all Member States. Furthermore, the adoption of the draft in the form of a non-binding instrument would by no means guarantee that all Member States would accept it. Many important resolutions—for example, Assembly resolutions 1803 (XVII), of 14 December 1962, on permanent sovereignty over natural resources, and 3281 (XXIX) of 12 December 1974, on the Charter of Economic Rights and Duties of States, were flouted by States that did not like their content. The problem was thus one of the acceptability of the substance of an instrument, rather than of the form it took.

38. Some members of the Commission considered that the question whether to include provisions on the settlement of disputes in the draft articles was one both of form and of substance. Personally, he favoured the inclusion of some form of dispute settlement provisions in the draft articles, for the reasons given in paragraph 13 of the fourth report, concerning the major standard-setting treaties that provided for compulsory dispute settlement mechanisms. In that regard, account should be taken of the proposal by China cited in paragraph 20 of the report.

39. Mr. PELLET said that he entirely agreed with the Special Rapporteur on the two points under consideration, namely, the future form of the draft articles and the question of dispute settlement, although he was rather less enthusiastic about some points of substance. That being said, there was no reason for the Commission to start the session by engaging in informal consultations on the matter. States and researchers alike were entitled to know what the members of the Commission thought and said and only when an impasse had been reached did the Commission have recourse to consultations or a working group in order to come up with compromise solutions. There was no justification for adopting either of those courses, as there was no reason to expect deadlock on the two points under consideration.

40. The question of dispute settlement was undoubtedly a fundamental problem in itself, a general problem on which the Commission might one day, in the framework of its long-term programme of work, prepare some sort of model clauses on dispute settlement for insertion

in the codification conventions. But there was certainly no reason to deal with them in the context of the draft articles on State responsibility, to the detriment of more important matters of substance. The problem was actually a twofold one, covering both the question whether the draft articles should contain special provisions on dispute settlement and also the question of dispute settlement with specific regard to countermeasures. Dispute settlement clauses should be avoided even more in the specific context of countermeasures than in the general context. The Commission had undoubtedly taken a wrong turning when, in the draft articles adopted on first reading, it had relied on dispute settlement to attenuate and contain the regime of countermeasures, even though, on the pretext that it was establishing a compulsory regime of dispute settlement concerning countermeasures, it had shown great laxity with regard to the substantive rules applicable to those countermeasures. Such reasoning allowed two things to be overlooked. First, former Part Three had been conceivable only if it was included in a convention in force between the two protagonists. Yet, 30 years after its adoption, the 1969 Vienna Convention, which some took as a model, still bound rather fewer than half the world's States. If the same were to be true of the future instrument on State responsibility, the protection afforded by the dispute settlement provisions in the case of countermeasures would be illusory indeed. Secondly, that protection would also be illusory even for States that had ratified the instrument, if the regime of countermeasures contained therein was a lax one, as had been the case in the draft articles adopted on first reading and as to some extent remained the case in the text submitted by the Drafting Committee at the preceding session. What was important was not the principle of dispute settlement, but its dissuasive effect. From that standpoint, the provisions adopted at the forty-eighth session had been sheer wishful thinking and, instead of repeating the same mistake, the Commission should focus on the core issue of the normative framework of countermeasures. As for the general problem of dispute settlement, to state the Special Rapporteur's view in more brutal terms, it was not for a handful of experts to revolutionize international law. In effect, either the Commission said nothing beyond what was contained in Article 2, paragraph 3, and Article 33 of the Charter of the United Nations, in which case its work would be completely futile, or else it tried to impose an innovative (in other words, binding) system of dispute settlement, in which case it would stray from the framework of progressive development to bring about a radical and revolutionary change in international law, something it was not mandated to do.

41. The second question the Commission must address was the form that the draft articles should take. The Commission was entrusted with the task of codifying existing international law, but also of developing it progressively: in other words, within what it saw as reasonable limits, filling the gaps in that law and making it more coherent and effective and bringing it more into touch with international society, without denaturing its spirit. It should thus do its utmost to ensure that States did not seize upon the fruit of 40 years' labour on the topic so as to turn it into a convention. States that advocated that solution were not necessarily all animated by the purest of intentions and there was a considerable risk that the

diplomatic conference convened to adopt the convention would destroy the laboriously achieved but broadly satisfactory balance of the draft prepared by the Commission and strip it of its elements of progressive development, ultimately retaining only the law from the "good old days" of the nineteenth century, from which the classical law of State responsibility had emerged and which reflected a serene domination of the rest of the world by a few States that were "more equal than others". The Commission draft did not call that law radically into question—and it would in any case be incompatible with its mandate to do so—but it did at least have the virtue of taking account, perhaps somewhat timidly, of the developments of the late twentieth and early twenty-first centuries. Of course, matters did not always turn out for the worst, but the example of the Rome Statute of the International Criminal Court cited in that regard was somewhat misleading because, in a codification conference on State responsibility, non-governmental organizations would not be present to exert the influence they had exerted in Rome. States would be among themselves and the "most equal" among them would find words to convince the "least equal". If the Commission could manage to safeguard its draft from that danger, State practice would eliminate those elements that smacked too boldly of progressive development and consolidate the rest. Moreover, as the Special Rapporteur pointed out in paragraph 25 of his report, a further reason arguing against a convention was that, unlike legal provisions embodied in treaties, the law of State responsibility did not require to be implemented in national legislation.

42. The best course was thus to recommend to the General Assembly, not to envisage the drafting of a convention or even to adopt a declaration, but simply to take note of the Commission's draft, if possible with approval. Even the draft adopted on first reading had already exerted a decisive influence on the development of international law. The Commission had indisputably improved that text on second reading, at least where Parts Two and Two bis were concerned. As it seemed impossible to achieve consensus on such an allegedly blunt—albeit in fact merely clear-cut—recommendation, if it became apparent that there was a risk of deadlock in the Commission in plenary, then a compromise solution might perhaps be found through informal consultations or the establishment of a working group. If that way, too, proved to be an impasse, then there would be nothing shameful in resorting to a vote, provided it was taken after efforts had been made in good faith by all concerned to find another way out. Lastly, in response to the Special Rapporteur's request for the opinion of the Commission on the future commentaries to the draft articles, he expressed his ardent hope that the level of former Special Rapporteur Ago's commentaries, which constituted definitive models whose value for practitioners was currently universally accepted, would not, as a sacrifice to demagoguery or in pursuit of the line of least resistance, be reduced to the very poor level of the commentaries to Part Two.

43. Mr. DUGARD said he was pleased that the members of the Commission shared the common goal of anchoring the law of State responsibility in international law. The only question was how best to do so. That was difficult because it involved legal and political considerations and because there was no real precedent.



44. It had been suggested that the draft articles under consideration should take the form of a convention because that had worked well in the case of the law of treaties and because some draft articles which the Commission had submitted to the Sixth Committee without formulating any specific recommendations on them, such as the draft Declaration on Rights and Duties of States<sup>12</sup> or the draft Code of Crimes against the Peace and Security of Mankind,<sup>13</sup> had achieved very little. It was important, however, to stress that, in the case of the draft articles on the nationality of natural persons in relation to the succession of States, the Commission had in fact recommended that the General Assembly should take note of them in a resolution. Perhaps that example should be followed. Despite the attraction of a convention, on balance, he preferred a declaration or a resolution in which the Assembly took note of the draft articles. There was reason to fear that a convention would not be ratified by many States, and that would undermine it. In any case, the draft articles adopted on first reading had already been very influential and there was no doubt that, on second reading, they would be equally and, indeed, even more so. If the draft articles went to a preparatory committee or a diplomatic conference, anything could happen and the final product might be completely watered down. The work of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court had led to the adoption of the Rome Statute of the International Criminal Court, but it must be borne in mind that non-governmental organizations had had tremendous influence behind the scenes and had succeeded in obtaining the adoption of the more progressive features of the draft articles that had gone beyond the expectations of the Commission itself. That would not happen with the draft articles under consideration and it was very likely that national interests would prevail.

45. On the other hand, if the Commission pronounced itself in favour of a restatement of rules and requested the General Assembly to take note of the draft, it might be very demanding and focus on the highest level of customary rules of international law. There was no reason to engage in an exercise of self-censorship. The basic principles on State responsibility were already clear and well established and the Commission should be careful not to repeat the mistake it had made in the case of the draft Code of Crimes against the Peace and Security of Mankind by weakening them.

46. As to whether the Commission should eliminate the more contentious features of the draft articles, it should be noted that Governments themselves were divided on the question. Some were in favour of a restatement, provided that it reflected State practice and discarded the contentious issues, whereas others suggested that the Commission should deal with progressive development and still others thought that the Commission should not embark on that path. The Commission had before it draft articles that, as they currently stood, represented an acceptable form of progressive development. It should pursue its tasks without trying to do the Sixth Committee's work. It should seek to complete a set of responsible and well-balanced draft articles by the end of the current session

and explain clearly why, in that particular instance and in principle, there was a case for a restatement of rules rather than a convention so that the General Assembly did not take its recommendation as a failure.

47. As far as Part Three on dispute settlement was concerned, he did not support either its underlying principle or its present form. He unreservedly endorsed the Special Rapporteur's view on that subject, as set out in paragraph 13 of his report. Rather than include dispute settlement articles in the project, the Commission should pay more attention to the provisions on countermeasures.

48. In sum, he said that he was in favour of a restatement of rules on the subject, provided that the Commission refrained from any self-censorship and did not remove from the draft articles the features on progressive development which it currently contained and which it must retain at all costs. Otherwise, he would reverse his position and support the conventional form.

49. Mr. ROSENSTOCK, paying tribute to the Special Rapporteur for his thorough, clear and succinct report, said that he entirely agreed with other members of the Commission on his analysis of the general issues, which must still be addressed. The first issue concerned the form of the draft articles, which the Commission should recommend to the General Assembly in conformity with article 23 of its statute. For a number of positive reasons, and also some negative ones, he was convinced that the Commission, in accordance with article 23, paragraph 1 (a), of its statute, should recommend that, subject to a few adjustments and deletions, the Assembly should take note of the articles as a whole, which represented an excellent and enormously useful exercise of codification. If one looked at the state of understanding of the law of State responsibility, it could be seen that the Commission had made considerable progress since it had begun its work, with the help of a succession of Special Rapporteurs. The latest to date, Mr. Crawford, had made a superb contribution in clarifying and focusing the text adopted on first reading.

50. There was widespread agreement on the question of *de lege lata*. If the Commission wanted to go beyond codification and change the existing law or create norms where there were none at present, it should recommend that the General Assembly should convene a conference to produce a convention because the Assembly did not have legislative authority.

51. As far as countermeasures were concerned, the law was authoritatively stated in the arbitral decision handed down in the *Air Service Agreement* case. He would return to that matter and other substantive issues later in the debate.

52. If the Commission were to recommend the elaboration of a convention, it should take up the issue of dispute settlement. To make such an effort worthwhile, it would need to go beyond Article 33 of the Charter of the United Nations, which was binding, and its restatement might be seen by some as suggesting that the articles were insufficient. He did not see the need to proceed in that way. The comments of Governments provided no basis, to say the least, for thinking that they were prepared to take that

<sup>12</sup> *Yearbook* . . . 1949, p. 287.

<sup>13</sup> *Yearbook* . . . 1996, vol. II (Part Two), para. 50.

path. Some might denounce such a cautious approach and insist that codification was not enough and that the Commission must engage in the progressive development of the law of State responsibility at the cost of usurping the legislative capacity involved. They argued “nothing ventured, nothing gained”. But that was not true in the present case. The Sixth Committee’s current practice of appointing a preparatory committee, the experience with regard to the jurisdictional immunity of States and their property and other similar experiences showed that, if the Commission recommended a convention, it would jeopardize, if not lose instantly, the opportunity to be a part of one of the most important contributions ever made to the codification of international law. It should not allow that to happen. Recommending a convention that did not bear fruit would be the worst possible solution.

53. He reserved the right to speak on the question of creating qualitative distinctions in the law of State responsibility and on the questionable wisdom or utility of treating countermeasures differently from the other issues referred to in article 23 of the draft, much less to do so in a manner inconsistent with existing law. It might, indeed, be a better world if Mr. Momtaz were right about the state of international law and countermeasures. Unfortunately, countermeasures were necessary because of the primitive state of international law, a fact that the Commission could not cure with a declaration or convention on State responsibility.

54. Mr. DUGARD asked Mr. Rosenstock to clarify what exactly he meant by “progressive development”: did he think that the Commission should decide at the current stage that the distinction between “ordinary breach” and “serious breach” or the question of countermeasures were so controversial that they went beyond acceptable progressive development and that the Commission should thus discard them or should the Commission consider them on the merits at a later stage?

55. Mr. ROSENSTOCK pointed out that there was no clear distinction between the “codification” and the “progressive development” of international law. But there were clear cases in which the law was being changed or new law created; that was a “legislative” function and the General Assembly did not have the capacity to legislate. That could only be done by a treaty process.

56. Mr. PELLET said he was afraid that the discussion that had just begun was based on a mistaken assumption and that Mr. Rosenstock was confusing two points: the distinction between *lex lata* and *lex ferenda* and the distinction between the codification and the progressive development of law. He was convinced that that was not at all the same thing. Although codification was based on a firm and well-established *lex lata*, what was important in the term “progressive development” was the adjective “progressive”. Pursuant to its statute, the Commission was empowered to work not only on codification, but also on progressive development. Progressive development was in line with existing law: it did not break with or contradict it, but filled its gaps and defined it more clearly. For its part, if the General Assembly confined itself to taking note of the draft articles, that was also within its role, because Article 13 of the Charter of the United Nations provided that the Assembly was to make

recommendations with a view to “encouraging the progressive development of international law and its codification”. It certainly had no legislative function.

57. Mr. TOMKA said he thought that Mr. Rosenstock’s analysis, which was based on the statute of the Commission, was on solid ground, but he was concerned that, by supporting the form of a declaration or other non-binding instrument, the Commission would be sacrificing some aspects of the progressive development of law. Draft articles usually combined elements of both codification and the progressive development of law and, in the present case, the Commission proposed the convening of a diplomatic conference to adopt a convention in conformity with article 23 of its statute.

58. Mr. ECONOMIDES said that Mr. Pellet had drawn a very interesting distinction between *lex lata* and *lex ferenda*, showing that *lex lata* and codification were fully identical and pointing out that, in the case of *lex ferenda*, the problem consisted simply in specifying existing rules or perhaps filling gaps in keeping with existing rules without going further. Thus, *lex ferenda* and progressive development were not the same thing. He rejected that interpretation, which was too restrictive. It was possible to go beyond, and build upon, existing law, but the Commission must not produce rules that were in contradiction with it.

59. Mr. BROWNLIE said that the discussion on the distinction between *lex lata* and *lex ferenda* was not helpful. The problem was applying the distinction when key problems arose, such as that of countermeasures.

60. Mr. CRAWFORD (Special Rapporteur) said that, if the Commission wanted to complete its work on State responsibility at the current session, as the Sixth Committee had asked it to, it would have to proceed in the following manner: first, the Drafting Committee must complete its elaboration of the entire text by the end of the first part of the session. Secondly, the Commission must adopt the commentaries, also by the end of the first part of the session. It would receive the commentaries to articles 1 to 11 very soon and could have them in a short form, if it wished, in order to save time. A working group would be established during the first week of the second part of the session to go through the commentaries systematically. Thirdly, the Commission would have to resolve the outstanding issues, which were numerous and linked, be they questions of form or of substance. It would thus be a good idea to take Mr. Pellet’s suggestion for having a working group to come up with acceptable solutions. Fourthly, during the second part of the session, the Commission must adopt the draft articles and the commentaries.

61. With that in mind, he intended to submit an annex to his fourth report shortly and the Commission might refer the articles of Part One, with the exception of article 23 on countermeasures, to the Drafting Committee, together with the suggestions and comments made on them. The Commission should then continue the debate on the remaining issues raised in the report and, once the debate had been concluded, refer all those questions to the working group for it to find an overall solution. Time was short and he appealed to the members of the Commission to be as succinct and specific as possible.

62. The CHAIRMAN said that the Commission would decide at the beginning of the following week on the Special Rapporteur's proposal on how to proceed.

*The meeting rose at 1 p.m.*

## 2669th MEETING

*Friday, 27 April 2001, at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Tomka, Mr. Yamada.

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

[Agenda item 1]

Mr. TOMKA (Chairman of the Drafting Committee) said that, following consultations, the Drafting Committee for the topic of State responsibility would be composed of the following members: Mr. Crawford (Special Rapporteur), Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Simma, Mr. Yamada and Mr. He (*ex officio*).

*The meeting rose at 10.10 a.m.*

\* Resumed from the 2666th meeting.

## 2670th MEETING

*Tuesday, 1 May 2001, at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr.

Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Idris, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

### State responsibility<sup>1</sup> (*continued*)\* (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,<sup>2</sup> A/CN.4/517 and Add.1,<sup>3</sup> A/CN.4/L.602 and Corr.1 and Rev.1)

[Agenda item 2]

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)\*

1. Mr. CRAWFORD (Special Rapporteur), introducing the annex to his fourth report (A/CN.4/517 and Add.1), said that it served as an agenda to assist the Drafting Committee in its work of finalizing the draft articles. It brought together suggestions for changes drawn from the comments received, accompanied, in the column headed "Comment", by his own comments, which for the most part were merely indications. The Drafting Committee was free to deal with the latter as it saw fit.

2. It was encouraging to note that, considering the importance of the articles, their scope and their number, the total number of proposals for changes was not excessive. In certain cases, they constituted positive improvements on the existing text; in others, they might be sufficiently covered in the commentaries; and, lastly, in a few cases, they raised fundamental questions of principle, such as that of "serious breaches" of an obligation owed to the international community, or of countermeasures, which were canvassed in the report itself.

3. Since members of the Commission might have specific points they wished to make in plenary, he drew attention to the proposals made on chapter IV of Part One, concerning which there was some divergence between the views of Governments, some wishing to tighten the scope of the chapter, others to expand it and others again to make deletions which would have the effect of expanding the scope of ancillary responsibility, such as the reference to knowledge of the circumstances of the internationally wrongful act. His own view was that chapter IV, as it stood, was very carefully balanced, although it required some clarification of the language and perhaps the introduction of some threshold in respect of materiality of assistance. It would be unwise to expand the scope of chapter IV significantly. Furthermore, the informal

\* Resumed from the 2668th meeting.

<sup>1</sup> For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook* . . . 2000, vol. II (Part Two), chap. IV, annex.

<sup>2</sup> Reproduced in *Yearbook* . . . 2001, vol. II (Part One).

<sup>3</sup> *Ibid.*

consultations had resulted in a consensus in favour of the retention of the chapter.

4. He stressed that, at the current late stage, silence on a particular article might be taken to indicate that it posed no particular problem for Governments, which had not failed openly to express their criticisms on other articles. It was currently for the Drafting Committee to take account of all the comments made and of the changes proposed, which, for the most part, went in the direction of greater economy and precision of language.

5. Mr. HERDOCIA SACASA said that he wished to comment on five aspects of the report, which bore eloquent testimony to the Special Rapporteur's skill and to his ability to give a balanced and accurate presentation of the various points of view concerning complex questions.

6. First, with regard to the commentaries that must accompany the draft articles, he endorsed the Special Rapporteur's approach of presenting more concise texts reflecting the current content of the proposed rule and the case law without depriving the existing texts of their substance.

7. Secondly, with regard to the form of the draft articles, it was extremely difficult to imagine a process which had lasted more than 40 years, and whose purpose had been to lay a cornerstone of contemporary international law, taking any form other than that of a binding legal instrument. Indeed, in his second report on State responsibility, the former Special Rapporteur, Roberto Ago, had indicated that the successive reports on the subject would be "so conceived as to provide the Commission with a basis for the preparation of draft articles, with a view to the eventual conclusion of an international codification convention".<sup>4</sup> Like Mr. Simma, he was receptive to the well-constructed and very realistic arguments put forward in favour of a resolution. That certainly seemed the simplest and most pragmatic way forward, but it was not necessarily the one best suited to fulfilling the Commission's task of contributing to the codification and progressive development of international law, a task that unquestionably constituted an indissoluble whole. It had, of course, been asserted, on the basis of arguments that merited attention, that the draft articles included a number of rules that constituted a progressive development of international law, a circumstance that might possibly stand in the way of their adoption in the form of a convention. In that regard, he noted that, according to article 15 of the statute of the Commission, "the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States". In May 1947, the Committee on the Progressive Development of International Law and its Codification had noted in its report to the General Assembly that "some of the tasks [of the future International Law Commission] might involve the drafting of a convention on a subject which has not yet been regulated by international law or

in regard to which the law has not yet been highly developed or formulated in the practice of States", adding that "the terms employed are not mutually exclusive".<sup>5</sup> Subsequently, in its observations on the review of the multilateral treaty-making process, the Commission had noted that "in practice, however, the functions performed by the Commission proved not to require a method for 'codification' and another for 'progressive development', the draft articles prepared on particular topics incorporating and combining elements of both *lex lata* and *lex ferenda*";<sup>6</sup> and had gone on to demonstrate in detail that the various conventions adopted up to that date, such as those concerning the law of the sea and consular relations, had constituted both a codification and a progressive development of international law, specifying that it had not been possible to determine to which category a particular provision belonged.

8. It had also been pointed out that it would not be desirable to draw up a convention that would not be ratified by States and which might even constitute a "reverse codification" exercise. That argument, which might be defensible in the case of other topics, could not be defended in the case of State responsibility. The draft articles under consideration had arguably exerted an unprecedented influence in the history of codification processes. Bringing them together in the form of a convention would lend them added weight and, in principle, the signatory States would be obliged not to obstruct the object and purpose of the convention.

9. Furthermore, as Eustathiades had pointed out in a commemorative lecture in honour of Gilberto Amado,<sup>7</sup> the codification process in itself, considered independently of the ratification process, could acquire an importance of its own and have considerable consequences for general international law. A number of the draft articles under consideration were an integral part of customary international law; they were frequently cited by authors and had been invoked by ICJ, for instance, in its judgment in the *Gabčíkovo-Nagymaros Project* case or in its advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. They had also been cited by members of the Court in their opinions, for example, by the Vice-President in his dissenting opinion attached to the order issued by the Court on the question of the *Legality of Use of Force (Yugoslavia v. Belgium)*. He thus thought that international law would in some way be incomplete if the law of State responsibility had not been codified. Primary rules and secondary rules were indissociable, interdependent and mutually complementary, conferring consistency on the international legal order. To construct an international legal order in which primary rules were comprehensively codified and secondary rules less comprehensively codified and less progressively developed would result in an imbalance. Secondary rules were

<sup>5</sup> Report of the Committee on the Progressive Development of International Law and its Codification (*Official Records of the General Assembly, Second Session, Sixth Committee, Summary Records of Meetings*, annex 1, document A/331), p. 175, para. 7.

<sup>6</sup> *Yearbook... 1979*, vol. II (Part One), p. 187, document A/CN.4/325, para. 13.

<sup>7</sup> C. Th. Eustathiades, "Unratified Codification Conventions", lecture delivered on 11 July 1973.

<sup>4</sup> *Yearbook... 1970*, vol. II, p. 179, document A/CN.4/233, para. 10.

in no sense minor or lower-ranking rules. The former Special Rapporteur, Roberto Ago, had stated to the Commission that secondary rules were so-called not because they were less important than primary rules, but because they determined the legal consequences arising out of failure to perform obligations set forth in the primary rules.<sup>8</sup> In that light, a resolution whereby the General Assembly confined itself to taking note of the draft articles, without envisaging the subsequent conclusion of a convention or specifying that some of its provisions reflected customary international law, would lack cohesiveness and would fail to take account of the historical dimension of the work in which the Commission had been engaged for almost 50 years or of the support that the drafting of a convention undoubtedly commanded, since, according to the Special Rapporteur himself, the fundamental structure of the draft and most of its provisions, taken individually, were broadly acceptable. As ICJ had noted in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, “the Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value” [para. 70]. It had reached the same conclusion, as Mr. Momtaz had pointed out, in its order in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. Consequently, it was necessary to draft a binding instrument. State responsibility called for a new international legal regime, additional to and complementing the existing regime, and only a convention would seem capable of fulfilling that role. As there were clearly two positions in the Commission on the question, it was worth drawing attention to the fact that, according to the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fifth session (A/CN.4/513, para. 24), delegations had proposed a phased approach with a view to reaching a compromise, a proposal which, in his view, must infallibly and indisputably point to the conclusion of a convention.

10. Thirdly, with regard to the settlement of disputes, he endorsed the Special Rapporteur’s view expressed in paragraph 10 of the report. The question had not been tackled in the most appropriate fashion. The approach set forth in article 58, paragraph 2, adopted on first reading<sup>9</sup> whereby there was a unilateral right to submit a dispute to arbitration, was far from balanced and compromised the principle of a dispute settlement regime open both to the injured State and to the State alleged to have committed an internationally wrongful act, as well as the principle of free choice of means. It would thus be wiser to delete Part Three and the two annexes, leaving those questions to the existing rules, regulations and procedures. To establish a special regime for the settlement of disputes in the framework of State responsibility might result in overlapping and lead to fragmentation and the proliferation of mechanisms, given the close link between the primary and secondary obligations of State responsibility and the fact that the law of State responsibility was an integral part of the global structure of international law as a whole. However, he would not be hostile to rules taking account of and based on the general principles applicable to any regime of dispute settlement as a whole, as provided for in Article 33 of the Charter of the United Nations.

11. Fourthly, regarding the regime of countermeasures, the current text of Part Two bis, chapter II, represented a fragile balance whose essential structure must not be tampered with. Despite certain inequalities between States, it was undeniable that countermeasures existed, but it was necessary to provide a strict framework for them, so that they did not give rise to abuses. The draft articles devoted to them made due provision for that. He endorsed the Special Rapporteur’s proposal for the deletion of article 54.\*\*

12. Fifthly, with regard to serious breaches of essential obligations to the international community, he was in favour of the retention of Part Two, chapter III, as a compromise solution. Crimes such as enforced and involuntary disappearances, aggression and genocide were unfortunately not a thing of the past. It was clearly important to spell out their consequences in each case, for such conduct affected the international community as a whole. However, he agreed with the Special Rapporteur that it must be clearly established that the obligations set forth in article 42, paragraph 2, must be neither exhaustive nor mutually exclusive.

13. Mr. PELLET said he regretted that, once again, the Commission had had to meet on 1 May, Switzerland and the United Nations having decided not to follow the internationalist trend.

14. Mr. Herdocia Sacasa’s remarks were somewhat contradictory. He had begun by proving that the impact of a draft was not a function of its form, showing in a very learned and detailed explanation that the draft articles adopted on first reading had had a considerable impact on State practice and the jurisprudence of ICJ—something which was perfectly true—but had then paradoxically concluded that the draft articles should take the form of a convention.

15. He disagreed with the assertion of many members of the Commission who seemed to think that a codification exercise automatically led to the elaboration of a convention. Nothing could be further from the truth. Article 23 of its statute provided that the Commission could recommend to the General Assembly: to take no action, the report having already been published (that approach would be wise in the current case); to take note of or adopt the report by resolution; to recommend the draft to Member States with a view to the conclusion of a convention; or to convoke a conference to conclude a convention. The elaboration of a convention was thus merely one of several possibilities. He was somewhat surprised to hear certain members imperturbably defend the idea that the Commission’s task was to elaborate conventions. That was not what was stated in its statute, which the Commission could not change.

16. Mr. IDRIS said that, over the years, the draft articles under consideration had achieved a degree of consistency and covered a broad range of questions, thus representing an exercise in both the codification and the progressive development of the law of State responsibility. He was

<sup>8</sup> See *Yearbook . . . 1974*, vol. I, 1251st meeting, para. 2.

<sup>9</sup> See 2665th meeting, footnote 5.

\*\* Unless otherwise indicated, the numbers refer to the draft articles as provisionally adopted by the Drafting Committee on second reading (see footnote 1 above).

grateful both to the current Special Rapporteur for his wisdom and his commitment to promoting and protecting the interests of the international community as opposed to the interests of States and to the past Special Rapporteurs for their important contribution to the development of the topic at various stages.

17. The general issues in abeyance which the Special Rapporteur, in his fourth report, had asked the members of the Commission to address, namely, the settlement of disputes concerning State responsibility (Part Three of the draft articles adopted on first reading) and the form of the draft articles, must be considered separately, without subordinating one to the other.

18. Part Three of the draft articles adopted on first reading had essentially instituted an optional procedure, except for a conciliation commission that could issue a final report embodying its “evaluation of the dispute ... and its recommendations for settlement” (art. 57, para. 5, adopted on first reading). The optional procedure would cover the entire area of the topic of State responsibility and disputes “regarding the interpretation or application” of the articles (art. 54 adopted on first reading). In that connection, the Special Rapporteur had alerted the Commission, in paragraph 14 of his fourth report, to the possibility that the scope of any regime of compulsory settlement would not be limited to disputes as to the specific application of particular provisions of the draft articles themselves and that it would extend to the application and interpretation of primary rules, i.e., those laying down obligations for States breach of which entails their responsibility. For those and other reasons set out in paragraphs 15 and 16 of the report, it was fair to agree that there was no realistic possibility of convincing States to accept such a wide and comprehensive obligation of compulsory dispute resolution in the area of State responsibility for the structure of general international law as a whole and that there was no need to set up an optional system of dispute settlement, which was, in any case, available to States in one form or another whenever they wished.

19. Concerning the related question of a binding dispute settlement regime for the use of countermeasures, the Special Rapporteur had enumerated the difficulties he had encountered in putting such a system in place. The arguments against such a system were well known and had been brought forward by a number of States. But the Commission must be aware of the sentiments of members of the Commission past and current, as well as States, which continued to favour such a system as a condition for accepting the lawfulness of countermeasures. Hence the need to strike a fair balance in the draft articles.

20. Turning to the question of the form that the draft articles should take, he endorsed the Special Rapporteur’s suggestion, in paragraph 26 of his report, that the Commission might return to the question later in the session, in the light of the balance eventually achieved in the text and, in particular, any decision reached as to the fate of current Part Three. To suggest that the draft should be adopted as a convention gave rise to practical difficulties and would be unrealistic, given the reluctance of States to adopt several provisions which were admittedly in the nature of progressive development of law.

21. On the other hand, it would be disappointing to recommend that the General Assembly should simply take note of the draft articles, which the Commission had worked on for more than four decades. Nor could the Commission leave the adoption and application of the draft articles to the whim of States. Exposing them to a “pick and choose” development and application would neither serve the interests of the international community nor do justice to the Commission’s balanced approach.

22. As the decision on form was one of policy to be taken by States, the Commission might adopt an innovative approach and consider recommending several flexible options, including the adoption of draft articles in the form of a declaration. The Commission could also take an à la carte approach to the five options set out in article 23 of its statute rather than commit itself to any one option in an irreversible way.

23. Mr. ELARABY said that he recognized the validity and relevance of certain arguments for and against the codification of the draft articles. He acknowledged that most of the texts that the Commission had recommended to the General Assembly had been ratified by only a small number of States, that the procedure for adopting a convention was complex and that the draft articles could continue to have an impact even if they did not take the form of a convention. Nevertheless, he did not think that those arguments were decisive.

24. Referring to Article 13 of the Charter of the United Nations, he said that the Commission had been created to promote the progressive development of international law and its codification. The form given to draft articles depended on their nature and, in certain cases, it was sufficient to take note of them. But the draft articles on State responsibility deserved better treatment. Moreover, if the Commission did not recommend their codification, the General Assembly would be influenced in its decision because its options would be more restricted. On the other hand, if it recommended the codification of the draft articles, the Assembly would have complete latitude to decide. There was thus no reason to restrict the Assembly’s freedom of movement by recommending that it should take note of the draft articles.

25. Those opposed to codification argued that, even in incomplete form, the draft articles already had an influence because they were cited by ICJ. It must be borne in mind, however, that a non-codified text was usually cited in support of a point of view, whereas it was unlikely that it would be referred to as a rule of international law. On the other hand, a codified text would undoubtedly be more authoritative than a text that had merely been taken note of. For those reasons, the Commission should recommend that the General Assembly adopt the draft articles in the form of a convention.

26. With regard to the question of dispute settlement, he recalled the Special Rapporteur’s point of view that the Commission should not make provision for a dispute settlement mechanism unless the draft articles were envisaged as an international convention and the Commission might return to the question later in the light of the proposal by China.

27. Lastly, he disagreed with Mr. Rosenstock's assertion (2668th meeting) that the General Assembly did not have legislative power. That ignored recent developments in international law in both doctrine and practice. Since 1945, the Assembly had acquired legislative power in financial, administrative and organizational matters. Moreover, as the Charter of the United Nations was a constitutional document, member States were entitled to expand, restrict or redirect the scope of its provisions. Such a development was perceptible, for example, in the decisions taken in the area of peacekeeping. Today, there was general recognition that, in certain cases, Assembly resolutions could reflect what many distinguished jurists had termed spontaneous custom. Hence, it could not be asserted absolutely and definitively that the Assembly did not have legislative power.

28. Mr. GALICKI said that, if he understood Mr. Elaraby correctly, any form other than that of a convention which the draft articles might take would not fall within the scope of codification. He personally thought that, if the Commission recommended that the General Assembly should adopt the draft articles in the form of a declaration, it would also be engaging in work of codification. Everything that the Commission did and decided, regardless of the form the draft articles ultimately took, was part of the codification and progressive development of international law.

29. Mr. ELARABY said it was undeniable that, even if adopted in a General Assembly resolution, the draft articles would have a definite impact; but, given their content, they should take the form of a convention.

30. Mr. MELESCANU, noting that State responsibility, which had been dealt with more than 70 years earlier, in the work of the Preparatory Committee for the Conference for the Codification of International Law, held at The Hague in 1930, said that the subject had reached a crucial phase, that of deciding on its definitive form, and he commended the Special Rapporteur on his excellent work.

31. In his view, the ongoing discussion on the form that the draft articles on State responsibility should take served no purpose because it was clear that there were two divergent positions in the Commission: some members advocated the adoption of the draft articles as an international convention, whereas others favoured the adoption of a resolution by the General Assembly, in which it would take note of the results of the Commission's work or, alternatively, the adoption of the draft articles in the form of a declaration rather than a simple resolution. Article 23 of its statute clearly specified that the Commission could recommend to the Assembly: to take no action on the Commission's report; to take note of or adopt the report by resolution; to recommend the draft to members with a view to the conclusion of a convention; to convoke a conference to conclude a convention. As could be seen, both positions expressed in unofficial discussions and in the Commission were correct and were in keeping with the Assembly's guidelines. However, if the real possibilities open to the Commission were considered, it would seem that the first and last options could be ruled out from the start, namely, recommending that the Assembly take no action and recommending that it convoke a conference

to conclude a convention. There did not seem to be any consensus possible on either of those two options. The solution was thus to be found in one of the two intermediate options.

32. Since the beginning, his country, Romania, had supported the efforts made to draw up and adopt an international convention on State responsibility because of the crucial significance of the institution of responsibility as the most important legal means of implementing and enforcing norms of international law. He wholeheartedly endorsed that view because, together with the 1969 Vienna Convention, the Commission would have two fundamental pillars of public international law. The best solution would thus be for the draft articles on State responsibility to take the form of a convention. Sometimes it was better to let well enough alone, however, and that was the case at the current time. All the discussions had shown that, at the current stage of the development of international law and State practice, the draft articles on State responsibility, which were associated with both the codification and the progressive development of international law, might well suffer from the convention form.

33. The idea that was gaining ground and had emerged in the comments of all the members of the Commission was that it was in the interest of the Commission and the international community as a whole to complete the draft articles and protect their concepts, principles and specific provisions, which represented a remarkable development in the codification of international law out of all proportion with any other effort made. Another aspect to be taken into account was that the Commission had reached a point at which there might no longer be any point in its continuing its work on the question of State responsibility, apart from amending the wording of the text or dispensing with certain provisions whose drafting had required considerable efforts and imagination. He was therefore in favour of any solution which would allow the Commission to submit the results of its work to the General Assembly by the end of the year and to obtain the assurance that those results would materialize in the near future. Consequently, he suggested setting up without delay a working group to make a specific proposal on the most acceptable way of completing the work on State responsibility.

34. The working group should be given a clear-cut mandate, which should take account of a number of elements. First, the Commission must finalize the draft articles on State responsibility in a form in which they could serve as the basis for a legal instrument for the codification and progressive development of the law in that field. Secondly, the draft must not be "amputated" so that it would be restricted to the mere codification of customary rules. According to article 1 of its statute, the Commission had for its object the promotion of the progressive development of international law and its codification, codification being mentioned second. It would be unacceptable to reduce so many years of efforts on the draft articles to nothing. Thirdly, according to its mandate, the working group was to put forward for the General Assembly a combination of the two possibilities provided for in article 23 of its statute. The Assembly would then be able to take note of the draft articles prepared by the Commission or to adopt the draft, commending it to Member States with a view to

further action aimed at the conclusion of an international convention on the subject. It would decide to convene a conference for that purpose after consulting the Member States. It was understood that the date of the conference would be set once States had had a chance to familiarize themselves with the draft articles and their contents had been assessed and applied by international judicial bodies. The draft articles had already played an important role, but would play an even more important role once they had been adopted and were no longer simply under consideration by the Commission.

35. The flexible solution he was proposing would help bring more than 70 years of work on the topic to a close and would show how States would react. The adoption of that solution would also heighten the importance of the commentaries, which should focus on two questions: the introduction of precedents and other relevant information, including custom, treaties, judicial decisions and legal opinion, and the setting out of conclusions on the extent to which agreement had been reached and the differences of opinion on each point, to enable States to understand the discussion that had led to the agreement. He endorsed the approach to the commentaries proposed by the Special Rapporteur. The content of the commentaries on the first 11 articles corresponded to the basic objectives he had outlined and care should simply be taken to ensure that the commentaries were presented in a balanced manner.

36. Since the discussion on the question of countermeasures had clearly revealed major differences of opinion among the members of the Commission, he suggested that the starting point for reconciling the differing views should be the objective fact that public international law was going through a transition phase. It was not realistic to think that the adoption of rules on the international responsibility of States and the peaceful settlement of disputes would make it possible to do away entirely with countermeasures and to prohibit them. It was, however, not acceptable to give the impression that States could, at their own discretion, take any countermeasures they considered necessary, with no rules or limitations. He was therefore in favour of the inclusion of provisions on countermeasures in the draft articles, but in a separate chapter, not in article 23, the purpose of which was different. He would prefer countermeasures not to involve the use of force, to be carried out individually by the injured State and to be collective only when backed up by a decision of the United Nations or taken in line with agreements between States, as in the case of security pacts.

37. Mr. ADDO, referring to the form of the draft articles, said that his preference was for a binding instrument such as a convention. It was, in fact, nearly impossible to engage in codification without making any changes at all in the law being codified, if only by eliminating ambiguities, favouring one aspect or another of the content, choosing between a broad or restrictive formulation or couching customary rules in written form. Furthermore, codification met urgent needs, which explained why States embarked on it with more than the sole aim of transcribing what already existed. The real aim was to update general international law and to find compromises that could furnish satisfactory responses to current and future needs. For those reasons, codification could not be dis-

sociated from progressive development. Codification that fully satisfied the needs of the international community could not be achieved merely by formulating a non-binding document inviting States to respect a certain number of rules described as forming part of general international law. That type of text would undoubtedly be useful, but it would afford no sure way of remedying the inadequacies of an international customary law that had become uncertain and was a source of tension between opposing conceptions. Custom had to be replaced by written norms recognized by States as peremptory. The elaboration of a convention or treaty seemed to be the solution. Such instruments were binding on the parties, however, and created neither obligations nor rights for a third State without its consent. It had been said that such an instrument would not be ratified, but that might or might not be true. It seemed to him that those who thought the General Assembly should simply take note of the draft were taking a defeatist attitude. Since the Commission was divided on the issue of form, and in the final analysis it was up to the General Assembly to decide, the Commission could leave the matter to the Assembly.

38. The provisions on dispute settlement should be deleted, since dispute settlement procedures were already available for use. The Chinese idea of including a provision modelled on Article 33 of the Charter of the United Nations in the draft articles was attractive and should be explored.

39. The CHAIRMAN announced that, in accordance with the recommendations of the Sixth Committee on cost-saving measures, the Bureau had decided to allocate the first week of the second part of the session to meetings of a working group to review the commentaries to the draft articles on State responsibility. The working group would have a total of 10 members.

40. Mr. RODRÍGUEZ CEDEÑO said that, whatever form the draft articles ultimately took, they must include provisions on dispute settlement. The question was whether the regime to be established should be a general one or whether there should be a special regime to allow for provisions on the delicate issue of countermeasures. Provisions on a general regime of dispute settlement would have to be grounded in the fundamental rules and principles recognized and accepted by States and enshrined in the Charter of the United Nations and the texts adopted by the General Assembly, namely, the obligation to settle disputes by peaceful means, the principle of free choice of means of settlement and the principle whereby the States parties to a dispute must consent to its submission to a mechanism whose decisions were compulsory and legally binding, such as arbitration or judicial settlement. In his view, it would be sufficient to refer to the procedures provided for in the Charter for the settlement of disputes on the interpretation or application of texts in general. As to whether a special regime for countermeasures was needed, it should be recalled that countermeasures were imposed in the context of the unilateral acts of States, which made such measures all the more problematic; hence the need to regulate them in an appropriate manner. If the draft articles took the form of a convention, special dispute settlement procedures must be created to guarantee the effectiveness of countermeasures, which were exceptional measures taken for the



sole purpose of inducing the responsible State to fulfil its obligations and which reflected the development of international relations and the need to improve the structure of the international community.

41. Concerning the final form of the draft, he thought that a distinction should be drawn between the nature of the text and its form. The point was not to take a decision on the legal nature of the draft articles, but to make a recommendation on the form they should take or, in other words, to indicate whether the process should lead to the adoption of a convention, something which, in theory, was best suited to the Commission's mandate, or of an informal text such as a General Assembly declaration. Whether the text was a declaration or a convention, it would have a significant impact in legal terms on relations between States. While it was obvious that a convention was binding on the States parties, it was not clear what status and effectiveness a declaration might have. A declaration was not in itself devoid of legal force; it could not be regarded simply as a political document. Its legal force depended on the terms in which it was drafted and on the will of States which it reflected. The draft articles would inevitably have to be considered by States in the Sixth Committee.

42. The codification and progressive development of international law were indissociable. It would be difficult for a working group to perform the very complex task of determining which rules related more to which category, as had been proposed. The text under consideration covered the existing rules of State responsibility without overlooking the progressive development of international law in that field. It was incorrect to say that the purpose of the exercise in which the Commission was engaged was solely to facilitate the progressive development of international law.

43. The opponents of the adoption of a convention contended that the organization of a diplomatic conference would re-open the discussion on the draft articles, which might then be altered or even stripped of their content. It would seem that States could not oppose such progress in the organization of the international community and must, instead, participate actively in the elaboration of the regime on an equal footing. The Commission could not impose a set of draft articles on States. Some members had also pointed out that a convention that was not ratified by a sufficient number of States would have less force and might even have a "decodifying" effect. That was true, and it was up to the Commission to preserve States from the dangers of such an eventuality. It would nevertheless be unacceptable simply to submit the draft articles to States in the Sixth Committee for their consideration. That would raise doubts about the value of the work done by the Commission.

44. The Commission's discussion clearly showed that a political perspective on legal matters and, in particular, on the codification process was essential and that the Commission could certainly not content itself with studying the topics submitted to it in an exclusively abstract manner, without taking account of political realities and State practice. He believed that the Commission must put the various options available to it before the General Assembly and comment on their implications. That would

be the best way of helping States to take a judicious political decision reflecting the idea that, whatever its form, the final text on State responsibility, must be of a legal nature and designed for the sole purpose of regulating relations among States. Lastly, while he supported the establishment of a working group to submit proposals to the Commission, he was not sure that it was appropriate to prepare a draft resolution for the Sixth Committee. That task fell exclusively to States and to the Assembly.

45. Mr. MELESCANU said that Mr. Rodríguez Cedeño had been right to emphasize the importance of the content and language of a declaration by the General Assembly, but it must not be forgotten that the way in which the decision on the question was adopted, whether unanimously, by consensus or by a vote, was no less important and perhaps even more so.

46. Mr. BROWNLIE said that several speakers had stressed the need to produce a legally binding instrument. He wondered how many States would ratify a convention, which would, of course, be binding only for those which had ratified it. The Commission was engaged in codifying an area of general international law comprising well-established elements. State responsibility was the axis of the whole system of obligations. The law of treaties, for instance, was simply a department of State responsibility. If the convention remained unratified or if an identifiable group of States did not ratify it, the result would be highly regrettable. It might even be called "reverse codification".

47. Codification took place against the background of a great deal of existing customary law. In that respect, the difference between a declaration and a convention was blurred, but it would be a pity to opt for a convention if it was not ratified.

48. Mr. LUKASHUK said that the solution of having the General Assembly take note of the draft of the Commission might also have a negative impact because the Assembly would not be approving the text if it simply took note of it.

49. Mr. RODRÍGUEZ CEDEÑO said that he wondered whether the non-ratification of a convention would mean that its provisions would have no effect in international law. In his view, the risks involved in ratification were much less serious than those that would weaken the entire text if it simply became a declaration, or if the General Assembly simply took note of it.

50. Mr. ECONOMIDES said that the customary rules of international law existed and did not lose their autonomy since their statement in treaty form gave them additional certainty, reliability and binding force. However, when a new rule was introduced, it became a customary rule more quickly if it was part of a convention rather than of a declaration. The approach of ICJ was enlightening in that respect, since it was quick to characterize new treaty rules as customary rules.

51. Mr. DUGARD said that there appeared to have been a shift on the part of those in favour of a convention, who seemed to believe that a convention was desirable even

if it had not been ratified. The 1969 Vienna Convention contained some elements that might encourage States to ratify it, but there was no certainty that the same would be true of a convention on State responsibility. What arguments could a Government legal adviser bring in favour of the ratification of such an instrument?

52. Mr. ROSENSTOCK said that he completely disagreed with Mr. Lukashuk that taking note of the draft would amount to a rejection by the General Assembly. It all depended on the way the question was put to the Assembly. If the draft was put forward as the culmination of 40 years' work by the Commission on the subject, the fact of taking note of it would not have negative consequences. If, however, the draft was presented in the form of a convention in which some elements were thought by States to be unacceptable, that approach would have negative and indeed destructive effects. It was perhaps even true, as Mr. Pellet had suggested, that some States favoured a convention on the subject so that they would not have to ratify it.

53. Mr. ADDO said he thought that States might well ratify a convention which consisted largely of customary law rules that did not cease to have effect merely because the convention was unratified. The examples of the Rome Statute of the International Criminal Court and the United Nations Convention on the Law of the Sea clearly showed that an instrument containing provisions on which States did not agree could well be ratified by over half the States in the world.

54. Mr. ELARABY said that the position of a Government's legal adviser when faced with a convention on State responsibility would depend on three factors. The first had to do with the importance of the subject matter. State responsibility was a sensitive topic, which States tended to approach cautiously. Secondly, it was beyond dispute that a convention, even unratified, carried more weight than a declaration. Thirdly, in the current state of international relations, there was a feeling of fatigue caused by the accumulation of new rules, but that situation might change in future. All things considered, the draft text on State responsibility warranted a recommendation to the General Assembly to adopt it in the form of a convention.

55. Mr. SIMMA said that, although he did not regularly advise his own Government, he could imagine that, in the various ministries of foreign affairs, senior advisers would express positive views about having a convention on State responsibility, but would immediately want to discuss possible reservations. The problem of reservations to human rights instruments would seem quite tame by comparison.

56. Mr. OPERTTI BADAN said the attitude of States towards the draft articles would be decided, in the first place, by the principles embodied in the text and, secondly, by the kind of country concerned, in the sense that it was the weakest countries which needed the protection of the law. In any case, he thought that it was hardly conceivable for a change of government, for instance, to bring about a change in the law on State responsibility.

57. Mr. MOMTAZ said that he had three observations to make. First, the non-ratification of an international legal instrument did not necessarily signify opposition to the provisions it contained. Secondly, when a convention codified firmly established customary rules, legal advisers to Governments were generally disinclined to advise ratifying it, since the State was already bound by the rules it embodied. Lastly, a State could refer to a convention in its international relations without being a party to it.

58. Mr. PELLET said that the example of the United Nations Convention on the Law of the Sea, mentioned by Mr. Addo, did not encourage much optimism because the most powerful countries had removed the most innovative aspects of the text through the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. If he had to advise a powerful State, his advice would be that it should insist on the draft becoming a convention so that its innovative elements could be removed. Then, when it was signed, he would recommend that the Government should formulate as many reservations as possible and that it should not ratify the convention. However, if he were advising a small country, he would tell the Government that the draft produced by the Commission was a balanced one, that, on the whole, it protected the interests of all countries as far as possible, that it went as far as it could along the "communitarian" path of international law and that practice should therefore be allowed to develop on that basis, without giving a handful of powerful States the opportunity to sap the draft of its substance. As for the scenario in which the General Assembly took note of the draft, the Assembly's decision would constitute a disavowal only if that particular scenario had been excluded from the Commission's recommendation. A working group should therefore find flexible and open wording by which the Assembly could not prevent the draft from developing through practice.

59. Mr. SEPÚLVEDA said that, if the draft was adopted in the form of a declaration, he wondered what guarantee the Commission would have that States would not attach interpretative declarations to the instrument when they accepted it. All the arguments put forward against the convention formula were equally valid for the resolution formula. The text proposed by the Commission would necessarily be argued over and analysed in detail by the Sixth Committee and, although a declaration had less legal force than a multilateral instrument, States would take precautions to ensure that the declaration was as innocuous as possible.

60. Mr. GALICKI said he was surprised at the apparent assumption that the General Assembly would accept the solution of a convention if the Commission recommended it. First, nothing could be less certain and, secondly, if the Assembly opted for a convention after all, there was no way of being sure that, after several years of negotiation, the final product would look anything like the Commission's draft or that it would not be burdened with innumerable reservations. In the abstract, a convention would be the ideal result, but, in practical terms, it would not be desirable to give the Assembly the

stark choice between “a convention or nothing”; it should be given as much room for manoeuvre as possible.

*The meeting rose at 1.10 p.m.*

## 2671st MEETING

*Wednesday, 2 May 2001, at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*later:* Mr. Gerhard HAFNER

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. He, Mr. Herdocia Sacasa, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

**State responsibility<sup>1</sup> (*continued*) (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,<sup>2</sup> A/CN.4/517 and Add.1,<sup>3</sup> A/CN.4/L.602 and Corr.1 and Rev.1)**

[Agenda item 2]

FOURTH REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. GAJA said that he would confine his remarks to two controversial questions dealt with in chapters II and III of the fourth report (A/CN.4/517 and Add.1). The first point concerned the consequences of serious breaches. Article 42, paragraph 1, referred to damages, which, according to the Special Rapporteur, were not punitive, but “exemplary or expressive”. The distinction was not obvious. As article 42, paragraph 3, made clear, in any case the ordinary consequences of wrongful acts flowed from the breach: those consequences included reparation for the injury. Thus, the gravity of the breach was already reflected in reparation. What further damages did a seri-

ous breach entail? Since the draft articles were not designed to entrust a judicial or arbitral body with a discretionary power if it found that a serious breach had been committed, a better course would be to define the consequences of serious breaches more precisely. Paragraph 1 should give some further indication about when a serious breach entailed exemplary or expressive damages and identify those damages more clearly.

2. Article 42, paragraph 2, subparagraphs (a) and (b), set out the obligation not to recognize as lawful the situation created by a serious breach and the obligation not to render aid or assistance to the responsible State in maintaining the situation so created. Both obligations presupposed the existence of a continuing wrongful act, which had given rise to an unlawful situation, as had been the case with Namibia. As was well known, the two consequences under subparagraphs (a) and (b) were modelled on what ICJ had found in its advisory opinion in the *Namibia* case, namely that the Member States had been under an obligation “to recognize the illegality of South Africa’s presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from ... lending support or assistance to South Africa” [p. 58] with reference to its occupation of Namibia. He proposed that paragraph 2, subparagraphs (a) and (b), should be rephrased to make it clear to which type of serious breach those consequences applied, i.e. only those continuing wrongful acts which had given rise to a wrongful situation.

3. The obligation under subparagraph (c) “to cooperate as far as possible to bring the breach to an end” was more general and applied to all continuing wrongful acts. But it could be made even more general and held to apply to cooperation in the presence of a serious breach in order to obtain not only cessation, but also assurances and guarantees of non-repetition and reparation. As he saw it, the main distinguishing feature between a serious breach and a wrongful act was that, in the first case, States were not only entitled, but required to react, if only by cooperating to obtain cessation, assurances and guarantees of non-repetition and reparation. That could be stated more explicitly in a separate paragraph. In any case, article 42, paragraph 3, on the ordinary consequences of a breach and those that might be entailed under international law, should be retained. For the latter consequences, the current “without prejudice” provision was probably the only practical way of referring to consequences that might vary from one type of serious breach to another and thus did not lend themselves to being expressed in more general terms.

4. His second point concerned injured States and invocation of responsibility by States other than those injured. Article 43 contained a definition of integral obligations that had proved controversial. There was some confusion as to what the term meant. The definition should indeed be more precise, but he did not agree with the substantive change suggested in the footnote at the end of paragraph 38 of the report, namely to say “and” instead of “or” in the last phrase so as to require that both “the enjoyment of the rights” and “the performance of the obligations” were affected before a State could be considered injured. For example, suppose a State party to the Antarctic Treaty dumped nuclear wastes on a large scale in the

<sup>1</sup> For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook* . . . 2000, vol. II (Part Two), chap. IV, annex.

<sup>2</sup> Reproduced in *Yearbook* . . . 2001, vol. II (Part One).

<sup>3</sup> *Ibid.*

Antarctic. That was obviously a breach of the Treaty and it could be said that the rights of all parties to the Treaty were affected, but, arguably, their obligations were not. The example showed that if both rights and obligations had to be affected, a breach of an integral obligation might be very rare. Uncertainty as to the application of the subparagraph would inevitably grow greater, because it would always be necessary to determine whether both elements were present.

5. It was perhaps subversive on his part, but he wanted to ask the more fundamental question whether the category of an integral obligation, theoretically sound as it was, should be retained in article 43. If the rights of States other than the injured State were maintained as currently set out under article 49, then article 43, subparagraph (b) (ii), could probably be dispensed with; that would no doubt simplify the understanding of article 43. For example, no issue of compensation for damage caused to a State party to a treaty imposing integral obligations was likely to occur. As the Special Rapporteur noted in paragraph 38 of the report, the other parties to an integral obligation that had been breached may have no interest in its suspension and should be able to insist, vis-à-vis the responsible State, on cessation and restitution. But that was precisely the avenue open to “article 49” States, which were affected by a breach not because there was an integral obligation, but because of a collective interest that was protected by a treaty to which they were a party, or else because of the interest of the international community as a whole.

6. One of the objections to article 49, paragraph 2, that had been raised by several States concerned the proposition that States other than injured States might be entitled to request reparation. It had been argued that that was not in keeping with customary international law and that “article 49” States should only be entitled to request cessation. Yet that would mean that in many instances no State would be entitled to request reparation for the breach of an obligation under treaties established to protect a collective interest or under obligations to the international community as a whole. Take a case of genocide involving only the nationals of the responsible State. If the Commission endorsed the view that “article 49” States could only require cessation, then no State could claim reparation for the victims’ benefit. In practice, that would be tantamount to condoning the breaches, even serious ones. Thus, article 49, paragraph 2 (b), should be retained. Logically, the fact that in certain circumstances there was also an injured State under article 43 should not affect the right of “article 49” States to request reparation. Why, for instance, should the position of “article 49” States vary in the case of massive pollution of the ocean depending on whether or not a coastal State qualified as specially affected? But as the Special Rapporteur suggested in paragraph 41 of his report, an exception could be provided as a compromise for the case in which there was an injured State.

7. Mr. SIMMA, reacting to a “subversive” point raised by Mr. Gaja suggesting that, in view of article 49, paragraph 1 (a), it was possible to dispense with article 43, paragraph 2, reminded Mr. Gaja that the title of article 49 was “Invocation of responsibility by States other than in-

jured States”. He saw a problem there, because Mr. Gaja’s solution implied that States parties to an integral obligation within the meaning of article 43 would be considered to be States other than injured States. He could not accept that in the case of an integral treaty, such as a disarmament treaty, a serious material breach would not “injure” the other parties within the meaning of article 43.

8. Mr. GAJA said that it was a difficult drafting question the Commission could try to resolve. He agreed that the Commission should not say things that were not theoretically sound, even if the consequences were the same.

9. Mr. SEPÚLVEDA said that he would focus on the draft’s legal form and the possible inclusion of a chapter on dispute settlement, which did not mean that he was disregarding the importance of other subjects or comments and suggestions from Governments. The chapter on countermeasures, and collective countermeasures in particular, and the subject of serious breaches of obligations for the international community as a whole deserved special attention, and much time would need to be spent on them if the draft was to be approved by the end of the current session. The Commission should allow sufficient time to prepare rules on dispute settlement, assuming it decided to recommend a convention.

10. In the informal consultations, he had expressed a preference for recommending the adoption of a draft that would take the form of a convention, for a number of sound reasons.

11. First, most Governments were in favour of a convention. Indeed, it was surprising to hear the claim that there was no support from Governments for an international convention. On the contrary: during the discussions in the Sixth Committee, 19 delegations had been in favour of a convention, whereas only 8 had preferred a declaration. Similarly, of the 14 States that had given their views in the comments and observations received from Governments (A/CN.4/515 and Add.1–3), 10 favoured a convention, with only 4 calling for a non-binding instrument.

12. Secondly, the draft articles in their current version were a normative text that imposed rights and obligations on States. While it was likely that in some matters the Commission had prejudged the decision on form in favour of a declaration, the final result of the work was of an eminently legal nature. As it stood, the draft’s structure differed considerably from that of a straightforward declaration. The setting-up of a normative system began with the definition of an internationally wrongful act, continued with rules on attribution, determination of the existence of a breach of an international obligation, circumstances precluding lawfulness, the legal consequences of an internationally wrongful act and reparation of damage and concluded with a chapter on how to make State responsibility effective. The scope of the rights and obligations referred to in the draft articles far exceeded—in both language and objectives—what usually constituted a General Assembly declaration, in which it was clear from the outset that the legal effects of the instrument could be relatively benign and that the legal commitment was very lax. The draft did not allow for such latitude. It was composed of rules that must be complied with and rights that could be asserted. A simple declaration could

not provide sufficient validity and effectiveness for what was essentially a treaty, an instrument the Commission had been working to produce from the very beginning.

13. In short, the obligations and rights peculiar to international responsibility required a set of rules that could only be envisaged in a binding instrument, in other words, as a convention. A declarative mechanism would abandon the original intention and objectives, which called for a general system of legal rules.

14. Thirdly, normative innovation would gradually be accepted. The ability of States to adapt to new circumstances and needs should not be underestimated. It had been asserted that Governments would not accept norms that represented a progressive development of international law they regarded as too bold. Yet that interpretation was not borne out by the facts. In 1958, some had thought that the three-mile limit for the territorial sea was inviolable. In 1969, a regime for the seabed and ocean floor had been considered absurd. In the beginning, there had been little support for establishing an exclusive economic zone so that coastal States would benefit from the ocean resources within a 200-mile limit. In the early 1960s, *jus cogens* had been a very strange legal concept. Until recently, an international criminal court had seemed impossible. Many other examples could be cited. The Commission should not prejudge whether or not the rules it eventually proposed in the draft were ripe for acceptance by States. That depended on circumstances and decisions that did not fall within the Commission's purview. The Commission must produce the most comprehensive articles possible on what it deemed the law of State responsibility should entail.

15. Special attention should be given to the final text, which, by its very nature, would have legal status and would be generally recognized in international law. As had already happened, the final version of the articles and the commentary would be cited by law courts and arbitral tribunals, would establish criteria for the conduct of States and serve as a source of inspiration for new legal doctrines. It would therefore be a very bad idea to weaken the content of the draft by arguing that the articles set out rules that presupposed a progressive development of international law. Expurgating the text because of imaginary fears of political issues would be prejudicial to the Commission's work.

16. Fourthly, in principle States acted in a responsible manner. It had been repeatedly argued that, if the Commission recommended the adoption of a convention, there would be a serious risk that a preparatory committee and a diplomatic conference would mutilate the work that the Commission had accomplished over so many years. That implied that Governments usually acted against their own interests. Surely, many States were convinced that it was possible to agree on norms on international responsibility, and they were prepared to engage in political negotiations to produce satisfactory results. If that argument was not valid, then neither a declaration nor a convention would be legally operative.

17. It was contended that a diplomatic process for elaborating a convention on State responsibility entailed a risk, but it would be equally dangerous, and might have even

more disastrous consequences, to recommend the adoption of a declaration. There was no guarantee that the text would be maintained as a whole and would follow, article by article, the draft finally adopted by the Commission. In fact, it was likely that Governments, although many of them did not give greater legal validity to declarations, would prefer to water down the text to ensure the adoption of a completely inoffensive resolution that would neutralize obligations and eliminate legal innovations.

18. Nor was it possible at the current time to guarantee that a convention would be a faithful reflection of the Commission's text. If the prime concern was for the integrity of the draft, the two options entailed the same risk, but with a declaration it might be easier to undermine the obligations set out in the draft.

19. It was wrong to assume that the text would automatically be damaged beyond repair if it formed the subject of diplomatic negotiations. One example of responsible conduct among States was the Third United Nations Conference on the Law of the Sea, whose results, despite legal, political and economic complexities and conflicting interests, were far from negligible. It would likewise be difficult to object to the final product of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, namely the Rome Statute of the International Criminal Court.

20. Fifthly, recommending a declaration presupposed the same problems as a convention, but without the advantages. It was not inconceivable that, in recommending the adoption of a declaration on State responsibility, the Commission would open the door to a diplomatic process, with the convening of a conference in the General Assembly to review and approve a politically acceptable text. Nor was it inconceivable that such a text would differ from one that emerged from the Commission. In addition, it would be difficult to accept that such a declaration would need to be approved unanimously or by consensus, and that would give rise to escape clauses so that those States that had voted against the declaration would not feel bound by any political or legal commitment. It should be recalled that the Charter of Economic Rights and Duties of States<sup>4</sup> had been approved by an overwhelming majority of Governments in the Assembly. The few Governments that had not endorsed the resolution had clearly announced their inability to go along with the majority decision. The same situation might arise with a declaration on State responsibility.

21. That example also served to illustrate the concern expressed at the possibility that a convention might not attract a sufficient number of ratifications and the risk that it might not enter into force in the immediate future. The same risk was inherent in the case of a declaration. However, even without the necessary number of ratifications, the legal value of a convention was infinitely superior to that of a declaration.

22. Sixthly, it had been suggested that adoption in the form of a declaration would constitute a diplomatic effort to confer on the draft articles a political solemnity

<sup>4</sup> See 2668th meeting, para. 37.

that would lend them additional legal weight. But that ceremonial aspect would not constitute the legal basis for the text, with its generalized acceptance of rights and obligations. The best way of achieving that aim, notwithstanding the problems it posed, was the adoption of a multilateral treaty. It should also be recalled that, despite the solemn circumstances attending the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations<sup>5</sup> some States still did not acknowledge the legal effects of that resolution.

23. As the Special Rapporteur pointed out in his fourth report, only if the draft articles were to be adopted as an international convention would there be any point in including a chapter on third-party settlement of disputes. Personally, in arguing in favour of a binding instrument, he endorsed the proposal to elaborate a system for settlement of disputes, the characteristics of which would have to be defined by the Commission. That new text would have to be different from the previous one, eliminating the obvious defects to be found in the draft adopted on first reading.<sup>6</sup>

24. In the debate in the Sixth Committee during the fifty-fifth session of the General Assembly, eight States had favoured including a chapter on dispute settlement, while only three had opposed such a course. In the comments and observations received from Governments, however, three Governments had favoured incorporating a section on dispute settlement, and three had opposed it. Other Governments had recommended awaiting the submission of a new text before stating their position.

25. Certainly the system proposed at the forty-eighth session of the Commission, and particularly the mechanism linking countermeasures with compulsory dispute settlement, was open to a number of objections, conferring, as it did, undue and disproportionate advantages on the responsible State. But that did not mean, as had been claimed, that a majority of Governments thought it inexpedient to include provisions on dispute settlement.

26. Bearing in mind the substantial changes incorporated in the text provisionally adopted on second reading, it seemed advisable to embark on the task of elaborating a chapter on dispute settlement reflecting the insertions in the text and the obvious needs of the new instrument. In that way, the rights and obligations set forth in the new draft articles could be elucidated if, as might prove to be the case, conflicts arose in the definition of the nature and scope of the provisions.

27. It was not easy to pronounce in favour of or against a system of dispute settlement. Undoubtedly, the earlier text had suffered from a number of defects. But, as yet, no finalized new text existed with which to compare it. The Commission could take a reasoned decision concerning the merits and drawbacks of a third-party dispute settlement mechanism only by examining the possible options for a new text, purged of the defects of the previous draft articles and incorporating a new mechanism.

28. In that regard, it was interesting to note the comment by the Government of China that they did not agree with the simple deletion of all the articles concerning dispute settlement. They stated that since the question of State responsibility involved rights and obligations between States as well as their vital interests, it was a sensitive area of international law in which controversy arose easily. In order to deal with these questions properly, it was necessary to set out general provisions to serve as principles for the settlement of disputes arising from State responsibility. In paragraph 20 of his fourth report, the Special Rapporteur rightly pointed out that such a provision, which could be modelled on Article 33 of the Charter of the United Nations, would go part of the way towards meeting the concern that claims of State responsibility not be the occasion for coercive unilateral measures by any State.

29. The object of the exercise was to establish a set of rules governing State responsibility based on a system of legal certainty, something that could best be achieved through a binding instrument containing, in a new chapter, a regime for dispute settlement.

30. As to other matters addressed by the Special Rapporteur in his fourth report, to avoid additional confusion it was important to standardize the use of terms in all languages. In the Spanish text of the fourth report, the terms *lesión* and *perjuicio* were used interchangeably to denote the English “injury”. On the other hand, the term used in the draft articles was *perjuicio*, the term that should be used in all the texts, thereby making clear the distinction between injury (*perjuicio*) and damage (*daño*), in line with the wording of article 31, paragraph 2. Again, in paragraph 31 of the fourth report, the Special Rapporteur expressed concern at the overlapping of the terms “injury” and “damage”, but that concern was resolved in the wording of the Spanish and French versions.

31. Nor could he concur with the proposal to retain the concept of “international community as a whole”. The purpose of the draft was to establish a set of rules governing State responsibility, and the addressees of the rights and obligations were those subjects of international law. If the intention was to establish a legal regime applicable to the European Union, the United Nations or ICRC, on the assumption that those bodies also formed part of the international community, that aim would be achieved by drafting a text regulating the responsibility of international organizations. Hence the need to use the more precise term “international community of States as a whole”. Even then, the question of what constituted “a serious breach by a State of an obligation owed to the international community” of States “as a whole and essential for the protection of its fundamental interests”, to borrow from the wording of article 41, remained undefined. Much work was needed to clarify the legal nature of those concepts.

32. The provisions in article 49 were controversial, as was demonstrated by the reactions of Governments and the debate in the Sixth Committee, since invocation of responsibility by States other than the injured State gave rise to problems and confusion. For instance, paragraph 1 (a) provided that a State other than an injured State was entitled to invoke the responsibility of another State if the

<sup>5</sup> *Ibid.*, para. 9.

<sup>6</sup> See 2665th meeting, footnote 5.

obligation breached was owed to a group of States including that State. In such circumstances, it would seem more logical to assume that the situation of an injured State or group of States was the one applicable, in which case article 43 would apply, and paragraph 1 (a) of article 49 would be redundant.

33. Another question requiring definition was what was meant by an obligation breached that had been established for the protection of a collective interest. Such an important right should not be conferred on a State other than the injured State on the grounds that a collective interest was protected without providing a fully reasoned justification. Otherwise, that right could be used as a pretext for the adoption of arbitrary measures, on the grounds that a collective interest was being protected.

34. The most contentious question, however, was the link between articles 49 and 54, whereby a State other than the injured State might take countermeasures at the request and on behalf of any State injured by the breach. More serious still, more than one State other than the injured State or States could jointly take countermeasures. He had had occasion to voice his objections about collective countermeasures at the previous session. Suffice it to say that determination of the existence of a serious breach by a State of an obligation owed to the international community of States as a whole and essential for the protection of its fundamental interests was, in principle, a matter regulated by Chapter VII of the Charter of the United Nations, which established a universally accepted legal system governing the adoption of enforcement measures.

35. In conclusion, while commending the work done by the Commission and its Special Rapporteur in the field of State responsibility, he would stress the need for the Commission to redouble its efforts if it was to complete its consideration of the topic at the current session, and to come up with a comprehensive and generally acceptable set of draft articles.

36. Mr. TOMKA said he shared the Special Rapporteur's view that a system of optional dispute settlement would add little or nothing to what already existed. A system of compulsory third-party dispute settlement would—as the Special Rapporteur had demonstrated—have the effect of instituting third-party dispute settlement for the whole domain of international law. States could not realistically be expected to readily accept such a compulsory system. Just one third of the States Members of the United Nations (63 out of 189) had accepted the compulsory jurisdiction of ICJ by a general declaration under Article 36, paragraph 2, of the Statute of the Court, a number of them with reservations. If States were willing to accept the compulsory jurisdiction of the Court for the purposes of State responsibility, they could do so by making a declaration under Article 36, paragraph 2, since subparagraphs (c) and (d) covered just such issues of State responsibility, namely, conferring jurisdiction on the Court in relation to disputes concerning, respectively, the existence of any fact which, if established, would constitute a breach of an international obligation, and the nature or extent of the reparation to be made for the breach of an international obligation.

37. He thus concurred with the Special Rapporteur's view that Part Three and the two annexes adopted on first reading should be deleted. Furthermore, it was not necessary to add a general provision inspired by Article 33 of the Charter of the United Nations. The Charter was part of general international law, and such an article would add nothing to the text.

38. As to the final form of the draft, the views expressed by a number of members appeared to reflect what States would like to hear, rather than what was feasible or realistic. Unfortunately, however, States were divided in their views. His own analysis of the comments and observations received from Governments suggested that nine States favoured a convention, while six preferred a non-binding form, usually involving the General Assembly taking note of the text and commending it to States' attention. Members' views might also have been influenced by the fact that, on a number of occasions in the past, the Commission's advice had not been followed. The Assembly had declined to follow the Commission's recommendations on at least five occasions. Thus, at its tenth session, in 1958, the Commission had recommended adoption of the draft articles on model rules on arbitral procedure,<sup>7</sup> but the Assembly, in paragraph 1 of its resolution 1262 (XIII) of 14 November 1958, had instead simply taken note of that text. In the case of the draft articles on most-favoured-nation clauses, the Commission had recommended the Assembly to commend the draft articles to Member States with a view to the conclusion of a convention on the subject.<sup>8</sup> Yet more than 10 years later, the Assembly had instead adopted decision 46/416 of 9 December 1991 to bring the draft articles to the attention of Member States. A similar situation had arisen in the case of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, where the Commission had proposed the convening of an international conference to conclude a convention on the subject.<sup>9</sup> Instead, however, several years later the draft had simply been drawn to the attention of Member States.<sup>10</sup> Then, at its fifty-first session, in 1999, the Commission had recommended to the Assembly that it adopt the draft articles on nationality of natural persons in relation to the succession of States, in the form of a declaration.<sup>11</sup> The Assembly, in paragraph 2 of its resolution 55/153 of 12 December 2000, had taken note of the draft articles, the text of which had, in an innovative development, been annexed to the resolution; and had invited Governments to take into account, as appropriate, the provisions contained in the articles in dealing with issues of nationality of natural persons in relation to the succession of States. At its forty-third session, in 1991, the Commission had recommended the convening of an international conference to examine the draft articles concerning the jurisdictional immunities of States and their property and to conclude a convention on the subject.<sup>12</sup> That matter was still pending, and a working group on the topic would yet again be convened at its fifty-fourth session, in 2002.

<sup>7</sup> *Yearbook* . . . 1958, vol. II, p. 83, document A/3859, para. 22.

<sup>8</sup> *Yearbook* . . . 1978, vol. II (Part Two), para. 73.

<sup>9</sup> *Yearbook* . . . 1989, vol. II (Part Two), para. 66.

<sup>10</sup> General Assembly decision 50/416 of 11 December 1995.

<sup>11</sup> *Yearbook* . . . 1999, vol. II (Part Two), para. 44.

<sup>12</sup> *Yearbook* . . . 1991, vol. II (Part Two), para. 25.

39. There had been a good deal of discussion about the role of unratified codification conventions and that of declarations, and as to whether States should be given an opportunity to endorse a text proposed by the Commission. In his view, it was States that determined the law; the role of the Commission was to advise and to prepare drafts. In the past, no text of the Commission had ever been simply rubber-stamped by States; changes had invariably been introduced during the negotiation process at the codification conference, or, in some cases, in the Sixth Committee. Unratified conventions could play an important role, as was demonstrated by the 1969 Vienna Convention, which, although adopted in 1969, had entered into force only in 1980. Yet by the 1970s ICJ was already expressing views on whether particular articles and parts of the Convention reflected customary international law. Nonetheless, it was important to distinguish between unratified conventions and ill-conceived conventions, the distinction residing in the degree of unanimity attending the adoption of a given convention. In that regard, there was a significant difference between the 1978 Vienna Convention and the 1983 Vienna Convention.

40. The Commission was thus faced with two possibilities: the first would allow States some say concerning the text. In that case the most appropriate course would be to advise States to convene a codification conference—though not necessarily one preceded by a preparatory committee process, *pace* the Special Rapporteur, to judge from paragraph 24 of his fourth report. The preparatory process preceding the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court had been an exception, due to the unusual nature of the exercise, in which the international community had decided to establish a new institution, the International Criminal Court. In the past, codification of international law had not involved a preparatory process, except in the case of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter “the 1986 Vienna Convention”), for which a consultation process had been organized one year before the conference. Accordingly, a preparatory committee should be avoided and the conference itself should be attended by high-level legal advisers to States, rather than by legal advisers to permanent missions to the United Nations. His own clear preference was for a recommendation to convene a codification conference. Failing that, the Commission should recommend that the General Assembly take note of the text and commend the annexed draft articles to the attention of States; for it was unrealistic to recommend adoption of a declaration unaccompanied by a process of negotiation between States.

*Mr. Hafner (Vice-Chairman) took the Chair.*

41. Mr. SIMMA said that a majority of those opposed to a convention favoured instead whatever form was most likely to ensure that the draft articles remained intact. The best alternative was thus to recommend that the General Assembly simply take note of the text. The fate suffered by the draft articles on jurisdictional immunities of States and their property at the hands of the Assembly over the past 10 years offered a salutary lesson in that regard.

42. Mr. SEPÚLVEDA said that, should the Commission decide to recommend that the General Assembly simply take note of the draft articles, it was totally unrealistic to suppose that the Assembly would do so without first substantially amending them. Given their possible political effects, there was absolutely no chance that the draft articles would survive intact.

43. Mr. TOMKA said that recommending that the General Assembly take note of the draft articles was the only way to ensure that they would survive intact. A number of States had advocated that course of action precisely because they would not thereby be precluded from arguing in the future that the draft articles did not represent their own legal position, since they did not constitute part of customary international law.

44. Mr. ECONOMIDES said past experience showed that codification conferences tended to make very few changes to texts prepared by the Commission, as amendments needed to be voted through by a two-thirds majority, a majority it was virtually impossible to obtain. Accordingly, if the Commission wished to ensure that its text remained intact, a codification conference was the best way of securing that end. On the other hand, to propose that the General Assembly simply take note of a text that had occupied the Commission for the best part of 50 years would be to cast doubts on its validity. He entirely endorsed the arguments advanced by Mr. Sepúlveda.

45. Mr. GOCO, in reply to the observation by Mr. Tomka, said that “taking note” did not necessarily imply approval. Under article 23, paragraph 1 (b), of its statute, the Commission could recommend to the General Assembly “to take note of or adopt the report by resolution”. Those were two different alternatives. The Commission could recommend both, namely that the Assembly should not merely take note of its report, but also adopt it by a resolution.

46. Mr. ROSENSTOCK said that to dismiss the option of recommending that the General Assembly “take note” of the report was to misunderstand the unique role the Commission had played in developing and devising the structure of the law of State responsibility, and its highly innovative work on countermeasures. Properly handled, the procedure of “taking note” could concretize the interaction that had taken place between the Commission and the international community on the topic of State responsibility, and provide a solid foundation for its future development. Such interaction had been especially significant over the past 40 years. The “taking note” approach might therefore be seen as firming up the foundations on which any future development must be based. Any other approach might well undermine the Commission’s achievements and jeopardize the development of the law. In that sense, the topic of State responsibility differed from other topics. The practice of the 1960s and 1970s did not necessarily offer a guide to what the Assembly might do in the new millennium. If a preparatory committee were set up, there would be a risk of its undoing the work already done and destroying the foundation on which future progress would be built.

47. Mr. PELLET said the Commission appeared to have reached an impasse. Mr. Tomka had explained its options



very clearly, while eliminating the idea of a declaration, which seemed to combine all the disadvantages of a convention while offering none of the advantages. The extreme view, represented by Mr. Sepúlveda and supported by Mr. Economides, was the classic nineteenth century notion that treaties made the law; the countervailing view, and his own, was that law comprised an endless variety of elements and could progress, as Mr. Rosenstock had suggested, otherwise than by the mechanics of treaty-making. A reasonable solution, underpinned by article 23, paragraph 1 (b), of the statute of the Commission, would be to tell the General Assembly that the Commission had two possible outcomes to propose, each with its own advantages and disadvantages—namely, a convention on the topic or a decision by the Assembly to take note of the report—and ask the Assembly to decide between them. For that purpose, it would need to agree on the merits and drawbacks of the two alternatives, and he suggested that a small working group should take on the task of listing them for inclusion in the final recommendation.

48. Mr. LUKASHUK said he agreed with Mr. Pellet, who had expressed himself as a twenty-first century jurist. The Commission had a real opportunity for compromise at the current time, since both alternative views were well founded. He suggested that it could recommend to the General Assembly to examine the conclusions in its report and consider whether to hold a diplomatic conference to prepare a convention. That would enable the Assembly to resolve the issue itself, while avoiding the impression that the Commission had been unable to arrive at a concerted view.

49. Mr. SEPÚLVEDA said Mr. Pellet's reference to nineteenth century notions of the law reminded him of the chapter in Mexican history when French intervention had prompted Mexico to devise a set of basic tenets of State responsibility. To ensure that such experiences were not repeated it was essential to produce a legal text to enshrine State responsibilities and guarantee that they were fulfilled.

50. Mr. TOMKA, summing up the discussion, said there was a difference between taking note of the report and adopting it. Taking note did not imply approval or disapproval. If the General Assembly took note of the draft articles, they would remain a text produced by the Commission, to be drawn upon by ICJ and arbitral tribunals. However, if the draft articles were adopted by the Assembly, they would become an Assembly text, and the Commission could not expect them to remain unchanged in the process.

*Mr. Kabatsi resumed the Chair.*

51. Mr. Sreenivasa RAO said that the form of the draft articles was not merely a procedural question. The issue had gained its own momentum, a soundly argued case being made for each of the alternative courses of action. Those members of the Commission who favoured adoption of the draft in the form of a convention were saying that that was what a majority of States wanted. Moreover, in view of the length of time taken to finalize the draft articles, a recommendation to take note of them would affect the Commission's reputation as a responsible body

of experts. States, they said, needed a definitive text on so complex a topic, otherwise they would be tempted to pick and choose the interpretations they preferred, and there would be many disputes about the respective elements of customary law and progressive development. A convention was needed to address the current difficulties in international relations, in a world characterized by a high degree of integration. It had also been argued that, whatever the Commission's final recommendation, the General Assembly remained sovereign and would dispose of the text as it saw fit. The Commission's role was therefore to produce a balanced set of articles, which might well incorporate an element of progressive development. The notion that few States would choose to ratify a convention was not justified: the extent of ratification would depend on the efforts made during the treaty-making process to involve as many States as possible and to reconcile the interests involved, without imposing particular solutions. That would take time, but a convention concluded in haste would not achieve consensus anyway.

52. Those who opposed the convention format had argued that the draft articles stated conclusions on customary law and thus contained a significant element of codification that should be preserved and protected. Otherwise, they claimed, there would be a risk of confusion and of reverse codification, arising from disagreement on other parts of the draft that represented progressive development. It was also feared that any preparatory committee established by the General Assembly would be highly divisive and might attempt to rewrite the draft articles, a kind of reverse codification which would unsettle the expectations of the international community and do harm to the existing international legal order. According to that view, there was no prospect of a conference to adopt a convention. Even if a convention were to emerge, few States would ratify it, and those that did might enter reservations, which would render it less acceptable.

53. His conclusion was that the Commission should develop and finalize the draft to the best of its endeavours and invite the General Assembly to take note of it with a view to adopting it in the form of a convention as soon as it would be expedient to do so.

54. In the matter of dispute settlement, there was no need for an optional procedure. Countermeasures should not be allowed to be taken under the articles without first compelling the State intending to take them to offer the wrongdoing State a means of settlement of the dispute. Such a provision should be included in the draft, without prejudice to article 53.

55. Mr. GOCO said he agreed with the Special Rapporteur that, according to the comments and observations received from Governments, the text of the articles was generally acceptable and most of the comments and observations were on questions of drafting. The issues that had attracted most attention from Governments were countermeasures and the form of the draft articles. It was generally accepted that countermeasures against a State committing an internationally wrongful act were lawful. However, strong warnings had been issued against vagueness in making provision for countermeasures and about the risk of abuse. One Government had said that provisions on countermeasures must only be made for the sake

of resolving disputes and not in order to exacerbate them. Another had argued that only powerful States were in a position to take countermeasures against weaker ones, and another that the Commission should endeavour to restrain the use of countermeasures by prescribing limits to them, rather than leaving the field open to abuse.

56. Concerning the form of the draft articles, due weight should be given to the Special Rapporteur's view, expressed in paragraph 25 of his report, that a General Assembly resolution taking note of the text and commending it to Governments might be the most practical way forward. His own original view had been that the text should ideally take the form of a convention, because State responsibility covered the entire infrastructure of the international obligations of States. However, genuine concerns had been expressed about that option, such as the time taken to conclude a convention and the risk that there would be too few ratifications, or too many reservations, to render it effective. He shared those concerns, because of his own experience of working on the Preparatory Committee on the Establishment of an International Criminal Court, and of helping to draft the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, which was still not in force. In short, he would prefer the draft articles to take the form of a convention, but recognized the need for pragmatism.

57. A draft elaborated by the Commission that had formed the basis for the 1969 Vienna Convention defined a general multilateral treaty as a multilateral treaty which concerned general norms of international law and dealt with matters of general interest to States as a whole. Such treaties had been described as the nearest thing to general statutes in international law. That reasoning highlighted what a convention on State responsibility would be, namely a set of rules, or law-making. States might be very wary of approving a set of rules on the responsibility stemming from their relations with other States. On the other hand, as the Special Rapporteur said in paragraph 25 of his report, whatever the status of the text, it would be authoritative in the field it covered: it was already frequently cited. The Islamic Republic of Iran had made the pertinent comment that a statement of the law so prepared would be a useful instrument that would guide States in their relations with other States in respect of the commission of internationally wrongful acts, and that adoption of a declaration on State responsibility did not in any way preclude further development of the topic in the future, including the elaboration of a convention on State responsibility.<sup>13</sup> It was a position that seemed to strike a reasonable balance.

58. What was to be done about dispute settlement hinged on whether a binding convention was chosen as the form for the draft articles. Chapter VI of the Charter of the United Nations, on peaceful settlement of disputes, could become applicable in the event of a dispute between States parties, including on the interpretation of provisions on State responsibility. He wished to draw attention in that regard to Mr. He's suggestion that a ref-

erence to Chapter VI should be included in the draft. It might not be necessary to develop an entire procedure for dispute settlement: as indicated in paragraph 6 of the report, making provision for third-party settlement was contingent on the draft articles being envisaged as an international convention. Paragraphs 12 to 19 of the report cited certain difficulties with respect to dispute settlement, including the isolation of the domain of obligations under State responsibility as distinct from other fields. Accordingly, questions of dispute settlement in relation to State responsibility should be left to be resolved by existing provisions and procedures.

59. Mr. BAENA SOARES said that the Commission had arrived at the final chapter of a historic work whose completion could be greeted with satisfaction. The time had come to give form to that work. Under article 23 of its statute, the Commission was entitled to recommend one of four options to the General Assembly. The final decision would of course be taken by States, but nothing prevented the Commission from expressing its views regarding the form to be taken by the product of so many years of stimulating and creative work. Indeed, it would be strange for the Commission not to propose a framework for such an important piece of legal carpentry.

60. The options under article 23, paragraph 1, subparagraphs (a) and (d), namely, to take no action or to convoke a conference to conclude a convention, could be discarded, leaving a choice between adoption by a resolution and conclusion of a convention. He favoured the latter option and nothing he had heard from the other members of the Commission had made him change his mind. The authority behind the work done, the length of time spent on it and the importance of the topic all made the draft worthy of becoming a convention. Any other approach would be demeaning to the Commission's work. It should also be recalled that, on the topic on international liability, the Commission was working on the draft articles of a convention.

61. It might be thought that adopting the draft in a General Assembly resolution would make it easier to preserve the articles intact. In reality, however, there was no certainty that such would be the case. It was not for the Commission to determine what States could or should do. The most realistic expectation was that, irrespective of the form taken by the draft, States would give it meticulous consideration.

62. He believed there was a need to include in the draft articles provisions on dispute settlement, and all the more so if the draft was to take the form of a convention. In such an event, a new proposal for a more appropriate system for dispute settlement would have to be considered.

63. Mr. PAMBOU-TCHIVOUNDA said that in his fourth report the Special Rapporteur set out his views on controversial issues debated by Governments during the discussion of the draft articles in the Sixth Committee at the fifty-fifth session of the General Assembly. The report tended to recast the issues within the traditional parameters of State responsibility, thereby highlighting the aspect of progressive development of the law of international responsibility.

<sup>13</sup> See *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee, 15th meeting (A/C.6/55/SR.15)*, and corrigendum, para. 18.

64. In connection with countermeasures, such principles of international law as effectiveness, sovereignty, equality and peaceful settlement of disputes were called into question if an injured State was accorded the right to decide, independently or in concert with other States, on ways and means of gaining reparation for harm. He experienced great difficulty with the idea of endorsing a draft that claimed the status of legal provisions yet fell far short of being positive international law. How was it conceivable that a State allegedly responsible for injury should be obliged to accept that the injured State and its friends could automatically resort to ways and means of righting a wrong, without the responsible State being able to question at least the relevance or the nature of the new relationship linking it to the State which argued that its rights had been injured? Any draft that proposed to build a comprehensive regime around the notion of countermeasures yet refused to define them would be difficult to justify and should in any event comprise dispute settlement machinery for dealing with the disputes that would inevitably arise, particularly on the interpretation and application of the articles.

65. The draft adopted on first reading had sought to address such difficulties in Part Three. He did not agree with the Special Rapporteur's remark in paragraph 14 of the report that Part Three incorporated a standard formula.

66. The draft currently under consideration was sometimes more concise and more abstract than the draft adopted on first reading, but both suffered from a penury of lexical precision. Definitions of terms were scattered throughout the various articles, in a departure from the classic structure of multilateral treaties. If time allowed, a set of provisions bringing together the basic terminology on State responsibility could well be elaborated. If that had been done earlier, there would be no need at the current time to examine terms like "damage" and "injury", as the Special Rapporteur did in chapter II of his report.

67. The arguments developed in chapters III and IV of the report considerably broadened the approach to the topic, amounted to progressive development of international law, not just consignment to paper of customary rules, and highlighted the need for a mechanism, not only of dispute settlement, but of what he would call regulation, in order to meet the demands of the international community, a course that would virtually do away with the distinction drawn between primary and secondary obligations of responsibility and thereby warrant the inclusion in the draft of provisions on the maintenance of international public order (*ordre public*). The idea that general provisions based on the Charter of the United Nations should be incorporated in the articles was worthy of consideration, irrespective of the form to be adopted for the draft.

68. Governments were not in agreement on the question of the final form. He himself favoured the conclusion of a convention and endorsed the arguments already advanced by the proponents of that option. The Commission's work could be enshrined only in a text whose legal nature was in no way open to debate. To adopt any other packaging would be to devalue and weaken the text, which should be binding upon States in and of itself. Far from providing guidance for States, for which purpose resolutions

and declarations were perfectly well suited, the text must lay the foundations of international law on State responsibility in conformity with the relevant provisions of the Charter of the United Nations. The Commission should recommend that the General Assembly place State responsibility firmly within the international legal order. As for the dangers of reopening the debate, great-Power manoeuvring or failure to achieve the requisite number of ratifications, they were mere scarecrows being raised, perhaps to frighten the Commission.

*The meeting rose at 1.05 p.m.*

## 2672nd MEETING

*Thursday, 3 May 2001, at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

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

**State responsibility<sup>1</sup> (*continued*) (A/CN.4/513, sect. A, A/CN.4/515 and Add.1-3,<sup>2</sup> A/CN.4/517 and Add.1,<sup>3</sup> A/CN.4/L.602 and Corr.1 and Rev.1)**

[Agenda item 2]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. BROWNLIE said that, given the structure of the discussion, his comments would focus on the question of countermeasures. The source of the difficulties relating to that notion was often assumed to be the polarity of position between the powerful States and the less powerful, but that distinction did not really exist in practice, since less powerful States often resorted to various forms of countermeasures in the ordinary sense, as opposed to the meaning in article 54 (Countermeasures by States other

<sup>1</sup> For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook* . . . 2000, vol. II (Part Two), chap. IV, annex.

<sup>2</sup> Reproduced in *Yearbook* . . . 2001, vol. II (Part One).

<sup>3</sup> *Ibid.*

than the injured State). The real problem derived from the fact that, in terms of customary law, the regime of countermeasures was only partly developed and did not fit easily into the usual classification of *lex lata* and *lex ferenda*. The current version of the chapter on countermeasures (Part Two bis, chapter II) in a sense dealt with the modalities of a notion whose central element was not clearly defined. “Ordinary” countermeasures had at least four different purposes: to induce resort to a procedure of dispute settlement; in a generalized way, as a reprisal; as a deterrent and to induce abandonment of a policy; as a form of self-defence, an interim unilateral protection of the rights of the injured State. The Special Rapporteur had not taken a clear decision as to which purpose was to be legitimated and it would probably be an unusual form of self-help to bring about both cessation of the wrongful act and reparation without any dispute settlement procedure. The Special Rapporteur had rightly argued in respect of that notion that it was better to “cage the animal”, but only by carefully studying the animal’s features and behaviour could the dimensions (reversibility, proportionality, etc.) of its cage be designed.

2. Article 54, on “collective” countermeasures, was an entirely different subject. In paragraphs 386 to 406 of his third report,<sup>4</sup> the Special Rapporteur, describing State practice in the area, acknowledged that it concerned only a small number of mainly Western States, that it was highly selective, i.e. effective in some cases and merely verbal in others, and that it was not always officially designated as countermeasures. The Special Rapporteur nevertheless stressed that there was strong support for the view that a State injured by a breach of a multilateral obligation should not be left alone to seek redress for the breach. In reality, article 54 constituted neither the law nor its potential progressive development. Progressive development related to some existing foundations, but practice was inconsistent in the extreme. Faced with the same allegation, State A risked economic sanctions and even armed attack, whereas State B would not even have to accept the presence of observers. In addition to that inconsistent practice, there was no evidence of an *opinio juris* in the material. In any case, leaving aside practice, article 54 was flawed in other respects. First, it provided a superficial legitimacy for the bullying of small States on the claim that human rights must be respected. Although article 54 referred only to non-forcible countermeasures, it would install a “do-it-yourself” sanctions system that would threaten the security system based on Chapter VII of the Charter of the United Nations. It added to circumstances precluding wrongfulness a new category that sooner or later might extend to the use of force. Including article 54 in the chapter on “ordinary” countermeasures provided “collective” countermeasures with legitimacy by association, although in reality there was no real connection whatsoever. But the defects of article 54 did not invalidate the general treatment of the question of countermeasures in the draft and it should not be difficult to take moderating action, such as by producing a strengthened and more comprehensive version of article 23 (Countermeasures in respect of an internationally wrongful act), deleting article 54 and perhaps includ-

ing a savings clause instead. In reality, article 54 was not about countermeasures: it was about sanctions, it was incompatible with the Charter and it was neither *lex lata* nor *lex ferenda*. Perhaps a new category would need to be invented for it: *lex horrenda*.

3. Mr. ELARABY endorsed Mr. Brownlie’s remarks on article 54, the scope of which extended to questions which fell under Article 41 of the Charter of the United Nations while circumventing the security system which the latter had set up to safeguard the rights of all States. The fact that the use of force was not included in countermeasures left untouched the question of what was meant by force. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,<sup>5</sup> for example, had expanded the notion of force to include economic sanctions. Article 54 should be deleted.

4. Mr. SIMMA said that the condemnation of article 54 went too far. The provision was not supported by consistent practice, but that was the case for countermeasures in general. Likewise, it was an exercise in futility to demand an *opinio juris* on the question: clearly, the *opinio juris* of a State taking countermeasures could not be that of the target State. Regarding Mr. Brownlie’s characterization of article 54 as a “do-it-yourself” sanctions system, he said that there was not a single provision on countermeasures that was not governed by the “do-it-yourself” principle. As for Mr. Brownlie’s argument that article 54 would introduce a broad spectrum of economic countermeasures which would induce States to go further and use or threaten to use force, the effect might be the other way around. The example of Kosovo showed that a State, in that case the United Kingdom of Great Britain and Northern Ireland, could consider economic sanctions illegal and then resort to the use of force. Thus, legitimizing economic sanctions might have the effect of reducing the risk of a spillover into military sanctions. Lastly, it was not true that economic countermeasures, whether individual or collective, were in breach of the Charter of the United Nations.

5. Mr. BROWNLIE said that the fundamental point of his argument was that there was a qualitative distinction between “collective” countermeasures and bilateral or plurilateral countermeasures. The *casus belli* was not the same in each case. The question of ordinary countermeasures had been insufficiently developed, but had a degree of familiarity and was supported by some practice. It had been carefully examined by a major court of arbitration, as well as in the judgment of ICJ in the *Gabčíkovo-Nagymaros Project* case. As for “collective” countermeasures, that term was a neologism that designated a category which itself had had to be completely invented and the practice included in the Special Rapporteur’s third report was classified *ex post facto*. Thus, it would be very harmful to transpose the logic of ordinary countermeasures to “collective” countermeasures and vice versa.

6. Mr. ROSENSTOCK said that Mr. Brownlie’s analysis went too far as concerned countermeasures in general, but his comments on article 54 were unarguably accurate

<sup>4</sup> Yearbook . . . 2000, vol. II (Part One), document A/CN.4/507 and Add.1–4.

<sup>5</sup> See 2668th meeting, para. 9.

and useful. Article 54 did not take the Commission in a direction in which it needed to go or had any basis for going. Ordinary countermeasures existed and they were corroborated by important arbitral decisions. Article 54 was a separate issue and should be deleted.

7. Mr. PELLET said that, during the consideration of the Special Rapporteur's third report at the fifty-second session of the Commission, the term "collective" countermeasures had been harshly criticized and the Special Rapporteur had himself agreed that it was not very judicious. Article 54 dealt not with "collective" countermeasures, but with countermeasures that would be taken by States other than the injured State in the strict sense of the draft articles. Those countermeasures could be collective, just as ordinary countermeasures could be. If it was borne in mind that the term had been abandoned, it would help in understanding the real scope of article 54.

8. Mr. CRAWFORD (Special Rapporteur) said that article 54 covered two types of situation. One situation was where States other than the injured State took action with its permission and on its behalf in the context of a serious breach of international law, as had been done in the conflict over the Falkland Islands (Malvinas) or the case concerning *United States Diplomatic and Consular Staff in Tehran*. The other situation was one in which there might be no injured State within the meaning of the draft articles, such as genocide committed by a Government against its own people, where measures might be taken by other States to comply with an obligation to the international community. Thus, Mr. Pellet was right on the question of terminology, but, on the question of substance, Mr. Brownlie had raised a real problem, which was that the field was thoroughly undeveloped. Different inferences could be drawn from the Yugoslav experience which also showed that, very often in that type of intervention, the measures taken were condemned or legitimated retrospectively, depending on the results. Hence the extreme difficulty in defining the subject matter of article 54 in any detail. On the other hand, it was impossible to exclude the subject because it could not be categorically asserted that the States referred to in article 49 (Invocation of responsibility by States other than the injured State) could not take countermeasures. The question was whether the monopoly on the use of force of the collective security system of the United Nations also applied to other areas. Arguing that that was the case, as the United Kingdom had done—although it had apparently abandoned that view in that particular case—was a defensible position. As it could neither exclude the subject nor regulate it in detail, the Commission should err on the side of *lex lata* or a moderate progressive development.

9. Mr. LUKASHUK said that he endorsed the Special Rapporteur's comments on article 54. Cooperation by States on countermeasures was a growing practice and it did not seem possible to exclude it. Thus, the question was how to prepare relevant and judicious provisions on the subject.

10. Mr. YAMADA, referring to the three substantive issues identified by the Special Rapporteur in chapters II to IV of the fourth report (A/CN.4/517 and Add.1), said that the first had to do with terminology. There was some ambiguity, inconsistency and confusion in the use

of the terms "damage", "injury" and "injured State" in articles 31, 35 to 40, 43 and 49. In particular, the notion of "injured" in the expression "injured State" seemed to be much wider in scope than the notion of "injury" as defined in article 31. He trusted that those problems could be sorted out in the Drafting Committee.

11. Article 43 (The injured State) gave rise to two problems. First, the Special Rapporteur was wrong to reject the suggestion by several States—France, Mexico, Slovakia, the United Kingdom and others—that the phrase "international community as a whole" should be replaced by "international community of States as a whole". Certainly, the international community included entities other than States and a State could be responsible for a wrongful act not only towards other States, but also towards international organizations, non-governmental organizations and even individuals. However, the Commission was dealing only with State-to-State relations. The second problem related to article 43, subparagraph (b) (ii), which dealt with so-called "integral obligations" and which expanded unnecessarily the scope of the term "injured State". On several occasions, the Special Rapporteur had cited obligations deriving from disarmament treaties as examples of obligations falling into that category. However, agreements on disarmament and arms control were very special in nature and could not readily be governed by general rules. In that area, the central issue was compliance with obligations in order to preserve the totality of the arrangement. Major disarmament treaties and even the bilateral arms control agreements between the United States of America and the former Union of Soviet Socialist Republics had set up elaborate mechanisms for verifying compliance with obligations, including confidence-building measures and verification by technical means such as on-site inspections. Such arrangements were self-contained regimes in which the draft articles on State responsibility had no real role to play. The disarmament treaties were *lex specialis* in relation to the draft. As for the outer space treaties and the Antarctic Treaty, it was hard to see which central obligation in those treaties warranted the description "integral". He was therefore in favour of the deletion of article 43, subparagraph (b) (ii).

12. With regard to article 49, he said the question of the relationship between the responsible State and the injured State was the core issue in the codification of the regime of State responsibility. The question was thus what responsibility the injured State should bear to which State and what responsibility the injured State could invoke against which State. While recognizing that there were some obligations in the modern world whose fulfilment had to be guaranteed through the cooperation of all member States of the international community, he wondered whether that issue was really one to be covered within the framework of State responsibility. Was it an established rule of customary law that a State other than the injured State could claim reparation before an international court in the interest of an injured State, as article 49, paragraph 2 (b), seemed to imply? On reading paragraph 41 of the report, it appeared that the Special Rapporteur himself had serious doubts on that point. Moreover, article 49, paragraph 2, was closely linked to articles 41 (Application of this Chapter) and 54, with which he had serious problems. He was therefore for the deletion of article 49.

At the same time, as he did not reject the valuable opinion that there were certain circumstances in which action by a State other than the injured State could contribute to the re-establishment of the legality of the norms which had been breached and as he did not wish to close the door on any evolution which might take place in line with article 49, he thought the inclusion of a “without prejudice” clause might be desirable.

13. As to the question of serious breaches of essential obligations towards the international community as a whole in chapter III of Part Two, he was fully aware that article 41 was the product of a compromise, resulting from a protracted discussion of the former article 19 on international crimes. He did not deny the existence of such breaches, but, if the Commission singled them out, it must define their specific legal consequences, which must be different from those arising from “ordinary” breaches. Otherwise, the category of serious breaches would have no *raison d’être* in the regime of State responsibility. However, they did not appear to have any special legal consequences because the damages mentioned in article 42 (Consequences of serious breaches of obligations to the international community as a whole), paragraph 1, were not to be interpreted as “punitive damages”. Moreover, article 42, paragraph 2, placed an obligation on all other States not to recognize as lawful the situation created by the serious breach in question, not to render aid or assistance to the responsible State in maintaining the situation so created and to cooperate as far as possible to bring the breach to an end. Those were minimal obligations that were not specific to serious breaches. In that sense, article 42 did not offer sufficient grounds for keeping a separate article on serious breaches. Moreover, article 41 had an undesirable link with article 54, paragraph 2, which gave any State the right to resort to countermeasures. He would therefore urge the deletion of the whole of chapter III, but, to avoid prejudicing the development of rules on “serious breaches”, he was willing, in that case as well, to agree to the inclusion of a “without prejudice” clause.

14. The draft articles on countermeasures gave rise to many problems. First, in relation to article 50 (Object and limits of countermeasures), paragraph 1, inducing a State responsible for an internationally wrongful act to comply with its obligations was not the only purpose of countermeasures. Secondly, with regard to the proportionality of countermeasures in article 52 (Proportionality), it must be in line with the purpose of countermeasures. Thirdly, the procedural conditions in article 53 (Conditions relating to resort to countermeasures) for resorting to countermeasures were too strict. Fourthly, the “provisional and urgent” countermeasures in article 53, paragraph 3, might create a loophole. Lastly, and above all, he had a serious problem with the notion of collective countermeasures in article 54, paragraph 2, because like Mr. Brownlie, he believed that customary rules on countermeasures not involving the use of force had not been developed and were not yet ripe for codification. For all those reasons, he was in favour of the deletion of the whole of the chapter on countermeasures, namely, chapter II of Part Two bis, and the retention of article 23 in chapter V of Part One (Circumstances precluding wrongfulness).

15. He was convinced that, in its work on State responsibility, the Commission should focus on the codification

of existing rules, State practice and doctrine. He was fully aware that the progressive development of international law was also part of its mandate, but, in setting out *lex ferenda*, it should be careful not to step beyond the limit of progressive development into the area of excessive legislation.

16. He was by no means a “destructionist” and he assured the Commission, and the Special Rapporteur in particular, that he would cooperate fully in working out a consensus text.

17. Mr. GOCO said that he was concerned about Mr. Yamada’s comments, in the context of the regime of countermeasures, on the *locus standi* of a State other than the injured State. He wondered whether a regional organization could take part in countermeasures, or initiate them, if one of its members was injured by an internationally wrongful act.

18. Mr. YAMADA said that everything depended on whether the organization in question had a joint defence agreement. Such an agreement would be *lex specialis*.

19. Mr. SIMMA, commenting briefly on the draft articles as a whole, said that he was categorically opposed to any bending of the criteria for deciding on aid or assistance for the commission of a wrongful act: the criterion of knowing the circumstances of the wrongful act must be retained. In article 30 (Cessation and non-repetition), subparagraph (b) on assurances and guarantees of non-repetition should also be retained. Like the Government of the United Kingdom, he thought that the Commission should spell out what was meant by the phrase “invocation of the responsibility of a State”.

20. Turning to the issues raised in the fourth report, and beginning with the relationship between the concepts of “damage” and “injury”, he said that the problem could not be solved simply by replacing the words “consists of” in the English version of article 31, paragraph 2, by the word “includes”. The problem required more thought. According to the current wording of article 31, any and every injury could and should be made good by reparation, which would necessarily take the form of restitution, compensation or satisfaction. As the Government of Japan had rightly noted in the comments and observations received from Governments (A/CN.4/515 and Add.1–3) however, it might be that the only kinds of reparation available in the case of an integral obligation were cessation and non-repetition. He had no wish to drop the category of “integral obligations” from the draft articles, but, purely for the sake of logic, to revise the concept of “injury”. Accordingly, as proposed by the Government of Japan in its option 1, the word “injury” in article 31, paragraph 1, should be replaced by the words “damage, whether material or moral” and paragraph 2 should be deleted altogether.

21. With regard to the relationship between article 43 and article 49, he did not agree with Mr. Yamada that the regimes introduced by disarmament and other arms control treaties could be described as “self-contained”. The procedures for execution established in those treaties did not of themselves rule out recourse to treaty law or to the law on State responsibility if the system collapsed or if

there was a material breach. In that connection, he still believed that the Special Rapporteur had been too conciliatory in agreeing that the word “or” in article 43, subparagraph (b) (ii), should be replaced by the word “and” and he fully agreed with the comments Mr. Gaja had made on that point (2671st meeting). As to the proposal which Mr. Gaja had made at that time and which was also the position of the Government of Japan, namely, that article 43, subparagraph (b) (ii), should be deleted in view of what was said in article 49, paragraph 1, he believed that that would be a systematic rupture. Article 49 was entitled “Invocation of responsibility by States other than the injured State”; the category of uninjured States could not be made to include States which were in fact injured. He was therefore in favour of adopting the suggestion of the French Government and transposing article 49, paragraph 1 (a), to article 43 as a new subparagraph (c). That would make it possible to take account of violations of human rights treaties in the highly likely event that article 54 was deleted.

22. Some of the elements of chapter III of Part Two (Serious breaches of essential obligations to the international community) were highly problematic, such as the definition, the proportionality of damages, the obligations incumbent on all States, the invocation of responsibility by the specially affected State and all other States and the countermeasures which the specially affected State and all other States were authorized to take. The question was how to preserve the essence of that chapter without creating too much resistance. If chapter III were deleted, that would not do away with the rules applicable to the invocation of responsibility in the case of serious breaches, the possibility of countermeasures being taken by specially affected and seriously affected States and, even if article 54 were retained, the possibility for all States to take countermeasures. That would, however, do away with the definition—which would not be so serious and would be remedied by adopting the suggestion of the French Government for article 49—and with the reference to damages, which would be no bad thing, since it was vague and misleading. In fact, appropriate saving clauses could usefully replace chapter III.

23. On the question of countermeasures, he referred to the solutions proposed by the Special Rapporteur in paragraph 60 of his fourth report and explained that he was in favour of the second one, namely, the retention of chapter II of Part Two bis with some drafting improvements, which might go quite far, but would not change the system as a whole. For example, on the proportionality criterion and article 53, it would be useful to adopt the suggestions of the United States Government contained in the comments and observations received from Governments.

24. Lastly, although he would certainly prefer to keep article 54, he also would not object to its deletion.

25. Mr. PAMBOU-TCHIVOUNDA, referring to the comments by Mr. Brownlie on article 54 and those by Mr. Yamada on article 49, said that he wondered whether the Drafting Committee of which they were both members could consider the two articles together, not so much with a view to deleting them as to making them intelligible. There were undeniably problems of terminology involved that should not be ignored.

26. Moreover, to delete chapter III, as Mr. Yamada had suggested, would mean going backwards and shutting one's eyes to serious breaches, which were not the same as “customary”, “ordinary” or “usual” breaches. He was therefore against the deletion of chapter III, an idea that it would be difficult to defend to States. He suggested that Mr. Yamada should instead make a proposal taking account of all the concerns expressed and giving greater weight to article 42.

27. Mr. CRAWFORD (Special Rapporteur) said that he would not comment on Mr. Simma's remarks about injury and damage because that question could be discussed in the Drafting Committee.

28. He agreed that the wording of article 43 could be improved and that it was necessary to be more specific in defining the category of integral obligations, but he was strongly opposed to the inclusion of article 49, paragraph 1 (a), in article 43. He thought that disarmament treaties might in some respects be *lex specialis*, but not necessarily in all cases. But where the Antarctic Treaty was concerned, for example, the “fundamental obligation” in article IV actually consisted of the obligation on the part of States not to claim territorial sovereignty. The reason why States parties had refrained from doing so was that they had all agreed not to. If a State claimed territorial sovereignty, the other parties to the Treaty would be individually injured because they would have refrained from doing something they could otherwise have done. That was the real meaning of the “integral obligation” provided for in article 60 of the 1969 Vienna Convention. The concept should therefore find a place in article 43.

29. On the other hand, the obligation established for the protection of a collective interest, as dealt with in article 49, had the same general character as obligations owed to the international community as a whole. The only difference was that, in the former case, the obligation would not be universal but might arise, e.g. towards certain States in a given region. There was a tendency to forget that, in the second phase of the *South West Africa* case, the obligation in question was not an obligation towards the international community as a whole, but towards the Members of the League of Nations. It was covered by the concept of the protection of a collective interest, as expressed in article 49.

30. The question whether a threshold should be set in article 49 might be open for discussion. However, the two situations covered in article 49 were essentially the same. The obligations imposed by regional human rights instruments were caught by paragraph 1 (a), whereas human rights obligations towards the international community corresponded to paragraph 1 (b). It would therefore be a mistake to separate the two and even more regrettable to do so with the idea of preserving the right of States to take countermeasures in the event of a breach of the obligations concerned, as Mr. Simma seemed to have in mind.

31. It might well be that article 54 could not survive in its present form, which was causing a lot of difficulty and was of concern not only to States which often took countermeasures, but also to those which might perceive themselves as targets of countermeasures. In any event

and in the light of the discussions, if article 54 was deleted, it would not be replaced by a prohibition against resorting to countermeasures. Mr. Yamada had proposed inserting in its place a general saving clause. However, he hoped that the members of the Commission would not take advantage of their concerns about article 54 to request changes to chapter I of Part Two bis.

32. He was pleased that, apart from a few problems of terminology, the Commission had managed to complete articles 43 and 49 at its previous session. The distinctions in those articles had been broadly supported by many States and had not given rise to any particular criticism. The Commission must therefore seek to preserve the distinction already made, whatever happened to the chapter on countermeasures.

33. Mr. SIMMA said he could agree that the distinction between articles 43 and 49 should be retained. He was merely proposing that article 43 should include one of the categories of obligations that was currently contained in article 49. From both a theoretical and a legal point of view, moreover, France's view that article 49, paragraph 1 (a), should be placed after article 43, subparagraphs (a) and (b), was entirely tenable. As France had written in its observations on the subject, it appeared that a breach of an obligation which protected a collective interest injured each of the States belonging to the whole group of States for whose benefit the obligation had been introduced, so that each of them had more than a mere legal interest in ensuring the performance of the obligation.

34. Mr. ECONOMIDES, referring to the comments by Mr. Simma and Mr. Crawford, said that, although the obligation specified in article 49, paragraph 1 (a), was a case of injury which could be placed in article 43, the same should apply, a fortiori, to the obligation referred to in paragraph 1 (b), but that would mean that the Commission was going back to the concept of an international crime, in which all States were regarded as being injured States. Consequently, if the Commission wanted to preserve the balance it had achieved at the previous session and avoid taking a step backwards, it must keep to the articles it had already prepared. Moreover, he could not agree that, in the event of a breach of a disarmament treaty, all States would be regarded as injured, whereas, in the case of serious breaches contrary to the interest of the international community as a whole, all States would have merely a legal interest to act. He hoped the Commission would proceed with caution on the points he had mentioned.

35. As to the other questions discussed in the Special Rapporteur's fourth report, he believed, first, that the concepts of "damage" and "injury" did not give rise to any great difficulty. It could be explained in the commentary that, in certain cases, damage was what incurred international responsibility, while, in other cases, that condition was not required, since State responsibility existed independently of damage of any kind and took the form not of reparation, but of the cessation of the internationally wrongful act or perhaps of the offer of assurances and guarantees of non-repetition and sometimes of satisfaction. As the Special Rapporteur had said, everything depended on the primary rule concerned. The Commission nevertheless had a duty to place the bar as low as

possible in order to cover all cases and that was what it had done with article 1 (Responsibility of a State for its internationally wrongful acts).

36. On that first question, he did not agree with the Special Rapporteur's statement, in paragraph 32 of his report, that assurances and guarantees of non-repetition were exceptional remedies. What could be said with certainty was that they were not automatic and depended on the circumstances of each breach. Obviously, the circumstances could not be foreseen in advance, so that the remedies might in some cases be exceptional and, in others, might be applied more often. Article 31, paragraph 2, should therefore read: "Injury consists of any damage, whether material or moral, caused by the internationally wrongful act of a State".

37. The distinction between the injured State and other States entitled to invoke responsibility was crucial to the draft articles and represented the basis of the compromise achieved at the previous session. The same was all the more true of the concept of serious breaches of essential obligations owed to the international community as a whole. Unlike some members of the Commission, he believed chapter III of Part Two was vital to the overall balance of the draft articles.

38. He also agreed with the Special Rapporteur that the expression "the international community as a whole" was preferable to "the international community of States as a whole", for the reasons explained in the report. Article 42, paragraph 1, was extremely useful. The damages referred to in it were not really a form of reparation, but they reflected the gravity of the breach, which must always be a serious one within the meaning of article 41. To strengthen the provision, the words "may involve" should at least be replaced by the word "involve" and, if that term was not accepted, the words "where appropriate" could be added.

39. It should be made clear in the text of article 42, paragraph 2, that the list was only an indicative one and paragraph 2 (c) should be developed and explained. The words "as far as possible" should be deleted.

40. With regard to countermeasures, he was in favour of retaining chapter II of Part Two bis, subject to some substantive improvements. First, in article 53, priority should be given in all cases to the settlement of disputes. The current distinction between provisional and urgent countermeasures, on the one hand, and other countermeasures, on the other, was not only vague and irrelevant from a legal point of view, but, above all, it could lead to the gravest abuses. If the settlement of disputes was to take priority over countermeasures, however, a dispute settlement mechanism must be specially provided for countermeasures and it must be a flexible and extremely swift procedure, similar to the system used within States for interim measures of protection. If it was difficult to devise such a system at the current time, the dispute settlement system provided for in Part Three of the draft adopted on first reading<sup>6</sup> should be retained, with improvements to the parts that had attracted criticism. A working group or the Drafting Committee could be authorized

<sup>6</sup> See 2665th meeting, footnote 5.



to undertake that task. There was also no doubt that the intervention of a neutral third party acting in good faith was to be preferred to the archaic system by which the parties settled matters between themselves and which obviously favoured the strong over the weak.

41. The second improvement related to article 54 dealing with countermeasures by “States other than the injured State”. That article was the cause of some concerns, which were largely legitimate. However, it was obvious that it was an extremely useful, indeed a necessary provision, especially for the serious breaches dealt with in article 41. For those reasons, he was in favour of retaining article 54, but increasing the guarantees against possible abuse. For that purpose, preference should be given as far as possible to action that could be taken by organized international society rather than to countermeasures that could be taken individually by one or more States. A fourth paragraph should therefore be added to article 54, possibly reading: “The foregoing paragraphs do not apply where the organized international community itself takes action or authorizes the taking of action against the responsible State.”

42. He had submitted some proposals to the Drafting Committee for drafting amendments to Part One of the draft, relating mainly to the French text. However, he also had a substantive proposal to make on article 20 (Consent), which dealt with consent of a State as a circumstance precluding wrongfulness. In his view, that article should include an explicit limitation for obligations arising from peremptory norms of general international law. A State should not be able to give its consent to another State for the latter to commit a grave breach covered by article 41 and, if it did so, both it and the State committing the breach should be held entirely responsible for the breach.

43. Mr. PELLET said that he was in favour of referring Part One of the draft, except article 23, to the Drafting Committee for a final *toilettage*, since the Committee had already provisionally adopted the text on second reading. The draft, which the Commission had included in its report, had drawn criticism from Governments, most of it fairly mild, with the possible exception of Japan and France, although some comments, nearly all of them from the same political or ideological quarters, occasionally bordered on intimidation. The Commission should not let itself be intimidated, however. True, it was at the service of the international community, which was made up primarily of States, and it was a subsidiary body of the General Assembly, which was made up exclusively of States. But it was not at the service of a handful of States and its job was not to make States happy. Rather, it was to codify international law and to develop it progressively in the light of recent trends in international society and it therefore had to propose coherent and balanced drafts. The final decision obviously lay with States, but the Commission must not bend to their wishes. He was convinced that the draft provisionally adopted by the Drafting Committee on second reading was fully in keeping with the scientific requirements that must be the Commission’s only guidelines and that the temptation to overhaul a text adopted after such in-depth discussion should be resisted.

44. In chapter II of his report, the Special Rapporteur went into a long disquisition on the distinction to be drawn between “damage” and “injury”. That really related only to the English text, since the problem apparently arose neither in French nor in Spanish, and the English text could only benefit from being aligned with the Spanish and French versions of draft article 31, paragraph 2. Whatever the distinction between those two terms in certain domestic legal systems might be, it had no place in international law, if only because there was no correlation among national legal systems and it was therefore impossible to derive general principles of law from them. In the absence of established practice, reference could also not be made to customary rules. He believed that it would have been sufficient, in article 31, paragraph 2, to say “Injury [or damage] may be material or moral”, but he could also go along with Mr. Simma’s proposal. To his mind, the problem was a non-issue and, if there was any real difficulty in English, it should be solved by the Commission’s English-speaking members. In any event, in French the words *dommage* and *préjudice* referred to the same thing.

45. The problems raised by the Special Rapporteur in relation to injured States and the possibilities that might be available to States that were not injured were more serious. The distinction between injured States and States that were not strictly speaking injured, but were nevertheless entitled to react to an internationally wrongful act was one of the major achievements of the draft adopted on second reading. In that connection, he noted that the English word “entitled” would be better translated into French by the words *en droit* than by the term *habilité*. The major contribution of the draft provisionally adopted by the Drafting Committee lay in the recognition of the capacity to respond of States which were not directly injured by an internationally wrongful act, but which nevertheless had a legally protected interest in responding as members of the international community. Under article 49, paragraph 1 (a), and article 54, paragraph 1, that capacity was also available to the member States of a more restricted group, some of whose interests were collectively protected. In contrast to what the Special Rapporteur had written in the footnote to paragraph 37 of his report, he did not think that the words “group of States” should be replaced by the words “number of States”. What mattered was precisely the collective dimension, which was well conveyed by the word “group” and would be blurred by the proposed change. It was the collective aspect that anchored the draft in the twenty-first century and broke with nineteenth-century international law. Articles 41, 42, 49 and 54 reflected the transition from an international society made up of the simple juxtaposition of “supremely sovereign” States to a still embryonic community that transcended national egotism in the interests of shared values. It was understandable that certain States might not view that transition favourably, but the Commission was meant to be developing international law progressively. The disappearance of the provisions mentioned would put an end to such development once and for all and the Commission would then no longer be carrying out the task entrusted to it, namely, to promote the advancement of international law, not to obstruct it. That did not mean that the draft adopted provisionally could not be amended and improved. Mr. Gaja and

Mr. Yamada had put forward some interesting arguments on article 43, subparagraph (b), for example. Perhaps subparagraph (b) should be deleted and a reference to the issue should be included in the commentary or perhaps it should be separated from subparagraph (a) for the sake of simplicity and clarity. He even wondered whether article 49, paragraph 1 (a), could not stand on its own and considered that the rationale put forward by France warranted consideration. He was, however, very much opposed to any “butchering” of article 49, which he saw as a key progressive development component of the draft. In particular, he was adamantly opposed to the deletion of article 49, paragraph 1 (b), as suggested by the Special Rapporteur in paragraph 41 of his report, if only because the injured State might be incapable of responding on its own, as was the case when it was the victim of aggression on the part of an invading State. He nonetheless agreed in general terms with the Special Rapporteur that article 49 achieved a certain balance—and not only *de lege ferenda*—between the collective interest in compliance with basic community values and the countervailing interest in not encouraging the proliferation of disputes and ensuring the certainty of the law.

46. With regard to serious breaches of essential obligations to the international community as a whole, there was nothing surprising about the list of countries opposed to the retention of chapter III (France, Japan, the United Kingdom and the United States). Article 41, which the Drafting Committee at the previous session of the Commission should have indicated was derived from former article 19, and article 42 were, after all, haunted by the ghost of international crimes, as were other draft articles. That was the very essence, the crux of the “communitarianization” of international law. The unenthusiastic States were right to point out that the legal regime for such serious breaches was a disappointment. It must be acknowledged that serious breaches did not yet entail very many specific consequences, but the presence of the provisions was absolutely indispensable in order to leave the door open to future progress. Despite what the Special Rapporteur said in paragraph 47 of his report, those consequences, namely, the obligations not to recognize as lawful the situation created by an aggression, not to render assistance to an apartheid regime and to cooperate in bringing genocide to an end, were not *de lege ferenda*, but well and truly reflected *lex lata*. The only debatable point was perhaps the damages that corresponded to breaches of differing degrees of gravity. The idea of punitive damages was not entirely unknown in traditional international law and was worthy of including in respect of serious breaches of international obligations to the international community. All human rights violations did not fall under chapter III; only certain serious violations of fundamental human rights did. The Special Rapporteur stipulated in his report that punitive damages were not involved, but it was the nature of all damages, irrespective of the obligation breached, to correspond to the gravity, if not of the breach, at least of the injury. That was perhaps the subtle distinction that justified the provision. If so, it should be clearly explained in the commentary.

47. He remained of the view, however, that the consequences of serious breaches were infinitely greater than

those set out in article 42 and he regretted the fact that the comments he had made on the subject at the fifty-second session had not been taken into account. Among the consequences that should be included in the draft were, firstly, the general consequence set out in the dictum of ICJ in the *Barcelona Traction* case, namely, “In view of the importance of the rights involved, all States can be held to have a legal interest in their protection” [para. 33]: the possibility of an *actio popularis*. It might be true that article 49 partially illustrated that idea, but it should be pointed out expressly in the commentary at least that, in such cases, the possibility of an *actio popularis* remained open. The second consequence was that the situation created by the breach could not be recognized and, in addition, the victim could not waive his right to demand reparation. Thirdly, there was the “transparency” of the State. The criminal responsibility of Governments could be invoked directly in the case of serious breaches of essential obligations to the international community. That possibility, which was a derogation from ordinary law, could be explained only by the gravity of the breach and the essential nature of the obligation breached. Fourthly, consideration should be given to the effect of the specific nature of such breaches on circumstances precluding wrongfulness. The comments made by Mr. Economides on article 20 went in the right direction on that point. *Force majeure* and state of necessity could never expunge or legally justify an act of genocide or aggression or the suppression by armed force of the right of peoples to self-determination.

48. As to the definition of serious breaches, the one proposed in article 41 was not as vague as had been said. It was certainly more precise than the definition of crimes which had been given in former article 19 and which had been perfectly adequate. Nevertheless, the relationship between fundamental interests, essential interests and collective interests should be clarified and the terminology harmonized to the extent possible. The deletion of the phrase “essential for the protection of its fundamental interests” in article 41, paragraph 1, mentioned by the Special Rapporteur in paragraph 50 of his report, would make the definition less precise.

49. Clearly, one of the essential consequences of serious breaches of essential obligations to the international community as a whole related to the capacity of all States to respond to such breaches, in other words, to take countermeasures. Article 54, though not very bold, was thus crucial to the balance of the draft and paragraph 2, in particular, was vital. Without it, if a State exterminated half its population, for example, other States would be powerless, since they would not be directly injured and the United Nations could not be called in, for two reasons. First, the Commission was codifying the law of international responsibility, not the law of the Charter of the United Nations or peacekeeping. Secondly, if the State in question was one of the five members of the Security Council or one of their protégés, genocide might not be prevented. Some would say that that would pave the way for intervention in the internal affairs of States, but genocide could not be considered an internal affair. According to article 54, paragraph 3, the taking of countermeasures under that article was subordinated to the general restrictions on the right to take counter-

measures and, in particular, to the conditions outlined in article 51 (Obligations not subject to countermeasures), which clearly included the obligation to refrain from the threat or use of force as embodied in the Charter. For cases other than serious breaches of essential obligations to the international community, which were exceptional situations, he would continue to welcome all proposals aimed at limiting recourse to countermeasures, but he was opposed, and firmly opposed, for legal and practical reasons, to the inclusion of such provisions in article 23. Their inclusion would be illogical, for countermeasures were in reality the consequence of an internationally wrongful act and therefore properly came within chapter III, not within “circumstances precluding wrongfulness”, strictly speaking. What constituted the circumstance was the internationally wrongful act to which the measures responded, not the measures themselves. Incorporation in article 23 could also not be envisaged for practical reasons, for the article would be far too long.

50. The list in article 51 could be considerably simplified, as proposed by the Special Rapporteur. Article 53 represented a balanced and entirely satisfying compromise and any amendment other than drafting changes was certain to destroy the balance. Lastly, unlike Mr. Brownlie, he thought that article 50 clearly identified the purpose of countermeasures.

51. Mr. LUKASHUK said that Part One, chapter IV (Responsibility of a State in respect of the act of another State), raised a number of questions. Many States had criticized articles 16 to 18, specifically calling for the deletion of the phrase “with knowledge of the circumstances”.

52. According to article 16 (Aid or assistance in the commission of an internationally wrongful act), a State which aided or assisted another State in the commission of an internationally wrongful act by the latter was internationally responsible for doing so only if it infringed an obligation that was incumbent on it as well. That was a typically private-law approach to responsibility. If an entity, while assisting another entity, breached the obligations stemming from a contract concluded with a third party, it was not considered to be liable. Even in private law, however, such acts were not deemed to be acts of good faith, something that would be all the more unacceptable in public law. The specific nature of international law and international responsibility certainly had to be borne in mind. Many States had pointed that out in the Sixth Committee, stating that the responsibility of States under international law had a *sui generis* quality and was neither civil nor criminal. It was on that basis that several States, including Israel, had called for the deletion of the provision that the obligation breached must also be binding upon the State that provided assistance.

53. The provisions cited ran counter to the principles of good faith, whose importance as a principle of positive law had been underlined both in the 1969 Vienna Convention and by ICJ. According to article 16, a State which aided or assisted another State in the commission of an internationally wrongful act was not responsible for doing so if the act would not have been internationally wrongful had it committed it itself. That provision essentially legalized aid or assistance provided with the intention of infringing

international law. The Special Rapporteur had wrongly referred to articles 34 and 35 of the Convention in that connection. True, those articles provided that a treaty was not binding on third States, but that did not mean that a third State had the right to assist another State in the commission of a breach of the Convention. Acts committed in bad faith were contrary to the Convention.

54. The CHAIRMAN said that, if he heard no objection, he would take it that the members of the Commission wished to refer draft articles 1 to 22 and 24 to 27, contained in Part One, to the Drafting Committee.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

## 2673rd MEETING

*Friday, 4 May 2001, at 10.10 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

**State responsibility<sup>1</sup> (continued) (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,<sup>2</sup> A/CN.4/517 and Add.1,<sup>3</sup> A/CN.4/L.602 and Corr.1 and Rev.1)**

[Agenda item 2]

<sup>1</sup> For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook* . . . 2000, vol. II (Part Two), chap. IV, annex.

<sup>2</sup> Reproduced in *Yearbook* . . . 2001, vol. II (Part One).

<sup>3</sup> *Ibid.*

FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

1. Mr. PAMBOU-TCHIVOUNDA, responding to a statement made by Mr. Pellet (2672nd meeting), said he had been taken aback by his desire to expand the consequences arising under article 42 (Consequences of serious breaches of obligations to the international community as a whole). One of the consequences was *actio popularis*, which would certainly influence one's conduct before the particular court. Problems could arise in terms of establishing jurisdiction. Which court would it be in the case of a serious breach?

2. Mr. Pellet had referred to the transparency of the State and the criminal responsibility of leaders, citing the Hutu-Tutsi conflict. He himself was concerned about a possible blurring of the distinction between the international responsibility addressed in the draft articles and responsibility for crimes against the peace and security of mankind, for which the Rome Statute of the International Criminal Court had been elaborated

3. Mr. PELLET said that, with regard to *actio popularis*, he had merely wished to suggest that, if a serious breach of an obligation to the international community as a whole was committed, any international court that might have jurisdiction could not declare it did not have jurisdiction simply because the wrongdoing State contended that the claimant State had no grounds to proceed. The need for a jurisdictional link had been laid down by ICJ in the *Barcelona Traction* case. There was no need for a chapter on dispute settlement, which was a jurisdictional consequence, not a procedural one.

4. With regard to transparency, when a State committed an internationally wrongful act, in principle its leaders had immunity, the State serving as a screen between its officials and international law. But in the case of a serious breach of an essential obligation to the international community, the screen fell away and officials could be brought before international courts or tried by domestic courts, as in the *Pinochet* case. The reason why officials could in exceptional cases be prosecuted for acts they had committed in their official capacity had to be explained, and the only possible explanation was that the acts were exceptionally serious ones—what were, at the current time, called serious breaches of essential obligations to the international community as a whole. It was a necessary explanation of situations that had actually already occurred, not an academic invention, and he found it unfortunate that such genuine twenty-first century law was not included in the draft.

5. Mr. HERDOCIA SACASA said he fully endorsed Mr. Pellet's defence of Part Two, chapter III (Serious breaches of essential obligations to the international community). Little emphasis had been placed on those provisions, which accounted for the great value of chapter III for human rights, in the best spirit of Article 55 of the Charter of the United Nations and, specifically, in the context of article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. As pointed out in paragraph 47 of the fourth report (A/CN.4/517 and

Add.1), chapter III had special significance in the context of forcible denial of the right to self-determination or in the cases of enforced disappearance referred to in General Assembly resolution 47/133 of 18 December 1992 as acts that constituted a grave and flagrant violation of human rights and fundamental freedoms. The Commission must not underestimate the great contribution of chapter III to and support for human rights.

6. Mr. ROSENSTOCK said it was one thing to acknowledge or build upon the individual criminal responsibility of specific persons, but quite a different thing to invent the notion of qualitative distinctions with regard to the responsibility of States. There was no foundation in the responsibility of States for such distinctions. It was important for the Commission to bear that in mind.

7. Mr. CRAWFORD (Special Rapporteur) said he entirely agreed with Mr. Pellet's points based on the *Barcelona Traction* case but thought they were covered in article 49 (Invocation of responsibility by States other than the injured State). On the transparency of the State, the consequences of the attribution to the State of acts such as genocide or aggression could well go beyond normal principles of responsibility, but article 42, paragraph 3, incorporated a reservation concerning such consequences. It was wrong, under normal principles, to attach individual criminal responsibility to the responsibility of the State. Not since Nuremberg had it been regarded as a defence that an international crime had been committed on a State's orders. The sole exception, and it was a partial one, was the application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, where it was necessary to show that the person charged had committed torture in his or her official capacity.

8. Mr. DUGARD said that, as far as serious breaches were concerned, he agreed with the Special Rapporteur that articles 41 (Application of this Chapter) and 42 should be retained, though not necessarily in their present form, as they did indeed require some polishing. He disagreed, however, with those who suggested that the language of those articles was too vague. It was the broad, majestic type of language that one found in national bills of rights such as that of the United States of America and there was nothing wrong with it as a vehicle for dealing with an important principle.

9. The Special Rapporteur had rather modestly suggested that States were fairly evenly divided on whether to retain articles 41 and 42, but his own count showed that, while a number of powerful States were opposed, the majority favoured retention.

10. His main reason for advocating articles 41 and 42, however, was that it would be a retrograde step to tamper with or delete them. The Commission was at the current time in the same position as at the eighteenth session, when it had decided to include article 50, on *jus cogens*, in its draft articles on the law of treaties. In its commentary to the article, it had said:

The emergence of rules having the character of *jus cogens* is comparatively recent, while international law is in the process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of the rule to be worked out in State practice and in the jurisprudence of international tribunals.<sup>4</sup>

The Commission had resisted proposals that it give examples of *jus cogens* norms, first, because that might lead to problems in respect of those norms that were not expressly mentioned, and secondly, because it would take the Commission beyond the subject of the law of treaties.

11. The Commission had been bold in taking that stance: the concept of *jus cogens* had been in its infancy and there had been little doctrine, no State practice and no judicial decisions. Almost simultaneously with that decision, ICJ had handed down its extraordinary rulings in the *South West Africa* cases which had directly refuted the notion of obligations *erga omnes* and by implication had denounced its twin brother, *jus cogens*. In the light of the strong Japanese opposition to articles 41 and 42, it was interesting to recall that the Japanese judge on the Court had written a strong dissent, which to some extent had inspired the whole doctrine of obligations *erga omnes*.

12. Today, the Commission was called upon to behave much less boldly. It was simply asked to codify the concept of obligations *erga omnes* within the framework of the secondary rules of State responsibility. That was not particularly innovative and lay somewhere between codification and cautious progressive development. The concept had been endorsed by ICJ in the *Barcelona Traction* case, in which it had gone out of its way, in an *obiter dictum*, to repudiate the judgment in the *South West Africa* cases. The notion had been reaffirmed elsewhere, notably in the *East Timor* case. There was thus judicial opinion in support of the action by the Commission.

13. As far as State practice was concerned, developments in the field of international criminal law made it clear that international criminal responsibility was engaged when an individual committed an internationally wrongful act constituting a serious breach by a State of an obligation owed to the international community: acts such as genocide, crimes against humanity, war crimes, torture or apartheid. If international law had developed sufficiently to recognize the criminal responsibility of the individual under international law, surely it had developed sufficiently to recognize the delictual, or civil, responsibility of the State for conduct of such a kind. In the evolution of the law, delictual responsibility normally preceded criminal responsibility.

14. It was difficult to follow the arguments of the United States on that point. It had declared that there were no qualitative distinctions between wrongful acts, but how could that be reconciled with the dictum in the *Barcelona Traction* case, namely that an essential distinction should be drawn between the State's obligations towards the international community as a whole in cases like aggression, genocide, slavery, torture and crimes against humanity, and cases arising vis-à-vis another State in the

field of diplomatic protection, such as denial of justice to a national or expropriation of property?

15. The United States conceded that there were violations of international obligations that could constitute serious breaches but argued that they should be dealt with by international criminal law. Everyone agreed that State officials should bear international criminal responsibility in such instances, but surely there should also be international delictual or civil responsibility for the State whose officials had committed such crimes. In addition, some obligation should be imposed on third States to take action: it could not simply be left to the Security Council, because of the veto problem.

16. The objection to article 19 adopted on first reading<sup>5</sup> had been that the article sought to impose criminal responsibility in such cases. That had been rejected, to the relief of most States and to the despair of some academic lawyers, article 19 having already become part of the language of international law. The Commission had behaved wisely and cautiously, however, in removing the notion of State criminal responsibility for serious breaches of international law. If it abandoned the idea of delictual responsibility for serious breaches at the current time, it would be seen to be too timid, unprepared to include within the framework of State responsibility a concept that had the support of judicial opinion, State practice and doctrine. In articles 41 and 42, the Commission was simply codifying a concept that was an accepted part of international law. The wording might be improved, but the Commission should not accept the suggestion by the Netherlands in the comments and observations received from Governments (A/CN.4/515 and Add.1-3) that it should list examples of serious breaches. That would invite the type of criticism that had been levelled against the examples set out in the former article 19 and represent an incursion into the field of primary rules.

17. He agreed that countermeasures must be covered in the draft. Articles 50 to 53 and article 55 must be retained, although work was needed by the Drafting Committee to bring them into line with the arbitration in the *Air Service Agreement* case. Article 54 (Countermeasures by States other than the injured State), paragraph 2, had been opposed by many States and, if necessary, he would support its deletion, provided there was a saving clause and the commentary explained that the idea was in an embryonic stage of development. He experienced difficulties, however, with the assertion that article 54, paragraph 2, was unsupported by State practice. In his third report,<sup>6</sup> the Special Rapporteur had provided evidence of such practice. Evidence could also be found in certain decisions taken, not by the Security Council under Chapter VII of the Charter of the United Nations, but by the General Assembly: for example, to urge States to impose sanctions against South Africa which in fact violated agreements they had made with that country. He was thinking specifically of decisions by the United States and the United Kingdom to terminate an aviation agreement and a defence pact, respectively. The recommendation of such action by the Assembly or the Council

<sup>4</sup> *Yearbook* . . . 1966, vol. II, p. 248, document A/6309/Rev.1 (part II).

<sup>5</sup> See 2665th meeting, footnote 5.

<sup>6</sup> See 2672nd meeting, footnote 4.

was simply a confirmation of what was enunciated in article 54, paragraph 2, namely that States had the right to take countermeasures where a State had committed a serious breach of an international obligation.

18. In short, he believed that article 54, paragraph 2, could be included as an example of legitimate progressive development of international law. The article nonetheless raised serious policy issues and he would be prepared to compromise on including it, but omitting articles 41 and 42 would be most unfortunate.

19. Mr. SIMMA said he sympathized broadly with Mr. Dugard's views but did not agree that there was nothing wrong with using "majestic" language in article 41. Unlike a national bill of rights or constitution, the article would be applied on a regular basis by courts, and vague, lofty and general phrases would therefore be inappropriate.

20. Mr. YAMADA said that he acknowledged the qualitative difference between serious and ordinary breaches and was able to state that the Japanese Government did too, and it felt strongly that serious breaches should be prevented. However, the question was whether any particular legal consequences arose from serious breaches. He did not think so. In advocating the deletion of article 41, he was not saying that serious breaches should be placed outside the scope of State responsibility, but rather, that they were already covered by the existing text.

21. Mr. BROWNLIE said that he was deeply sceptical about the evidence suggested by Mr. Dugard for State practice in support of article 54. If a State did something by virtue of a General Assembly resolution, there was no *opinio juris* linked to a candidate rule of customary international law. If, however, the Member States that had voted for the resolution explained that they thought the resolution referred to a principle of general international law, that would be evidence. Resolutions as such were ambiguous.

22. Mr. Sreenivasa RAO said that, although he appreciated the clarity with which Mr. Dugard had presented his position for the retention of articles 41 and 42, he agreed with Mr. Simma's point that there was a qualitative difference between ordinary and serious breaches. It was the State, and not individuals, that took action in the interest of society. In the case of the international community, an institution already existed: the United Nations. The Charter of the United Nations contained many of the general concepts to which reference should have been made and which had been developed through State practice, General Assembly resolutions and Security Council decisions and actions. He was opposed to bypassing and undermining the United Nations, then complaining that it was ineffective and giving States a unilateral right to exercise countermeasures without any accountability and legal limitations. Thus, legal, mandated responses by States could not be reduced to communities of States. That was where the gap had to be bridged. It was difficult to see how that could be done, but in the meantime, genocide or other serious breaches could not be condoned. Indeed, institutions were being set up to deal with such matters, and it was hoped that they would fill the gap, but until they did, the Commission could not enlarge the scope of the draft to permit arbitrary acts, selectiveness or

double standards. That kind of development was not to be equated with conferring universal jurisdiction for crimes on States which could prosecute as they saw fit when they apprehended an offender. The proposals in articles 41 and 42 came close to conferring a universal right to intervene, but in the present context, a distinction must be drawn between universal jurisdiction and universal right.

23. Mr. SEPÚLVEDA said that Mr. Dugard was raising a question of legitimacy. The topic had to do with action that the General Assembly could legally and legitimately take on the basis of a previously established legal system, whereas action by a group of States acting outside the legal system created by the United Nations could not be legitimized. To cite an example, in 1956 three States had considered that the nationalization of the Suez Canal had been an illegal act and had taken collective measures. That had not been the position of the Organization, which had undertaken its first peacekeeping operations under the Charter of the United Nations. Those were radically different situations involving the question of legitimacy.

24. Mr. LUKASHUK said the issue was that the articles might let someone loose who was brandishing a stick and using it. The Commission's job was not to legalize the stick, but to limit the possibilities for its being used. Hence the importance of the article on countermeasures.

25. Both Governments and the Commission had referred to a gap: the most serious human rights violations were being enunciated, but it turned out that the means for a special implementation process could not be defined. The point was that the Commission could not establish special measures, because that would go beyond existing positive law, especially as a definite step was being taken towards recognizing a special category for the most serious human rights violations.

26. Mr. KUSUMA-ATMADJA commended Mr. Yamada for raising a number of important points that had given rise to a lively debate.

27. The number of members in favour of the work of the Commission leading to a diplomatic conference appeared to have increased. That raised the risk of resurrecting certain ghosts, presumably something that members did not really want. The Special Rapporteur had gone out of his way to be receptive to views that did not support his own position, which was gratifying.

28. The Commission should proceed with caution. Otherwise, the issue would drag on endlessly. The General Assembly had appreciated the work of the Commission to date. While he preferred a diplomatic conference, the danger was that changes might upset the careful balance that the Special Rapporteur had achieved. Thus, with apologies to those in favour of a diplomatic conference, he was changing sides and joining those who wanted the Assembly to take note of the draft articles.

29. Mr. HE said that, under present international law, for the purposes of State responsibility there were in fact no unified definitions of the terms "injury" and "damage" applicable to all circumstances. Used in legal instruments, the terms were tailored to meet the particular requirement of each case. They should be employed in a broad and general way while maintaining internal consistency.

He therefore endorsed the Special Rapporteur's proposal, in paragraph 33 of his fourth report, to change article 31, paragraph 2, to read: "Injury includes any damage, whether material or moral, caused by the internationally wrongful act."

30. On the other hand, further clarification was needed with regard to article 37 (Compensation), paragraph 2. According to the explanation in paragraph 34 of the report, which stressed the marginal difference between financially assessable damage and economically assessable damage, it was not certain that financially assessable damage did not include moral damage as part of compensation. If it did, it seemed necessary to say as much in the main body of article 37, paragraph 2, or at least give an explanation in the commentary, because omitting moral damage as part of compensation for the injury would be inconsistent with the international jurisprudence that compensation be awarded for moral damage.

31. As to invocation of State responsibility, article 46 (Loss of the right to invoke responsibility), subparagraph (b), raised the question of what kind of conduct by a State was needed for the conduct to be deemed valid. Did it require a reasonable time frame or other action? Again, clarification was called for.

32. As the notion of "collective interest" was difficult to define, article 49, paragraph 1 (a), should be further qualified and more carefully drafted so as to be confined to breaches which actually impaired the interests of the States to which that obligation was owed.

33. With regard to articles 41 and 42, the introduction of serious breaches of obligations to the international community as a whole might be acceptable. The new text replaced the concept of "State crimes", thus avoiding the protracted controversy over article 19 on first reading. The rejection of the concept of "State crime" would in no way diminish the personal legal responsibility of the person committing such a crime. Chapter III represented a compromise for discarding former article 19 and it should not be deleted.

34. However, problems still remained with articles 41 and 42. The proposed terms and phrases, such as "serious breaches", "essential for the protection of its fundamental interests", "a gross or systematic failure by the responsible State" and "risking substantial harm", all required further elaboration to clarify what they meant. If the two articles were to be applied, more detailed information would be needed on what was essential or non-essential and fundamental or non-fundamental. What was the standard for "a gross or systematic failure", and how should "risking substantial harm" be interpreted? All those terms should be brought into line with the principles underlying the text as a whole, so as to ensure that they were used consistently throughout the draft.

35. Countermeasures had long been one of the most controversial issues of the regime of State responsibility and had been a bone of contention in the Commission. It was generally accepted that, with due respect for the basic norms of international law and international relations, countermeasures could be one of the means that was available to a State injured by an internationally

wrongful act in order to redress an injury and protect its interests. The existence of countermeasures in international law had been noted in the *Gabčíkovo-Nagymaros Project* case. But in view of past and possible future abuses, the provisions on countermeasures set out in the draft articles provisionally adopted by the Drafting Committee on second reading must be improved to make sure that recognition of the right of an injured State to take countermeasures was accompanied by appropriate restrictions that struck a balance between their legitimacy and the need to curb their misuse.

36. Accordingly, difficulty might arise with article 54, a provision that was tantamount to introducing "collective countermeasures" and "collective sanctions" into the regime of State responsibility. That would be inconsistent with the principle that countermeasures should be taken by the State injured by an internationally wrongful act. Countermeasures in response to violations of community obligations fell within the domain of the Charter of the United Nations and should be taken through the United Nations. As article 54 complicated the already complex question of countermeasures, making it even more controversial, the best solution would be to delete it, as Mr. Brownlie and others had suggested.

37. It was all too plain that the draft could not be submitted to the General Assembly until the difficult issue of countermeasures was resolved and a proper balance struck.

38. Mr. OPERTTI BADAN, after briefly reviewing the wide range of views expressed by members on the question of form, said his own position was that the draft had the merit of being incremental. The articles met the Commission's expectations. The best example of that was Part Two, chapter III, which clearly reflected the progressive development of contemporary international law and the progress made in the past year on article 54. In any case, the draft was more in keeping with a convention than with another type of international act. The Commission should be able to agree that its work in preparing principles and rules on State responsibility had made progress in overcoming remaining differences and why not assume as a reasonable prospect that that work should be recognized by the General Assembly in a "maximalist", rather than a "minimalist" way? There had, of course, been new proposals, such as the one formulated by Mr. Brownlie and supported by other members on the need to improve on article 23 (Countermeasures in respect of an internationally wrongful act) and delete article 54. Mr. Pellet had also made lucid, provocative proposals regarding Part Two, chapter III, but as he saw it, if chapter III were deleted, it would remove an essential part of the future convention. It was also gratifying that mention had been made of the concept of "communitarization". It was an important step that went beyond the traditional terrain of States, entering that of the international community, a term that perhaps had not yet been properly defined. In his opinion, international law should follow the terms of article 53 of the 1969 Vienna Convention, which spoke of the "international community of States". The scope of the concept of "the international community as a whole" should not be further broadened. While non-governmental organizations represented a potent and effective force within civil society—not only in the field of human rights,

as evidenced by their contribution to the drafting of texts such as the Rome Statute of the International Criminal Court, but also in the more prosaic context of the trade liberalization negotiations at the Third WTO Ministerial Conference, held at Seattle from 30 November to 3 December 1999, and at the Third Summit of the Americas, held at Quebec City, from 20 to 22 April 2001—the best way of safeguarding their activities was to exclude them from an area reserved for States.

39. Like other members—and also like the Special Rapporteur himself, to judge from paragraph 2 of the fourth report—he thought that while the text of the draft articles might be improved, its substance must be retained and defended both in the Commission and in the Sixth Committee. He also agreed on the need to harmonize terminology.

40. Not only States but also members of the Commission had a responsibility to base their actions on the Charter of the United Nations. Accordingly, he again called for the deletion of article 54, with its legitimization of collective countermeasures. The task facing the Commission was not simply to consolidate existing law but to exert real influence on the regulation of contemporary international relations. Much work had gone into the drafting of the articles on State responsibility. In view of their intrinsic importance, and also to enable the Commission to pursue other very important and sensitive topics included in its programme of work, the draft articles on State responsibility should now be transmitted to the General Assembly without further delay.

41. Mr. ADDO said he regarded Part Two, chapter III, as an exercise in progressive development within a narrow compass, as indicated by the Special Rapporteur in his report. In his view, it also represented an acceptable compromise by the proponents and opponents of crimes of States and, as such, must be retained in the draft.

42. Part Two bis, chapter II (Countermeasures), had a place in the draft, but was like an unruly horse that must be ridden with care. The rules elaborated in articles 50 to 53 and article 55 accomplished that task adequately. Article 54, however, was an unpredictable beast, the demise of which would not be missed, even by the most ardent proponents of countermeasures, for its retention might lead to more problems than it solved. Since, as the Special Rapporteur pointed out, general international law on that question was still embryonic, the Commission should not mar the good work it had done on countermeasures by an injured State by retaining article 54. For the reasons already given by Mr. Brownlie, article 54 should be deleted.

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

[Agenda item 1]

43. The CHAIRMAN said that an open-ended informal working group, convened to consider outstanding issues

on State responsibility under the chairmanship of the Special Rapporteur, would meet the following week.

44. As previously announced, the Bureau had proposed the establishment of a working group, comprised of no more than 10 members, to review the commentaries to the draft articles on State responsibility. The Working Group would be composed of Mr. Melescanu (Chairman), Mr. Crawford (Special Rapporteur), Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Sepúlveda, Mr. Tomka and Mr. He (ex officio).

45. If he heard no objection, he would take it that the Commission agreed to the establishment of a Working Group to review the commentaries to the draft articles on State responsibility.

*It was so agreed.*

#### **Cooperation with other bodies**

[Agenda item 8]

#### **STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE**

46. The CHAIRMAN welcomed Mr. Trejos Salas, Observer for the Inter-American Juridical Committee, and invited him to take the floor.

47. Mr. TREJOS SALAS (Observer for the Inter-American Juridical Committee) said he would confine his remarks to just two topics the Committee had considered at its most recent sessions. At its fifty-seventh regular session, held at Rio de Janeiro, from 31 July to 25 August 2000, a proposal had been submitted to include on the Committee's agenda the preparation of a draft declaration or other instrument defining democracy. After a heated discussion, in the course of which some members had expressed concern that such an initiative might be unacceptable to OAS member States, the proposal had been withdrawn. However, at a meeting of the Committee held in Ottawa at the invitation of the Canadian Government shortly before the Third Summit of the Americas, the Committee had again heard the arguments in favour of drafting such an instrument. Among those arguments was the fact that observers sent to monitor elections in OAS member States needed sound criteria on which to base their conclusions.

48. Furthermore, at the Third Summit of the Americas, Heads of State and Government had since taken the decision to incorporate in the future treaty on free trade in the Americas a clause excluding States that failed to comply with democratic rules and standards. It was thus all the more surprising that the content of an obligation embodied in the Charter of OAS was nowhere clarified in any international or regional treaty text.

49. On a proposal by the Government of Peru, the Third Summit of the Americas had decided to commission the ministers for foreign affairs of its member States to draft

\* Resumed from the 2669th meeting.



an Inter-American democratic charter for submission to the General Assembly of OAS, to be held at San José, Costa Rica, in June 2001. Meanwhile, the Committee had agreed to include the topic on its agenda and to assign two of its members the task of preparing a draft inter-American instrument on democracy, for submission to the fifty-ninth regular session of the Committee, in August 2001.

50. That concern was shared not only by other regional bodies—such as the Council of Europe, which made admission of candidate countries conditional on their acceptance of pluralistic, representative democracy—but also in the broader context of the United Nations system. In that regard he drew attention to a book by Sicilianos, with a preface by Boutros Boutros-Ghali.<sup>7</sup>

51. Such a charter would set out to codify the principles of democracy, and also to innovate to some extent, subject to the approval of States. It should contain, among other principles, the following: free, secret, fair, authentic, pluralistic and periodic elections; a multiparty system; guarantees of fair electoral representation for minorities; separation of powers; subordination of the military to the civilian authorities; economic independence of the judiciary; freedom of the press and respect for fundamental rights and freedoms; and active participation by civil society in public affairs.

52. The charter might innovate by enshrining as an essential principle of democracy an obligation on political parties, as a means of obtaining access to power, to make sure that their internal procedures were conducted democratically. In that regard he cited two recent cases in which the Supreme Electoral Tribunal of Costa Rica had annulled the expulsion of a member of a political party, deeming it to have been undemocratic, and had ruled that a provision of a political party's statute requiring an office holder to have nine uninterrupted years' service was unconstitutional.

53. Another topic discussed at the Ottawa meeting was in vitro fertilization. The Committee had decided to prepare a legislative guide for use by OAS member States, setting out the various options facing legislators in countries that intended to regulate the practice. The Committee had decided that a legislative guide was preferable to a declaration, which would call for a decision on the wide-ranging ethical issues involved. It had refrained from such a decision because of a case brought before the Constitutional Court in Costa Rica, the only country in the world to prohibit by law the practice of in vitro fertilization. The decree prohibiting it was based on article 4 of the American Convention on Human Rights: "Pact of San José, Costa Rica", which protected the right to life from the moment of conception. The Constitutional Court had upheld the existing legislation, immediately sparking off protest by a group of patients intending to seek in vitro fertilization. They had subsequently taken proceedings against Costa Rica in the Inter-American Court of Human Rights, on the basis that the Constitutional Court's ruling deprived infertile people of the possibility of giving life, and likewise infringed article 4 of the Convention. They

also argued that the right to life under article 4 was not absolute, since there were other circumstances, such as armed conflict, in which international law allowed the taking of life; moreover, the protection afforded to the foetus by article 4 was framed in "general" terms only, so that the foetus had some rights to life, but not all of them. The Inter-American Court of Human Rights would settle the case in 2002, and his own hope and expectation was that it would rule in favour of the applicants.

54. Mr. BAENA SOARES thanked the Observer for the Inter-American Juridical Committee for the information he had given on the activities of the Committee, and expressed his appreciation of the regular pattern of dialogue and cooperation between the Commission and the Committee. Mr. Trejos Salas had given a valuable insight into the successful practice of democracy in regional organizations. In the draft text on democracy currently under preparation by the Committee, he would like to see some mention of the impact of economic interests on political reality, and of the need for transparency on the part not only of governments, but also of all actors in the democratic process, especially non-governmental organizations.

55. Mr. ECONOMIDES emphasized the importance of democracy, both as a concept and as an institution. Democracy was beneficial and salutary in international society as well as within nations. In the past few years, great strides had been made within States in the practice of democracy, and that was especially evident in the impressive expansion in human rights that had taken place since the Second World War. However, there was still much to be done, because international law remained essentially anti-democratic. For example, there was as yet no binding system of international justice, because the existing system depended on the consent of the parties to each individual dispute. Without a compulsory system, there could be no democracy. Countermeasures too were undemocratic. Greater efforts must be made to bring democracy into operation in international society and to render it more effective.

56. Mr. GALICKI welcomed the regular reports received by the Commission on the legal work being done in the regions, which in turn influenced international treatment of the same topics. Democracy was a political term, but it also influenced legal regulation: for instance, the Council of Europe had made the practice of democracy a condition of entry. It would be interesting to see how the obligation to exercise democracy developed in future. It would certainly call for a legal definition of democracy, which would be an important element in the progressive development of international law. A codification of the principles of democracy on a regional level, together with an expanded catalogue of those principles, would have great influence on similar codification efforts both regionally and, perhaps, internationally. The ministerial conference entitled "Towards a Community of Democracies", hosted by Poland, was held in Warsaw in June 2000. The conference and its recommendations had attracted worldwide interest.<sup>8</sup>

<sup>7</sup> L.-A. Sicilianos, *L'ONU et la démocratisation de l'État* (Paris, Pedone, 2000).

<sup>8</sup> See A/55/328.

57. The work on the ethical problems which had found a place in the work of OAS and of the Inter-American Juridical Committee helped to develop concepts of human rights, especially the right to life, which was the most important of all. It also offered useful guidelines to the Commission and to other legal bodies for their work in the future.

58. Mr. PAMBOU-TCHIVOUNDA said that democracy and democratization were fashionable subjects, but he distrusted the attempt to impose, not merely rules, but a kind of standard model of democracy on everyone. States should be on their guard against standard formulas, which could endanger the prospects of successful democratization. He doubted whether the principles of democracy could be codified at all, especially at the international level. How could there be a convention on democracy, and how could the Third Summit of the Americas ponder the choice between that and a declaration? All countries had to proceed towards democracy at their own pace and in the light of their own history and development. The Americas formed a vast continent, and there were glaring disparities between North, South and Central America; how could the countries of those regions be expected to manage democracy in the same way at all times? An OAS meeting might well issue a declaration discriminating against Cuba, for instance, which would be deeply regrettable given that the essence of democracy was tolerance and respect for differences. The North American model of democracy was a formal one, enshrining the separation of powers, periodic elections and multipartyism, but those institutions had to take root in the life of each nation. The North American system of government had little in common with the systems in Panama, Costa Rica or Honduras. It would be noted that the Charter of OAS did not allow for a free choice by each State of its own system; perhaps the OAS should consider revising it.

59. As for the other topic mentioned by the Observer for the Inter-American Juridical Committee, the protection afforded by article 4 of the American Convention on Human Rights: "Pact of San José, Costa Rica" to the right to life of the foetus took no account of difficult situations such as malformations of the foetus which might in turn endanger the life of the mother.

60. Mr. RODRÍGUEZ CEDEÑO expressed his appreciation of the work of codification within the Inter-American Juridical Committee. A declaration defining democracy would have valuable and far-reaching legal effects and would also influence the process of regional integration. Certain existing instruments, such as the Santiago Declaration, signed at the Second Summit of the Americas, in Santiago de Chile in 1998, and the Washington Declaration, signed at the meeting of the North Atlantic Council in Washington, D.C. in 1999, could prove useful in the task of definition and in stabilizing and strengthening the democratic system.

61. Mr. OPERTTI BADAN said he disagreed with the view expressed by Mr. Pambou-Tchivounda that it would not be feasible to devise a democratic charter for the Americas. Within the inter-American institutions, successful endeavours had already been made to frame rules of democratic political conduct for member States, for example in the Southern Cone Common Market

(MERCOSUR), through the Ushuaia Protocol on Commitment to Democracy in MERCOSUR, the Republic of Bolivia and the Republic of Chile, which applied to Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay, and through the Protocol of Amendment to the Charter of the Organization of American States (Protocol of Washington). The inter-American region as a whole was anxious to progress both economically and politically, by embracing democratic systems and enshrining them in institutional practice. Naturally, it was important to take account of economic and other disparities among different countries in the region, but the commitment to multipartyism did not require the imposition of any standard model. Both the Charter of OAS and the Protocol of Amendment to the Charter of the Organization of American States (Protocol of Cartagena de Indias) legitimized representative democracy as a tenet of positive law for the Americas. The ministerial conference, "Towards a Community of Democracies", had performed a valuable function by drawing attention to the fact that, although there were different levels of socio-economic development, democracy was possible wherever human rights flourished, especially civil and political rights, and impossible without them. His own country had a long democratic tradition, dating back some 100 years, which had been interrupted for only 11 years, and then only because the rule of law had been attacked on the pretext that it ran counter to formal democracy. No truly democratic system, in either the political or the economic sense, could exist unless human rights and multipartyism were respected.

62. Mr. HERDOCIA SACASA congratulated the Observer for the Inter-American Juridical Committee on his description of the democratic elements of the Charter of OAS. Until recently, democracy had been regarded as part of the reserved domain of internal law, and priority given to the principle of non-intervention or non-interference. However, as a result of human rights violations in Latin and Central American countries in the previous century, democracy was currently regarded as part of the common heritage of the region. He had himself taken part in the Contadora process that had facilitated the pacification process in Central America.<sup>9</sup> That in turn had produced a commitment to democracy through the agreement on "Procedures for the establishment of a firm and lasting peace in Central America",<sup>10</sup> enabling the irregular forces to participate in the electoral process. Those elections had been monitored by the United Nations, for the first time in an independent country. It was the lack of democracy that had precipitated the armed conflict in the first place. He welcomed the trend, reflected equally in the work of the Commission, to seek a better balance between the State, the individual and society.

63. Mr. TREJOS SALAS (Observer for the Inter-American Juridical Committee) said he could not agree with the doubts Mr. Pambou-Tchivounda had expressed about the project being undertaken by the Committee. However,

<sup>9</sup> See *Official Records of the Security Council, Thirty-ninth Year, Supplement for October, November and December 1984*, document S/16775, annex.

<sup>10</sup> *Ibid.*, *Forty-second Year, Supplement for July, August and September 1987*, document S/19085, annex.

it should be emphasized that the document was still in its early stages. He would welcome further information on the resolutions adopted by the ministerial conference, "Towards a Community of Democracies", which could be of value to the work of the Committee.

*The meeting rose at 1.10 p.m.*

## 2674th MEETING

*Tuesday, 8 May 2001, at 10 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Idris, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

**State responsibility<sup>1</sup> (*continued*) (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,<sup>2</sup> A/CN.4/517 and Add.1,<sup>3</sup> A/CN.4/L.602 and Corr.1 and Rev.1)**

[Agenda item 2]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. HAFNER said that, if he had to advise a Government on whether or not to ratify a convention on State responsibility, he would try first of all to find out which States had already ratified it. If the objective was to gain protection under the convention, the States against which one wanted such protection would also have to be bound by the convention. In terms of the famous "prisoner dilemma", the risk, however, was that such States might adopt the strategy of not cooperating. The most reasonable approach would then be for States to refuse to be bound by the convention. It would not be the first time that States had chosen such a strategy. A large portion of the United Nations Convention on the Law of the Sea had

been renegotiated by States in order to satisfy one or two which in the end had failed to ratify the text. The Kyoto Protocol to the United Nations Framework Convention on Climate Change, the Comprehensive Nuclear-Test-Ban Treaty and the Rome Statute of the International Criminal Court were additional examples. He was accordingly not convinced that one could really expect to receive protection from such a convention.

2. Turning to the question of countermeasures, he said that he had doubts about the proposal made by the United Kingdom, among others, in the comments and observations received from Governments (A/CN.4/515 and Add.1–3) to insert the main limits to countermeasures in article 23 (Countermeasures in respect of an internationally wrongful act). That article and the articles dealing with countermeasures had totally different functions. To insert part of the provisions on countermeasures in it would be to give it a new function, a definitional one. It might also become overloaded, since the object and purpose of the measures, the States entitled to take them and the limits to their use would have to be stated. The text proposed by the United Kingdom, reproduced in a footnote to paragraph 60 of the fourth report of the Special Rapporteur (A/CN.4/517 and Add.1), reflected only a very selective choice of limits and it could be asked why it was only those that were cited. For instance, no mention was made of the State that was entitled to take such measures. It could be asked whether that omission meant that the issue was left open and that there was room for interpretation going beyond even the much criticized article 54 (Countermeasures by States other than the injured State). While article 23, paragraph 1, already referred to lawful countermeasures, the subsequent paragraphs would nevertheless single out certain of the conditions to which they were subjected. It could then be asked whether that set of conditions was exhaustive and, if not, why those particular conditions and not others were mentioned. For those reasons, he strongly preferred to keep the existing order or to live with article 23 as it stood and to delete all the articles on countermeasures. It would be for the General Assembly to propose that the Commission should deal with countermeasures as a separate topic on its agenda. With regard to article 54, he was convinced that an attempt to codify it would do more harm than good, since, in that area, international law was developing in a way that could not be foreseen. A shift was occurring in international relations, a change from bilateralism to a community approach. A saving clause on countermeasures by States other than the injured State would certainly be the best thing.

3. He agreed with the distinction between the States referred to in article 43 (The injured State) and in article 49 (Invocation of responsibility by States other than the injured State). As to article 43, he shared the Special Rapporteur's view that the provisions on integral obligations needed to be redrafted. At the same time, he thought that the use of terms in the draft was not very clear and shared the concerns expressed by Japan in that regard. The word "injury" was used in articles 31, 35, 38 and 52, while the expression "damage" appeared in articles 31, 37, 40, 42 and 48. Article 31 (Reparation), paragraph 2, gave the impression that damage was a factual aspect of the legal term "injury". If so, then the States referred to in article 49 would have to be those that suffered neither

<sup>1</sup> For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

<sup>2</sup> Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

<sup>3</sup> *Ibid.*

damage nor injury. The question then would be what the purpose of satisfaction was, since restitution and compensation already covered any damage, including moral damage. There would be no room for satisfaction and that would contradict article 35 (Forms of reparation). That interpretation would even raise a contradiction within article 31 itself. If, however, article 31, paragraph 2, was reformulated as suggested, stating that injury included damage, injury would go beyond damage. It could then even be argued that the mere breach of an obligation *erga omnes* would constitute injury to all States bound by that obligation; the States referred to in article 49 would then also qualify as injured States. But it seemed that damage was connected with the definition of the injured State in article 43. It could therefore be argued that injury only entailed damage arising as a consequence of the internationally wrongful act to the State referred to in article 43. Article 31, paragraph 2, could then read: "Injury consists of any damage, whether material or moral, arising in consequence of the internationally wrongful act to a State referred to in article 43." That would be tantamount to saying that injured States were only those that were referred to in article 43; injury occurred only to them. The text of article 43 should make that very clear. A different way of solving the problem would be to change article 43 first to provide a definition of the injured State and then to set out the rights of that State. In that context, he was of the view that the expression "international community as a whole" must be kept in, since it was common in international practice.

4. The use of the terms "damage" and "injury" also gave rise to concern in the context of article 37 (Compensation), paragraph 1, and article 38 (Satisfaction). Article 37 stipulated that it was the damage, including moral damage according to article 31, paragraph 2, that had to be compensated. Article 38 obliged a State to give satisfaction for injury that could not be made good by restitution or compensation. Did that refer to moral damage or to the part of the injury that was neither material nor moral? In the light of the ideas voiced concerning article 31, article 38, paragraph 1, could read: "The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the damage caused by that act in so far as it cannot be made good by restitution or compensation." That would mean that moral damage would be addressed by satisfaction. Another possibility would be simply to drop the reference to damage in article 31, paragraph 2, since it contained no definition. In any case, the use of the expression "damages" in article 42 (Consequences of serious breaches of obligations to the international community as a whole) was inappropriate, since it did not correspond to the usage in the other draft articles.

5. Going back to the provisions of article 43 on obligations *erga omnes*, he suggested that they should be inserted in article 49. The essential difference between the States referred to in article 43 and in article 49 was that only the former could request reparation. It was conceivable, however, that States which were bound by obligations *erga omnes* and which suffered damage might be assimilated to the States "specially affected" within the meaning of article 43, subparagraph (b) (i). The only drawback in transposing article 43 to article 49

would be that the other uninjured States could not request satisfaction in the context of moral damage.

6. He wondered whether it would not be best to cut out Part Two, chapter III (Serious breaches of essential obligations to the international community) for a number of reasons. First, it dealt with primary rules. Secondly, the proposed definition included many subjective elements that would only give rise to disputes. Thirdly, doubts remained about the particular consequences of such breaches. If there turned out to be a need to keep the chapter, the distinction between the obligations *erga omnes* dealt with in article 49 and those dealt with in article 41 (Application of this Chapter) would have to be retained.

7. The commentary drafted by the Special Rapporteur concentrated more on jurisprudence than on bibliography. He could understand the problem arising from an attempt to include the doctrine. Usually, the works cited in commentaries tended to be those written in English or, to a lesser extent, in French, as if no works had been written on the issue in other languages. It would be too late to include the whole doctrine developed in the different languages. Instead of this, the Commission could add an updated version of the existing international bibliography to the commentary prepared by the Special Rapporteur. That had already been done by the United Nations in connection with the law of the sea. With regard to the content of the commentaries, the Commission could add a general plan of the concepts of State responsibility used as the foundation of the draft articles to the introduction to the commentaries or in the commentary to the first articles. Lastly, pointing out that the comments by the United Kingdom on articles 24 and 25 in the comments and observations received from Governments were in line with the draft that had been prepared by the Special Rapporteur, but had not been adopted on second reading, he said it might be useful for the Drafting Committee to reconsider the matter.

8. Mr. CRAWFORD (Special Rapporteur) said that he had deliberately left all references to the literature out of the commentaries because that had been the practice followed in previous commentaries and because such references currently appeared very dated, whereas the references to jurisprudence were still relevant. There was also the problem of the selection of works to appear in the commentary. If it was necessary to include references to the literature, a single footnote could be included for each article, citing the salient pieces of literature for the subject of the article. A further alternative, contrary to established practice, would be to include a selective bibliography, such as the one annexed to the first report of the Special Rapporteur,<sup>4</sup> which was quite comprehensive.

9. Mr. MELESCANU said that he would be circulating a draft structure for the commentaries to the draft articles and that he hoped that the members of the Commission would give him their comments on it.

10. Mr. BROWNLIE said that the references to literature had been extremely useful. The Special Rapporteur's

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

contention that the works cited were dated was completely unfounded. Some articles published many years previously remained definitive. He was opposed to the deletion of references to the literature and was not persuaded by the grounds suggested for doing that.

11. Mr. LUKASHUK said that the deletion from the commentaries of references to the literature was not justified. The bibliography already prepared by the Special Rapporteur could perhaps be annexed to the commentaries. Guidance must be provided for those who would use the draft. The commentaries must be concise and should refer to positive law.

12. Mr. SIMMA said that he opposed the inclusion of references to the literature in the footnotes, but thought that a separate bibliography could be prepared, since bibliographies inevitably involved questions of vanity.

13. The CHAIRMAN said that an informal meeting would be held to discuss issues relating to the commentaries and that would provide an opportunity to consider such matters.

14. Mr. GALICKI said that he would focus his comments on two very controversial questions that, in his view, were of great importance for shaping the final product of the Commission's work on the subject, namely, serious breaches of essential international obligations to the international community as a whole and countermeasures. The provisions on those questions had fervent supporters, but also fierce adversaries, the latter demanding their complete deletion from the draft articles. Removing those provisions entirely would in reality be tantamount to avoiding a settlement of unquestionably difficult but crucially important questions and, in so doing, would diminish the work carried out by the Commission for such a long time and mean that it was unable to find solutions to complicated and controversial problems. In actual fact, the provisions on those two points were among the most valuable of the entire draft because they reflected the Commission's creative approach to seeking acceptable solutions in a difficult area in which the progressive development of international law prevailed over simple codification. The Commission must have the courage to defend the product of its work, but to say that provisions on serious breaches of obligations to the international community and on countermeasures must be retained certainly did not mean that they could not be improved or corrected.

15. On the first point, the scope of which was defined in article 41, it must be agreed that the concept of "serious breaches of essential obligations to the international community" was a reasonable solution to the problems posed by the former, and highly criticized, concept of international crimes advocated in former article 19. Article 41 brought together both substantive and procedural elements—*jus cogens* and obligations *erga omnes*. But were the proposed criteria for determining whether the breach in question was serious really objective and sufficient? In particular, it seemed that the application of the criteria contained in article 41, paragraph 2, might create serious difficulties in practice. The provisions dealing with serious breaches in Part Two bis (The implementation of State responsibility), also contained shortcomings.

As could be seen in the comments by States, it must be clarified whether, in the case of obligations *erga omnes*, reparation could be claimed by each State, by all States acting together or by the international community as a whole. There was also a need to define clearly what claims could be formulated by States not affected by the breach of international law and whose legal interest affected by the breach was of a different nature.

16. As for the provisions on countermeasures, he was in favour of retaining a separate chapter II on the subject in Part Two bis; on no account was article 23 an adequate replacement of that chapter. However, the practical application of article 54, did give rise to a problem, not so much with regard to the countermeasures taken at the request and on behalf of the injured State under paragraph 1 as to those set out in paragraph 2. As a number of States had correctly pointed out, that paragraph suggested that, in cases of serious breaches of essential obligations to the international community as a whole within the meaning of article 41, every State could individually have recourse to countermeasures to force the perpetrator of the breach to comply with the obligations deriving from its responsibility as a State and that, in taking that decision, its only obligation would be to consult with other States which had also taken countermeasures. There was clearly a trend in that direction in contemporary law, but in practice that development was encountering strong opposition in the international community. It therefore seemed that article 54, paragraph 2, was still too premature even for fervent supporters of the notion of the progressive development of international law.

17. Mr. KAMTO, taking the floor for the first time on the subject and referring to the question of the recommendation which the Commission was to make to the General Assembly on the form the draft articles on State responsibility should take, said that he was wholeheartedly in favour of a convention because there were no advantages in a declaration, a resolution or a simple decision to make note of the draft articles. But there were other reasons as well: for one thing, he did not think, more generally, that the Commission should regard its work as so sacred that States did not have the right to make changes to it where necessary, especially since States had sufficient respect for the Commission's technical authority that they would not mangle its proposals without sufficient cause. Concerning more particularly the draft articles on State responsibility, which, as everyone agreed, contained a number of provisions involving the progressive development of international law, it would be perfectly normal for the addressees and sponsors of the draft articles, namely, States, to ensure that the legal advances outlined therein reflected the objective trends of modern-day international law and that they were not simple extrapolations, intuition or anticipation, or even a leap into the unknown of future law. Furthermore, by opting for a convention, the Commission was not making the draft articles run any risk other than that of a possible renegotiation because, even if the convention process came to nothing, the legal status of the draft articles would not represent a step backwards in relation to the current body of customary rules, which were for the most part given concrete form in codification and liable at some point to be enshrined by ICJ, which had already referred to the draft articles even

before their finalization, just as, in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, it had invoked rules of the “new law of the sea”, although the Third United Nations Conference on the Law of the Sea had still been at the stage of the informal composite negotiating text. If the Commission did not want to take it upon itself to propose the form of a convention, it could very well send the draft articles to the General Assembly and let it decide what form they should take. After all, article 23 of the statute of the Commission merely said that it “*may*\* recommend to the General Assembly”.

18. With regard to the terminology in the draft articles, several general observations were called for on the various terms and expressions used in Part Two, chapter III, and in Part Two bis. First, the insertion of the words “of States” in the phrase “international community as a whole” was not superfluous because it avoided the opening implicitly made for individuals, groups of individuals, peoples or non-governmental organizations. Such an opening did not seem to be legally necessary because, even if an obligation was essential for one of the above-mentioned categories, its breach would not entail State responsibility unless that obligation was required of the State. Such was the regime of obligations *erga omnes* invented by ICJ in the *Barcelona Traction* case. Consequently, the international community concerned could only be that of States. The system of criminal responsibility of individuals, particularly as set out in the context of the Rome Statute of the International Criminal Court, was parallel or supplementary to the system of State responsibility, but it was important not to confuse the two.

19. Another term that gave rise to problems, including for many States, was that of “essential obligations”, which the draft articles did not define. Defining such obligations would be tantamount to enunciating primary rules, which successive Special Rapporteurs had always refused to do, with good reason. But did not the very creation of that category of obligations also involve a primary rule? Creating such a category in a sense meant also establishing a hierarchy between obligations in the manner of *jus cogens*, whereas it was up to States themselves to say whether such a category existed or should exist. That was an additional reason why it was a good idea for States to have an opportunity to consider the draft articles. For want of a definition, those so-called essential obligations would be a mutant category whose introduction would confer upon States that invoked the responsibility of other States on behalf of the international community an independent power for assessing and defining acts which might lead to abuses. If those “essential obligations” were synonymous with *jus cogens*, then that was a further reason to speak of the “international community of States as a whole”, otherwise there was a risk of indirectly modifying the definition of that notion as contained in article 53 of the 1969 Vienna Convention.

20. With regard to the content of the draft articles, he pointed out that the disputes which might arise from the interpretation and application of articles 41 to 55, in particular, were such that it seemed impossible to retain those provisions without adding a dispute settlement mechanism, which could be designed only in a flexible manner, similar to that set out in article 287 of the United Nations Convention on the Law of the Sea. Concerning

article 42 more specifically, the damages to which it referred would hold only if the notion of essential obligation was clarified. The question then arose whether it was conceivable that those damages, whether “punitive” or not, could be paid to States other than the injured State. As for article 49, the *actio popularis* that seemed to be its logical extension might in some cases cause practical difficulties in that it involved the *locus standi* of States other than the injured State. That showed the practical limits of the notion of “essential” obligations applied to State responsibility because, bearing in mind the principle of State continuity, that notion would lead to prosecuting a State for a genocide which had in fact been committed, but whose current leaders had been its former victims. The transparency of the State in that area was a source of confusion between the regime of State responsibility and that of the international criminal responsibility of individuals, which was all the more harmful because the latter responsibility could not be assumed: even if it was proved that the State had committed a serious breach of an essential obligation, it could not automatically be deduced that all the leaders of that State were guilty. Such guilt must itself be established on a case-by-case basis.

21. Turning to article 53 (Conditions relating to resort to countermeasures), the words “provisional countermeasures” in paragraph 3 not only seemed redundant, but were also a potential source of confusion. The Special Rapporteur had pointed that out briefly in his fourth report, but had not drawn the consequences. As countermeasures were by definition provisional, he suggested using the words “provisional and urgent measures” or “urgent countermeasures”.

22. Lastly, he noted that article 54 raised important questions for a number of members of the Commission and States. Notwithstanding lasting trends in international relations, its paragraph 2 seemed unacceptable in the current international context. The Commission could not allow itself to give a legal basis to the uncontrolled power of a few States or to the risk of arbitrary conduct that that entailed. The Commission did not codify Charter law, but it could not ignore the fact that a number of United Nations bodies had powers under the Charter of the United Nations that in principle permitted them to administer certain situations that the Commission was trying to regulate through the codification of State responsibility. Although the Security Council was powerless if the author of a breach of an obligation, even if essential to the international community, was a permanent member of the Council or a protégé of that permanent member, it was also clear that those same permanent members and their allies were the only ones which had the means of taking the measures which the breach of such an obligation imposed. Recent history had shown that those States that had the means to act did not necessarily do so, whether in the context of the United Nations or in some other framework. The risk of a deadlock, double standards or even arbitrary action thus remained. It was therefore not by increasing the power organized, structured and controlled within the United Nations, but by legally authorizing unorganized and even anarchic power for a group of States that were capable of taking independent action, that there would be a reversion to the international system that had existed prior to the United

Nations. At the fifty-second session of the Commission, attention had been drawn in the Drafting Committee to the need to give in-depth consideration to the question of relations between the work of the Commission on State responsibility and the Charter, bearing in mind the risk of interference or overlapping between the two topics which had appeared at the end of the work of the Committee. The Commission would do well to focus on that problem or at least to opt for the solution of the saving clause (without prejudice to) suggested by a number of members.

23. Mr. TOMKA said that the draft articles should contain provisions on countermeasures, an institution recognized as part of international law, as ICJ had confirmed in its judgment in the *Gabčíkovo-Nagymaros Project* case. Consequently, the reference to countermeasures in article 23 was not sufficient. As circumstances precluding wrongfulness, countermeasures with respect to an internationally wrongful act differed from other circumstances of that type, such as *force majeure*, state of necessity or self-defence, in that they played a determining role in the implementation of responsibility, for their purpose was to induce the wrongdoing State to comply with its obligation not only of cessation, but also of reparation. He was thus opposed to the first option proposed by the Special Rapporteur in paragraph 60 of his report, namely, the deletion of chapter II and the addition of corresponding provisions in article 23; and he was in favour of the retention of a separate chapter on countermeasures in the draft articles.

24. With regard to the actual articles on countermeasures, he thought that article 50 (Object and limits of countermeasures) correctly reflected the purpose of countermeasures and their reversibility and that it required no major change. However, the drafting of article 51 (Obligations not subject to countermeasures) might be improved to ensure that its paragraph 2 was not interpreted as meaning that, before taking countermeasures, a State had to resort to dispute settlement procedures in force between it and the responsible State. Article 52 (Proportionality) should reflect the fact that it was the effects of countermeasures, not the countermeasures themselves, that should be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. That was also the position adopted by ICJ in the judgment in the *Gabčíkovo-Nagymaros Project* case, in which it also confirmed the condition set forth in article 53 whereby, before resorting to countermeasures, the injured State must first call upon the State committing the internationally wrongful act to discontinue its wrongful conduct or to make reparation for it. In view of the comments made by a number of Governments and the jurisprudence of ICJ and arbitral tribunals, it seemed that the Commission accorded too important a role to negotiations in relation to entitlement to take countermeasures, either by preventing the injured State from taking countermeasures or, if they had already been taken, by requesting it to suspend them; the same applied to the impact of the judicial or arbitral procedures envisaged in article 53, paragraph 5 (b). The arbitral award in the *Air Service Agreement* case and the judgment of the Court in the *Gabčíkovo-Nagymaros Project* case showed that the Commission should not continue in its effort to revolutionize the law

of countermeasures on those points, and should instead base itself on customary law on the question.

25. Still on article 53, he noted that there seemed to be some inconsistency between its paragraph 5 (a), read in conjunction with paragraph 1, and article 50, paragraph 1. According to article 50, paragraph 1, the purpose of countermeasures was to induce the wrongdoing State to comply with its obligations under Part Two, namely, to cease the wrongful act and to make full reparation for the injury caused and, in certain cases, to offer appropriate assurances and guarantees of non-repetition. Article 53, paragraph 1, provided that, before taking countermeasures, the injured State must call on the responsible State to fulfil those obligations. Yet under the terms of article 53, paragraph 5 (a), the injured State was under an obligation to suspend the countermeasures it would have taken, if the internationally wrongful act had ceased, irrespective of whether the wrongdoing State had made reparation or at least offered to make reparation. In his view, the latter provision limited the object of countermeasures and he therefore wondered whether it was a correct reflection of the current law on countermeasures.

26. With regard to article 54, it was his view that its paragraph 2 might be deleted, so as not to disadvantage small States that would not normally have the possibility of availing themselves of the measures envisaged therein: it would be better to leave those measures to the United Nations, in its capacity as an institutional international community—the course of action originally envisaged by the former Special Rapporteur, Roberto Ago.

27. Mr. ROSENSTOCK said that the topic of State responsibility was, in several important ways, different from other topics with which the Commission had dealt, in that it covered the entire scope of international law, in that it covered secondary rather than primary rules and, most significantly, in that the Commission had already made a singularly important contribution to the topic. It would be hard to imagine a topic of greater importance both for the immediate future of international law and for that of the Commission.

28. There was an existing corpus of work on the topic, which the Commission had helped to build and which it must be careful not to weaken or compromise. An agreed statement *de lege lata*, of which the General Assembly could take formal note, would be a major contribution to the codification of the law. The fact that the preliminary work of the Commission had shaped thinking in that field and had been relied upon so far should allay concerns that such an instrument would lack authority and impact.

29. On the question of countermeasures, articles 50 to 55 were unnecessary and, more seriously, in significant regards did not reflect the state of the law or the logic of the role of countermeasures. The clearest and most authoritative statement of the relevant law was contained in the arbitral award in the *Air Service Agreement* case, due in large part to Willem Riphagen, the then Special Rapporteur on the topic. The existence of and need for countermeasures as a recognition and consequence of the primitive state of the international legal system were no stronger at the current time than they had been in the 1970s, when the arbitral award had stated that, "If a situation

arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through 'countermeasures'" [para. 81], going on to explain why the existence of negotiations or a dispute settlement proceeding did not terminate the right to seek recourse to countermeasures. The award made it clear that to terminate the right to take countermeasures would disadvantage the victim State, inter alia, and also weaken pressure towards dispute settlement. Some, while recognizing the need for countermeasures, suggested that they benefited the strong more than the weak. Of course, the strong could be more effective in the exercise of their right of self-defence, under Article 51 of the Charter of the United Nations, but that did not mean that Article 51 benefited the strong more than the weak. The same was true of countermeasures. Indeed, the strong had many alternatives to countermeasures, such as retortion, sanctions and economic pressure. Countermeasures provided a means of responding to a wrongful act. Articles 51, 53, 54 and 55 of the draft contained unnecessary and unacceptable details. There was no need to repeat that the Charter prevailed (Art. 103). Article 53, paragraph 4, flew in the face of the award in the case cited and invited the wrongdoing State to delay the imposition of measures and thus the pressure to terminate the wrongful act. The same was true of paragraph 5 of that article.

30. As to "serious breaches of essential obligations to the international community", there was no basis for such a notion in State practice. Indeed, there was no basis for any qualitative distinction between wrongful acts of States. If such a notion were to become accepted, would it be a useful addition to the law? In the first place, it would be important to ensure that that invention did not lead to the imposition of "punitive damages" or their equivalent by any other name. It would be necessary to ascertain whether the advantage gained by creating such a notion justified the risk incurred, as well as to assess the extent to which action by States other than the injured State, such as collective action or *actio popularis*, was implicit in or enhanced by such a notion. Could the Commission be serious in saying, as it did in article 42, paragraph 1, that a serious breach "may" involve responsibility reflecting the gravity of the breach, thereby appearing to suggest that, in certain cases, the gravity of the breach mattered, while in other cases it did not? He agreed with Mr. Hafner's comments concerning articles 43 and 49 and considered that his proposed revision of article 43 offered a promising approach.

31. Mr. IDRIS, referring to the question of the definition of injury which, according to article 31, paragraph 2, consisted of any damage, whether material or moral, arising in consequence of the internationally wrongful act of a State, said that, according to one view, there was no need for any specific reference to damage, as it might not be a necessary constituent element of every breach of international law. A threat of harm or a mere failure to fulfil a promise, irrespective of the consequences of the failure at the time, might be sufficient to give rise to a legal injury. On the other hand, there was also the view that questioned the need to refer to injury in the abstract, without relating it to damage, whether material, moral or

both, in the context of invoking the responsibility of a State. According to that view, an injured State's right to claim appropriate reparation would depend on the nature of the injury suffered; hence the need to refer to the damage and to specify its type and degree in order to quantify the reparation involved and its proportionality to the injury. That debate appeared to be very general and conceptual. But at another level, the distinction between damage and injury was directly linked to the right of the injured State and hence to its right to invoke the responsibility of a State. Given the lack of agreement on the distinction between injury and damage and its direct relationship to the right to invoke State responsibility, he believed, like several other members of the Commission, that, in article 31, paragraph 2, injury should be defined as meaning any damage, material and moral, arising in consequence of an internationally wrongful act. Compensation as a measure of reparation should cover any financially assessable damage, as provided in article 37, paragraph 2, the intention being, as the Special Rapporteur himself had noted in paragraph 34 of his fourth report, to cover any case in which the damage was susceptible to evaluation in financial terms, even if it involved estimation, approximation or the use of equivalents.

32. Turning to the question whether reference should be made to "integral obligations", a concept incorporated in article 43, subparagraph (b) (ii), he noted that there was an understandable confusion about the nature and scope of obligations of that type and their relationship to obligations established for the protection of a collective interest, referred to in article 49, paragraph 1 (a). It was his understanding that that was an obligation which had been envisaged under article 60, paragraph 2 (c), of the 1969 Vienna Convention, which provided that, in the case of the breach of an integral obligation established by a treaty, any other party was entitled to suspend the performance of the treaty, not merely with respect to the State in breach, but also with respect to all States parties to the treaty. Given that special consequence, he wondered whether it was really necessary to refer to the legal consequences of the breach of an integral obligation in the context of the present draft articles. He was inclined to think that deletion of the reference to the "integral obligations" in article 43, subparagraph (b) (ii), might lessen the confusion and promote consensus. He further believed that any legal consequence of a breach of an obligation of that type could be covered by the principle of *lex specialis* under article 56.

33. With regard to serious breaches of essential obligations to the international community, incorporated in articles 41 and 42 of the draft articles, article 41 was a refinement but not a replacement of article 19 adopted on first reading.<sup>5</sup> While it eliminated the concept of international crime, it retained its main elements. Article 41, paragraph 2, further established some thresholds, such as "gross or systematic" failure to perform the obligation, in order further to amplify the criterion of seriousness of the breach. Strong supporters of article 41 were also those who in the past had supported the concept of international crime, whereas those who continued to oppose that concept were also against the present formulation of

<sup>5</sup> See 2665th meeting, footnote 5.



article 41. The arguments for and against the retention of article 41, and of chapter III in general, were captured by the Special Rapporteur in paragraphs 43 and 44 of his report.

34. Article 41 had special significance. It was undeniable that the international community had long recognized aggression, genocide, apartheid and colonial domination as crimes. The Special Rapporteur, while dropping article 19 and formulating the concept of serious breaches, had indicated that he would refer to those examples in the commentary and not in the text of the article in order to avoid any impression that the draft articles on State responsibility dealt with primary obligations. There was good reason to retain the notion of serious breaches in article 41, with appropriate examples in the commentary, as suggested by the Netherlands in the comments and observations received from Governments, to which reference was made in paragraph 51 of the fourth report. However, it was necessary to clarify the various thresholds mentioned in article 41 and to identify the relationship between that article and the Charter of the United Nations. As China had pointed out in its comments on the article, the text, in its current form continued to raise fundamental questions both with regard to the definition of the concept and to its consequences, questions which must be examined and clarified.

35. With regard to chapter II of Part Two *bis* on countermeasures, the main question was whether the Commission should retain and, if necessary, improve the draft articles on countermeasures, or delete them, leaving article 23 in chapter I to cover the subject. Like many other members, he believed that the Commission must first delete article 54; and he noted what appeared to be a growing consensus within the Commission in favour of deleting that article, a course of action that would improve the balance and clarity of the draft articles. While he had an open mind on the question of retaining chapter II of Part Two *bis*, he wished to see all the conditions referred to in article 53 retained, so as to preserve the balance of the draft articles. He would even favour a more direct reference to the offer of a means of peaceful settlement of disputes as one of the conditions set forth in article 53. He suggested, however, that article 53, paragraph 3, which provided that the injured State could take "provisional and urgent countermeasures", should be deleted, since in his view that provision removed the very *raison d'être* of the article. No real distinction could be suggested between urgent and definitive countermeasures.

36. Mr. Sreenivasa RAO said that the remaining issues relating to State responsibility had elicited almost diametrically opposing views, on the one hand, and reactions with significant nuances, on the other, even when the speakers were on the same side. Many of the views expressed, both by members of the Commission and by Governments in their comments, were based on an underlying philosophy or policy that could not be discussed in a direct and transparent manner. That had inevitably created misunderstandings that could have been removed if there had been a debate on the basic issues. At the present stage of the work, it was very difficult to deal in just a few minutes with the outstanding issues, which had been the subject of much controversy both in doctrine and in terms of policy. It was a pity that the Commission had

not been able to consider them in greater depth, because they were not merely semantic questions, but were bound up with the background and experience of members of the Commission and would have warranted study in a broader context.

37. Turning to the question of the relationship between injury and damage and the need to identify the injured State having the right to invoke the responsibility of the wrongdoing State, he said that that was not merely a conceptual or abstract problem. The Commission's stand on it must be careful and pragmatic, since it had to do with the *locus standi* of the State to raise the question of responsibility of another State. Injury should be conservatively defined and must mean moral or material damage arising as a consequence of the internationally wrongful act. Accordingly, there was little reason to change the existing wording of article 31, paragraph 2.

38. Once the injured State had been identified, the right of other States not directly injured to invoke the responsibility of a State should be limited. In particular, they should not be given the right to take countermeasures, as proposed in article 54. However, that did not mean that, when a violation was serious or had implications for an obligation essential to the international community as a whole, such States had no role to play; they could still make diplomatic representations. As correctly noted in paragraph 35 of the fourth report, such *démarches* did not amount to invocation of responsibility and no special legal interest was required. Representations of that kind had a value in the real world and they could be further coordinated in a variety of ways: for example, they could take the form of a resolution by the United Nations or another of the organizations involved or be used to deprive the wrongdoing State of special incentives or to assist the victim State. All those responses would have as good an effect as countermeasures themselves. Moreover, sanctions in the formal sense did not necessarily produce as good and as swift results as desired and they could do harm to innocent civilians and third States. It would therefore be a sound policy to limit the scope of "injury" and the field in which countermeasures could be taken and, for that purpose, to delete article 54.

39. He also believed that it would be useful to delete the reference to integral obligations in article 43, subparagraph (b) (ii). The consequences of violating such obligations were spelled out in article 60, paragraph 2 (c), of the 1969 Vienna Convention. In any case, that type of obligation was covered in only a few treaties and violations of such obligations were extremely rare. As several members of the Commission had pointed out, deleting article 43, subparagraph (b) (ii), would lessen the confusion and help promote consensus.

40. With regard to the treatment in articles 41 and 42 of serious breaches of essential obligations towards the international community, it was no secret that article 41 was a replacement of article 19, adopted on first reading. The examples given had been adopted on the understanding that they were based on the law in force. Since that time, the concept of an international crime had gained ground. The International Criminal Court had taken the matter further by providing for the prosecution of individuals, but that was without prejudice to State responsibility for

the serious breach involved. Accordingly, he believed the Commission must maintain articles 41 and 42 and bring back the various examples that had been used to illustrate article 19, either within article 41 or in the commentary. In that respect, he agreed with the comment by the Netherlands referred to in paragraph 51 of the fourth report.

41. The fact that the relevant articles did not provide for any special or different consequences in case of “serious breaches” should not lead to the conclusion that there was no difference between ordinary and serious breaches. On the contrary, such a distinction would help to reduce the involvement of States not so directly injured by a wrongful act and to confine their responses to cases of serious breaches. Those responses could be organized without having to go as far as article 54 provided.

42. He felt that the question of countermeasures was a subject that the Commission could usefully have done without. Efforts made in that direction had not yet been able to satisfy either those who opposed the institution or those who supported it. But since the regime of countermeasures was already included in the draft articles, the Commission should not shrink from spelling out the conditions for resorting to them, as defined in article 53. It should also be expressly stated that the offer of a means of peaceful settlement should be a precondition for resort to countermeasures. Furthermore, article 53, paragraph 3, should be deleted because it provided for measures which were not regarded as part of current international law and, as Mr. Idris had said, it could be said to negate the very *raison d’être* of the article.

43. The draft articles on countermeasures successfully captured the dictum of ICJ and the relevant decisions of arbitral tribunals. The message of chapter II of Part Two *bis* was that, if States took the law into their own hands, they must act within its bounds.

44. The CHAIRMAN, speaking as a member of the Commission, said that, in his opinion, the draft articles on State responsibility ought to take the form of a convention. It would be a pity if the long and careful work of the Commission were to become simply an annex to a General Assembly resolution rather than a binding legal instrument. As for the question of the settlement of disputes, he could accept the proposal by China that Part Four should contain a general provision on the peaceful settlement of disputes arising out of State responsibility, which could be based on Article 33 of the Charter of the United Nations.

45. With regard to serious breaches of essential obligations towards the international community as a whole, he favoured retaining the distinction between serious and other breaches, as long as it was made clear that the purpose of consequential damages was not to stigmatize and punish the State which had committed the wrongful act, but to reflect the gravity of the breach in a compensatory way.

46. As to countermeasures, he believed there was a real danger of legitimizing them, irrespective of the situation, and that the draft articles in chapter II of Part Two *bis* could be deleted. At the same time, the presence of that chapter in the draft articles helped to balance the

text as a whole. The solution might therefore be not to delete it, but to limit the scope of its provisions to reduce the risk that was inseparable from the very possibility of resorting to countermeasures. Article 54 could not be watered down and he thought it should be deleted, along with article 53, paragraph 3, as Mr. Idris and Mr. Sreenivasa Rao had suggested.

47. Speaking as Chairman, he declared the debate on State responsibility closed. The Commission seemed to agree that the remaining draft articles should be referred to the Drafting Committee, but without prejudice to any decision which might be taken on the basis of the consultations to be held on the outstanding issues and to be organized by the open-ended working group set up for the purpose under the chairmanship of the Special Rapporteur, Mr. Crawford.

*It was so agreed.*

*The meeting rose at 12.35 p.m.*

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## 2675th MEETING

*Friday, 11 May 2001, at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka, 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) (A/CN.4/513, sect. E, A/CN.4/516,<sup>1</sup> A/CN.4/L.601 and Corr.1 and 2)**

[Agenda item 6]

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<sup>1</sup> Reproduced in *Yearbook* . . . 2001, vol. II (Part One).

## REPORT OF THE DRAFTING COMMITTEE

1. Mr. TOMKA (Chairman of the Drafting Committee), introducing the report of the Drafting Committee on prevention of transboundary harm from hazardous activities (A/CN.4/L.601 and Corr.1 and 2), said the Committee had completed the second reading of the draft articles on that part of the topic.

2. The Commission had decided to divide the topic “International liability for injurious consequences arising out of acts not prohibited by international law” into two: liability and prevention. The first reading of the draft articles on prevention, entitled “Prevention of transboundary damage from hazardous activities”, had been completed at its fiftieth session.<sup>2</sup> The articles had then been circulated to Governments for comments. At its fifty-second session, the Commission had established a Working Group to assist the Special Rapporteur in examining the comments and observations received from Governments.<sup>3</sup> On the basis of the Group’s work, the Special Rapporteur had proposed revisions of some of the articles and the Commission had referred those articles to the Drafting Committee.<sup>4</sup> Because the Committee had not had time to consider them during the fifty-second session, it had taken them up as the first item on its agenda at the current session.

3. The Drafting Committee had not made any substantial changes to the structure of the draft articles as proposed by the Special Rapporteur at the fifty-second session, which was based on the text adopted on first reading. Nevertheless, he proposed, as an addition, a preamble and two articles dealing with emergencies. The titles and texts of the draft preamble and draft articles adopted by the Drafting Committee on second reading read as follows:

**PREVENTION OF TRANSBOUNDARY HARM  
FROM HAZARDOUS ACTIVITIES**

*The States Parties,*

*Having in mind* Article 13, paragraph 1 (a) of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

*Bearing in mind* the principle of permanent sovereignty of States over the natural resources within their territory or otherwise under their jurisdiction or control,

*Bearing also in mind* that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited,

*Recalling* the Rio Declaration on Environment and Development of 13 June 1992,

*Recognizing* the importance of promoting international cooperation,

<sup>2</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1998*, vol. II (Part Two), para. 55.

<sup>3</sup> *Yearbook . . . 2000*, vol. II (Part One), document A/CN.4/509.

<sup>4</sup> For the draft preamble and revised draft articles 1 to 19, as proposed by the Special Rapporteur in his third report, see *Yearbook . . . 2000*, vol. II (Part Two), para. 721.

Have agreed as follows:

*Article 1. Scope*

The present draft articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

*Article 2. Use of terms*

For the purposes of the present draft articles:

(a) “Risk of causing significant transboundary harm” includes risks taking the form of a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm;

(b) “Harm” means harm caused to persons, property or the environment;

(c) “Transboundary harm” means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(d) “State of origin” means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft article 1 are planned or are carried out;

(e) “State likely to be affected” means the State or States in the territory of which there is the risk of significant transboundary harm or which have jurisdiction or control over any other place where there is such a risk;

(f) “States concerned” means the State of origin and the State likely to be affected.

*Article 3. Prevention*

The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.

*Article 4. Cooperation*

States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof.

*Article 5. Implementation*

States concerned shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present draft articles.

*Article 6 [7].\* Authorization*

1. The State of origin shall require its prior authorization for:

(a) any activity within the scope of the present draft articles carried out in its territory or otherwise under its jurisdiction or control;

(b) any major change in an activity referred to in subparagraph (a);

(c) any plan to change an activity which may transform it into one falling within the scope of the present draft articles.

2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present draft articles. Authorizations already issued by the State for pre-existing activities shall be reviewed in order to comply with the present draft articles.

3. In case of a failure to conform to the requirements of the authorization, the State of origin shall take such actions

\* The numbers in square brackets correspond to the numbers of the articles adopted on first reading.

as appropriate, including where necessary terminating the authorization.

*Article 7 [8]. Assessment of risk*

Any decision in respect of the authorization of an activity within the scope of the present draft articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.

*Article 8 [10]. Notification and information*

1. If the assessment referred to in article 7 [8] indicates a risk of causing significant transboundary harm, the State of origin shall provide the State likely to be affected with timely notification of the risk and the assessment and shall transmit to it the available technical and all other relevant information on which the assessment is based.

2. The State of origin shall not take any decision on authorization of the activity pending the receipt, within a period not exceeding six months, of the response from the State likely to be affected.

*Article 9 [11]. Consultations on preventive measures*

1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof. The States concerned shall agree, at the commencement of such consultations, on a reasonable time-frame for the consultations.

2. The States concerned shall seek solutions based on an equitable balance of interests in the light of article 10 [12].

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.

*Article 10 [12]. Factors involved in an equitable balance of interests*

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 9 [11], the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the State likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;

(d) the degree to which the State of origin and, as appropriate, the State likely to be affected are prepared to contribute to the costs of prevention;

(e) the economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(f) the standards of prevention which the State likely to be affected applies to the same or comparable activities and the standards applied in comparable regional or international practice.

*Article 11 [13]. Procedures in the absence of notification*

1. If a State has reasonable grounds to believe that an activity planned or carried out in the State of origin may involve a risk of causing significant transboundary harm to it, it may request the State of origin to apply the provision of article 8 [10]. The request

shall be accompanied by a documented explanation setting forth its grounds.

2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 8 [10], it shall so inform the requesting State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy that State, at its request, the two States shall promptly enter into consultations in the manner indicated in article 9 [11].

3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a reasonable period.

*Article 12 [14]. Exchange of information*

While the activity is being carried out, the States concerned shall exchange in a timely manner all available information concerning that activity relevant to preventing significant transboundary harm or at any event minimizing the risk thereof. Such an exchange of information shall continue until such time as States concerned consider it appropriate even after the activity is terminated.

*Article 13 [9]. Information to the public*

States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present draft articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

*Article 14 [15]. National security and industrial secrets*

Data and information vital to the national security of the State of origin or to the protection of industrial secrets or concerning intellectual property may be withheld, but the State of origin shall cooperate in good faith with the State likely to be affected in providing as much information as possible under the circumstances.

*Article 15 [16]. Non-discrimination*

Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of an activity within the scope of the present draft articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

*Article 16. Emergency preparedness*

The State of origin shall develop contingency plans for responding to emergencies, in cooperation, where appropriate, with the State likely to be affected and competent international organizations.

*Article 17. Notification of an emergency*

The State of origin shall, without delay and by the most expeditious means, at its disposal, notify the State likely to be affected by an emergency concerning an activity within the scope of the present draft articles and provide it with all relevant and available information.

*Article 18 [6]. Relationship to other rules of international law*

The present draft articles are without prejudice to any obligation incurred by States under relevant treaties or rules of customary international law.

*Article 19 [17]. Settlement of disputes*

1. Any dispute concerning the interpretation or application of the present draft articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties to the dispute, including negotiations, mediation, conciliation, arbitration or judicial settlement.

2. Failing an agreement on the means for the peaceful settlement of the dispute within a period of six months, the parties to the dispute shall, at the request of any of them, have recourse to the establishment of an impartial fact-finding commission.

3. The Fact-finding Commission shall be composed of one member nominated by each party to the dispute and in addition a member not having the nationality of any of the parties to the dispute chosen by the nominated members who shall serve as Chairperson.

4. If more than one State is involved on one side of the dispute and those States do not agree on a common member of the Commission and each of them nominates a member, the other party to the dispute has the right to nominate an equal number of members of the Commission.

5. If the members nominated by the parties to the dispute are unable to agree on a Chairperson within three months of the request for the establishment of the Commission, any party to the dispute may request the Secretary-General of the United Nations to appoint the Chairperson who shall not have the nationality of any of the parties to the dispute. If one of the parties to the dispute fails to nominate a member within three months of the initial request pursuant to paragraph 2, any other party to the dispute may request the Secretary-General of the United Nations to appoint a person who shall not have the nationality of any of the parties to the dispute. The person so appointed shall constitute a single-member Commission.

6. The Commission shall adopt its report by a majority vote, unless it is a single-member Commission, and shall submit that report to the parties to the dispute setting forth its findings and recommendations, which the parties to the dispute shall consider in good faith.

4. In the title of the topic on prevention, the term “damage” had been changed to “harm” in the English version only, for the sake of linguistic consistency. The Drafting Committee had also deleted the word “Convention” in the title. In its view, the nature of the future instrument was a decision to be made by the Commission in its recommendation to the General Assembly.

5. Article 1, unchanged by the Drafting Committee, defined the scope of the draft articles. According to comments by some Governments, and some made within the Committee, it might be better to delete the words “not prohibited by international law”, because it was not always clear whether a particular activity was or was not prohibited. As that argument ran, a State which was likely to be affected by an activity should always be able to insist that the State whose activity posed a risk of transboundary harm complied with its obligations under the articles, whether or not the activity was prohibited. Moreover, the invocation of those articles by a State likely to be affected should not be used to bar a subsequent claim by that State that the activity in question was a prohibited one. However, the Committee as a whole took the view that the purpose of the words “not prohibited by international law” was to separate the topic from the topic of State responsibility, dealing with activities which were so prohibited or were wrongful. To remove the dividing line between the two topics at present would only create confusion. The Committee shared the concern that the demarcation

between activities prohibited and not prohibited by international law was not always clear, and that invocation of the articles should not per se bar a claim that the activity in question was wrongful. The commentary to article 1 should therefore elaborate on the issue. The title of the article had been amended to read simply “Scope”.

6. Article 2 defined six terms commonly used in the draft. The concept of “risk of causing significant transboundary harm” in subparagraph (a) had been difficult to define. The Commission’s intention was clearly to refer to the combined effect of the probability of an accident occurring, and the magnitude of the harm which would result if it did. The text adopted on first reading had defined the range of the risk as encompassing “a low probability of causing disastrous harm and a high probability of causing other significant harm”. That approach had caused some confusion among Governments as to whether the article referred to a range of alternatives or to only two. With the assistance of the Working Group, the Special Rapporteur had then suggested a new definition, namely, “a risk ranging from a high probability of causing significant harm to a low probability of causing disastrous harm”. In the view of the Drafting Committee, the new formulation merely added to the confusion, since, logically speaking, there was no range of possibilities between two identified sets of activities, involving a high probability or a low probability. The Commission’s preference had been for a modified version of the text adopted on first reading. The text proposed at the current session defined the risk as including both broad categories, rather than ranging between them. An analysis of the probability of causing transboundary harm and the impact of the harm would have to be determined in relation to factual circumstances. The word “transboundary” had been inserted before “harm” in order to exclude any other kinds of harm. In subparagraph (b), the words “means harm” had been substituted for “includes harm”, for the sake of consistency with the text, which followed. No changes had been made in subparagraph (c). The language of subparagraph (d) had been changed to reflect that of draft article 11, according to which the State in whose territory an activity was planned to take place was also considered the State of origin. Consequently, subparagraph (d) spoke of the State in “which the activities . . . are planned or are carried out”. In subparagraph (e), the new wording defined the “State likely to be affected” in terms of the State at risk, as in subparagraph (a), and made clear that more than one State might be affected. The State of origin was defined in the singular, although it was possible to have more than one State of origin, for instance if two neighbouring States were to plan or launch an activity on their common border. Subparagraph (f), on the “States concerned”, had been added for clarity by the Special Rapporteur, and retained by the Committee.

7. Article 3, a key article, set out the general obligation of prevention on which the entire draft was based. It seemed to be acceptable to Governments. “States of origin” had been placed in the singular, to ensure consistency with the definitions in article 2. The phrase “significant transboundary harm” appeared immediately after the word “prevent” in order to make it clear that the primary objective of the measures to be taken by States was to prevent the harm; minimizing risk was a secondary option only,

if prevention could not be achieved. The previous wording might have been seen as placing prevention and the minimizing of risk on an equal footing. To make clear that that was not the intention, the Drafting Committee had also inserted the words “or at any event”. The commentary would explain that “all appropriate measures” included the obligation of the States parties to, *inter alia*, adopt national legislation incorporating internationally recognized standards, which would form a benchmark for judging the suitability of the measures. The commentary would also emphasize that article 3 complemented articles 10 and 11, and that the three articles fitted harmoniously together.

8. Article 4 had also been accepted by Governments and had been changed only to the extent necessary to accord the same primacy to prevention as in the revised version of article 3.

9. The text of article 5 was unchanged from that adopted on first reading, because Governments had not chosen to comment on it. However, in order to allay the concern that it could be misinterpreted to mean that only States planning activities covered by the articles would be obliged to take the action prescribed, it was considered necessary for the commentary to clarify that the article applied to any State which might become one of the “States concerned”. It would be made clear that the article was binding upon all States parties in regard to legislative and administrative matters, while the measures for the establishment of monitoring mechanisms would be incumbent only on the States concerned.

10. Article 6 corresponded to article 7 adopted on first reading. Some clarifications had been introduced. Paragraph 1, subparagraph (a) referred to “any activity” in the singular, instead of “all activities”, and subparagraph (c) to “any plan” instead of “a plan”. No changes had been made to paragraphs 2 and 3.

11. Article 7, former article 8, provided that, before authorization was granted for an activity within the scope of the articles, there must be an assessment of the possible transboundary harm the activity might cause. The text had been slightly modified from the text adopted on first reading, but only for the sake of clarity. The article reflected the current trend in international law of requiring an environmental impact assessment of any activity which might cause significant environmental harm, but limited that requirement to the effects of transboundary hazards and their assessment. The words “in particular” had been added not simply to emphasize the element of novelty but to indicate the significance of the requirement. However, other factors might also be relevant in deciding whether to authorize an activity. The Drafting Committee had added, at the end of the paragraph, the phrase “including any environmental impact assessment”. The query had arisen whether the concept of “assessment of possible transboundary harm” was the same as “environmental impact assessment”. In the Committee’s view, the former concept should be understood broadly, in line with the definition of “harm” in article 2, subparagraph (b), as “harm caused to persons, property or the environment”.

12. The authorization was not defined as “prior” authorization for two reasons: first, when authorization was

required for a new activity to be undertaken, and secondly, because it might relate to a change in an ongoing activity. As for the title of the article, article 8 adopted on first reading had been entitled “Impact assessment”, and the Special Rapporteur had proposed “Environmental impact assessment”. The new title was sufficiently broad to reflect the content.

13. Article 8, former article 10, applied to situations in which the assessment conducted under article 7 indicated that the planned activity did indeed pose a risk of causing significant transboundary harm. In those situations, article 8, together with articles 9 and 10, provided for a set of procedures to balance the interests of all the States concerned, by giving a reasonable opportunity to undertake preventive measures. The word “prior” had been deleted from paragraph 2 for the reasons explained in connection with article 7. The paragraph also stated more clearly that the time limit for a decision on authorization was “within a period not exceeding six months”.

14. Article 9, former article 11, included all the provisions for consultations on preventive measures. The Drafting Committee had made only minor drafting changes which did not affect the requirement in the sentence added to paragraph 1 by the Special Rapporteur that the States concerned should agree on a reasonable time-frame for the consultations. The first sentence had been brought into line with the changes made in articles 3 and 4. Paragraph 3 of former article 13 had been moved back to its original place in article 11 in order to match the timing of the consultations under the latter article, which might occur after authorization was granted for the activity or even when it had already started.

15. Article 10 corresponded to article 12 adopted on first reading. Its purpose was to provide guidance for States in their consultations about an equitable balance of interests. No major drafting changes had been made.

16. Article 11 corresponded to article 13 adopted on first reading. The phrase “have a risk”, in paragraph 1, had been altered to “involve a risk”, for the sake of consistency with article 1. The words “to it” had been inserted after the phrase “risk of causing significant transboundary harm”, in order to make it clear that only a State actually at risk could request the application of article 8. For the sake of precision, the term “State of origin” replaced the “latter” State. Similarly, in paragraph 2, the words “other State” had been replaced by “requesting State”, and the second sentence redrafted to avoid a second reference to “the other State”. Paragraph 3 had been moved back from article 10 proposed by the Special Rapporteur, in which it had featured as paragraph 2 *bis*.

17. Article 12, former article 14, dealt with steps to be taken after an activity had been undertaken for the purpose of preventing or minimizing the risk of significant transboundary harm. No drafting suggestions had been submitted by Governments, but the Drafting Committee had made minor changes to align the text with articles 3 and 4, specifically in the use of the words “preventing significant transboundary harm or at any event minimizing the risk thereof”. The Committee had also inserted the phrase “concerning that activity” after “all available

information”, thus clarifying the link between the information and the activity.

18. The Drafting Committee had taken the view that since article 12 dealt with exchange of information, it merited reformulation to ensure that it was applicable not only while an activity was being carried out, but even when the activity had ceased: for example, in the case of an activity dealing with nuclear waste. It had therefore inserted a new second sentence, which read: “Such an exchange of information shall continue until such time as States concerned consider it appropriate even after the activity is terminated.” The sentence was a recognition of the fact that the consequences of certain activities continued to pose a significant risk of transboundary harm, even after the activities were terminated. At that point, the obligations of the State of origin did not end, the exchange of information should continue and the States concerned should continue to monitor the potential risk and be prepared to deal with it when and if it materialized. The commentary would elaborate on that issue.

19. Article 13, corresponding to article 9 adopted on first reading, drew on the new trend of seeking to involve in a State’s decision-making process those people whose lives, health and property might be affected, by affording them a chance to present their views to those ultimately responsible for making the decisions. Comments by Governments indicated that they had no substantive or drafting problems with the article, and the Drafting Committee had therefore made no changes. It had merely transposed the article so that it followed article 12, which seemed a more appropriate position.

20. Article 14, former article 15, provided a narrow exception to the obligation of the State of origin to provide information under other articles of the draft. Its formulation had been well received by Governments, although the suggestion had been made that a reference to “intellectual property” should be included, as the term “industrial secrets” was not sufficiently broad. The Drafting Committee had agreed and had inserted the words “or concerning intellectual property”. The phrase “industrial secrets” had been retained, even though it was subsumed in “intellectual property”, to make certain that the article gave sufficient coverage to protected rights. Minor drafting changes had been made for consistency in the use of terms and to avoid redundancy.

21. Article 15, former article 16, was based on article 32 of the Convention on the Law of the Non-navigational Uses of International Watercourses and set out the basic principle that the State of origin was to grant access to its judicial and other procedures without discrimination on the basis of nationality, residence or the place where the harm occurred. The Drafting Committee had taken the view that, since article 32 of the Convention had been the subject of extensive discussions in both the Commission and the Sixth Committee, no substantive modifications were appropriate: only a minor drafting change had been introduced.

22. Article 16 was new and had no equivalent in the text adopted on first reading. There had been general agreement that the scenarios anticipated in the draft could well include situations of emergency, which should therefore

be addressed. Article 16 itself was based on article 28, paragraphs 3 and 4, of the Convention on the Law of the Non-navigational Uses of International Watercourses. It required the State of origin to develop contingency plans for responding to emergencies, in cooperation, where appropriate, with the State likely to be affected and competent international organizations. Two minor amendments had been made to the text originally proposed by the Special Rapporteur in his third report,<sup>5</sup> and the article had been entitled “Emergency preparedness”.

23. Article 17 was also new and was based on article 28, paragraph 2, of the Convention on the Law of the Non-navigational Uses of International Watercourses. The purpose of the article was to require the State of origin to notify the State likely to be affected as expeditiously as possible of an emergency concerning an activity within the scope of the articles and to provide that State with all relevant and available information. While the article did not define “emergency”, the commentary would provide guidance on that issue. The Drafting Committee had made minor linguistic changes, for consistency with other articles, to the text proposed by the Special Rapporteur in his third report. In addition, the word “available”, after “expeditious means”, had been replaced by “at its disposal”, because the means to which States could resort might differ, depending on their level of development. Although particularly expeditious means might exist, and therefore be “available” in a general sense, not all States would, in practical terms, have access to them. The new phrase seemed better suited to capturing that nuance.

24. The Drafting Committee had been of the opinion that the provision might be interpreted as limiting the obligation of the State of origin to mere notification of the emergency, whereas the intention had been to ensure that the State likely to be affected was kept apprised of all the facts concerning the emergency. For greater clarity, the Committee had decided to add the phrase “and provide it with all relevant and available information” at the end of the article.

25. Article 18, former article 6, established the relationship between the rights and obligations of States under the draft articles and other international obligations, whether treaty-based or based in customary international law. In the context of the article, the Drafting Committee had discussed whether the draft represented a framework or traditional convention, and it had become clear that there was no unified definition of a “framework convention”. According to some, in order for a framework convention to be enforceable, its application should be agreed upon by the parties through another treaty, while according to others, a framework convention could be directly applicable without the assistance of any other treaty. Ultimately, the Committee had agreed that it was unnecessary to tackle that issue in the draft article, because it would eventually be a matter for States to decide.

26. The text adopted on first reading had stated that “obligations arising from” the draft were without prejudice to any other obligations incurred by States under relevant treaties or rules of customary international law. The corresponding provision of the Convention on the

<sup>5</sup> *Yearbook* . . . 2000, vol. II (Part One), document A/CN.4/510.

Law of the Non-navigational Uses of International Watercourses spoke of nothing in the convention affecting “any rights or obligations” that might arise from existing agreements. The Drafting Committee had thought that that form of language was not appropriate for the draft articles, but that the text adopted on first reading could prove too restrictive, as it spoke only of “obligations”. The provision in the Convention had dealt only with the relationship between the Convention and agreements in force for a State party prior to the Convention’s entry into force for it. Article 18, however, dealt with existing agreements as well as future ones and the development of customary law through State practice. All questions of overlap between treaties could certainly not be resolved, but the Committee had found it preferable to delete the phrase “Obligations arising from” from the beginning of the text as adopted on first reading, leaving only a reference to “The present draft articles” as being without prejudice to any obligations incurred by States. It went without saying that the word “relevant”, before “treaties”, applied to the rules of customary international law.

27. Article 19, former article 17, retained the provisions of the version adopted on first reading, which had been taken from article 33, paragraphs 1 to 3, of the Convention on the Non-navigational Uses of International Watercourses. The text as adopted on first reading had been a “disabled” dispute settlement mechanism, however, as its operation had required the full cooperation of all parties to the dispute. If one party refused to cooperate, then no fact-finding commission could be set up.

28. The Drafting Committee had taken the view that, while it was prudent not to establish fully-fledged dispute settlement provisions which might serve as a disincentive to ratification by Governments, it was counterproductive to include a disabled dispute settlement provision that might undermine the obligations embodied in the draft. It had also felt that the provisions on fact-finding commissions in the draft articles should be similar to those of the Convention on the Law of the Non-navigational Uses of International Watercourses, the dispute settlement machinery of which had been extensively negotiated by States and found acceptable. On that basis, the Committee had revised and redrafted article 19, in summary form, of article 33 of the Convention.

29. Paragraph 1 set out the obligation of the parties to settle expeditiously any dispute concerning the interpretation or application of the articles by peaceful means of their own choosing. The means were described as including negotiations, mediation, conciliation, arbitration or judicial settlement, that list being, of course, non-exhaustive. In the Drafting Committee’s view, the reference to “mutual agreement” of the parties on a mode of settlement included agreement of the parties in the form of a treaty that provided for a particular mode of settlement: for example, settlement of a dispute by arbitration or other means. That was why the words used in the Convention on the Law of the Non-navigational Uses of International Watercourses, “in the absence of an applicable agreement” between the parties, had not been included, and that would be explained in the commentary.

30. Paragraphs 2 and 3 indicated the establishment of a fact-finding commission as a minimum step if the parties

themselves could not agree on a mode of dispute settlement. Each party was to nominate one member of the commission and the members of the commission were to agree on a chairperson—the gender-neutral term preferred in United Nations usage.

31. Paragraph 4 was a new one which dealt with the composition of the fact-finding commission, a body whose membership must be balanced, so that it could command the confidence of the parties to a dispute. In the context of the draft articles, it was very possible that there would be one State of origin but more than one State likely to be affected. If each State party to the dispute selected a member of the fact-finding commission, there would be a majority of members from States likely to be affected, and the commission’s composition would be unbalanced. The Drafting Committee had opted for allowing the State of origin to appoint the same number of members as the States likely to be affected would appoint. Paragraphs 5 and 6 indicated that the Secretary-General of the United Nations would appoint the members of the fact-finding commission should any of the parties refuse to cooperate and described the modalities for the adoption of the commission’s report.

32. Article 19 did not deal with the rules of procedure and expenses of the fact-finding commission, but those issues could perhaps be addressed in the commentary. The commentary must also underline the fact that the article had been modelled on article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses in that it created a fact-finding commission that was well balanced and impartial and could be established and could function even in the absence of cooperation from one of the parties to the dispute.

33. The inclusion of the preamble went against the Commission’s usual practice, but the Special Rapporteur had thought that the mention of certain principles might better project the balance-of-interests test that had been applied all the way through the draft. The Drafting Committee had agreed but had wanted the preamble to focus only on the principles central to the draft. Accordingly, the first preambular paragraph referred to the codification and progressive development of international law in line with Article 13, paragraph 1 (a), of the Charter of the United Nations. The second and third preambular paragraphs were intended to set the basis for the balance-of-interests test and referred to the permanent sovereignty of States over natural resources within their territory or otherwise under their control and the fact that the freedom of States to carry on or permit activities in such territory was not unlimited. The fourth preambular paragraph referred to the Rio Declaration on Environment and Development (Rio Declaration)<sup>6</sup> without specifically citing the principles of a precautionary approach and sustainable development, which could be mentioned in the commentary, along with the “polluter-pays” principle.

<sup>6</sup> *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.



34. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the titles and text of the draft preamble and draft articles on prevention of transboundary harm from hazardous activities, on the understanding that editing corrections required in some language versions would be made by the secretariat.

*It was so agreed.*

35. Mr. MELESCANU congratulated the Special Rapporteur on his excellent work and his readiness to take account of comments and thanked the members of the Drafting Committee. The conclusion of the work proved that the Commission had been doubly right to decide to confine the draft articles to the prevention of transboundary harm from hazardous activities.

36. The Commission was mandated by the General Assembly to focus its attention on responsibility for wrongful acts and on liability, a word which unfortunately had no translation in the other languages, i.e. responsibility for risk or, quite simply, responsibility for activities that were not prohibited by international law and thus did not constitute wrongful acts by States. The subject of responsibility for consequences arising out of acts not prohibited by international law had been taken up by earlier Special Rapporteurs, in particular Mr. Barboza and Mr. Quentin-Baxter. In his twelfth report,<sup>7</sup> Mr. Barboza had proposed a set of more than 30 draft articles on the subject of liability. The fact that the Commission had decided to deal with one aspect of that topic, namely the prevention of transboundary harm, did not release it from the general obligation to revert to the very topical subject of liability in the future.

37. He raised the point because article 3 might be interpreted as creating a general obligation of State responsibility, even for activities not prohibited by international law. He was reminded of a section of Romania's highway code on speed limits for trams entering depots which stipulated that the driver must slow down to prevent an accident. The Romanian police, in its great wisdom, had always interpreted that as meaning that if an accident occurred, the driver was automatically going too fast, even if the tram had been moving at a snail's pace. Similarly, article 3 allowed the interpretation that, if significant transboundary harm occurred, it could only mean that the State of origin had not taken all appropriate measures to prevent it. Hence the need to return to the subject of liability.

38. Mr. BROWNLIE, speaking on a point of order, said that a number of members did not want to continue the issue of liability. They had not expected a discussion on that important question of principle, and their silence should not be taken as agreement with Mr. Melescanu's position.

39. The CHAIRMAN said he agreed with Mr. Brownlie and appealed to members to confine their comments to the report of the Drafting Committee and not to raise general issues relating to liability.

40. Mr. LUKASHUK expressed his gratitude to the Special Rapporteur for his draft. If the Commission were only able to complete its work on the draft articles on State responsibility with equal success, it would greatly enhance its authority. The draft articles on the prevention of transboundary harm from hazardous activities were well balanced and realistic and there was every reason to expect that the General Assembly would adopt them.

41. Mr. PELLET said that one could, of course, be pleased that the Commission had just adopted a new draft and he joined the concert of self-satisfaction of other members. Admittedly, for him it was difficult to speak of self-satisfaction, for he had hardly participated in the preparation of a draft he had never been excited about, but which could have been important, since the subject was in itself fundamental. Even though formally it did not concern the environment, that was what it was all about. Again, the topic had been ripe for codification and was conducive to a cautious yet determined progressive development of international law. But that was where the problem lay. Not only did the draft fail to contain any elements of progressive development, but it even represented a big step backwards in the area of codification properly speaking. No one would accuse him of being a militant environmentalist; specialists in international environmental law sometimes had an unfortunate tendency to behave like human rights advocates, making disconcerting use of a "wishful-thinking" approach. In the present instance, the opposite was true. At the risk of upsetting the Special Rapporteur, he continued to believe that the draft was rather pointless. Members might quibble over details and provisions adopted, but on the whole the draft did not contain anything reprehensible or fundamentally disputable. What was unfortunate and even alarming in certain respects was what it did not include. Apart from prudent obligations of notification and consultation, which he welcomed, he would perhaps not call the draft lukewarm water, which would be going too far, but certainly decaffeinated coffee, to use Mr. Barboza's words with reference to another draft. By that he meant that all recent advances in positive international law had been carefully ignored. Not a word had been said about the principle of precaution, which was at the heart of recent developments in international environmental law, but which, notwithstanding the Special Rapporteur's assertion in his first report,<sup>8</sup> was no longer a mere political principle, but a genuine, fundamental legal principle. The draft's complete silence on that central issue, a principle which would take on growing importance in the years ahead, was not only regrettable in itself, but might even be a danger for the future, and he feared that the adoption of the draft might put a brake on the strengthening of that principle and on other less marked developments. He was worried that States might make use of the draft's silence to hold up certain important changes. The Commission was codifying with its gaze riveted on the past, not at all on the future, and with a somewhat blinkered attitude towards the present. He had not opposed the adoption of the draft because, to use a banal expression, it was no big deal, and in any case he preferred decaffeinated coffee to no coffee at all.

<sup>7</sup> Yearbook . . . 1996, vol. II (Part One), document A/CN.4/475 and Add.1.

<sup>8</sup> Yearbook . . . 1998, vol. II (Part One), document A/CN.4/487 and Add.1.

42. He had burst out laughing when reading article 19, paragraph 6, according to which the commission was to adopt its report by a majority vote, unless it was a single-member commission. He could not imagine how the members of the Drafting Committee had got it into their heads to adopt such a wording.

43. The extreme timidity of the draft confirmed for him that the Commission was not made to take on a subject of that kind and that it would do well not to continue to take on the other aspect of the topic, namely liability. If the Commission was unable to reflect recent, clear and well-established trends in prevention, then it would obviously be overwhelmed by an infinitely more controversial subject which was at the centre of a heated debate that could be resolved only through negotiations between States, and not through codification by legal experts. His position in that regard was radically opposed to that of Mr. Melescanu. The draft might become a convention: so much the better, or perhaps, so much the worse. But for him, it was a codification which was, if not a step backwards, then in any case one which simply marked time, and he could not but wonder about the import of such an exercise. Decaffeinated coffee did not keep one awake.

44. Mr. KATEKA said that Mr. Pellet was trying to trivialize the topic of prevention of transboundary harm from hazardous activities. It might be recalled that Mr. Pellet was fond of complaining about the demolition enterprise in the topic of reservations to treaties. What was sauce for the goose should be sauce for the gander. Members should show courtesy to the topics of others. Some members had different opinions on reservations to treaties and all the Special Rapporteur's ingenious work on that topic, but no one had referred to it as decaffeinated coffee. He hoped that such would not be the kind of language to be used in connection with topics on which the Commission had decided to embark. The draft just adopted was not as strong as it could have been, because of the demolition enterprise which had plagued the topic.

45. Mr. TOMKA (Chairman of the Drafting Committee) pointed out for Mr. Pellet's information that the phrase, which he had found so amusing, had been taken by the Drafting Committee from article 33, subparagraph (b) (v), of the draft articles on the law of the non-navigational uses of international watercourses adopted by the Commission at its forty-sixth session.<sup>9</sup> States had adopted the draft and the phrase appeared in article 33, paragraph 8, of the Convention on the Law of the Non-navigational Uses of International Watercourses.

46. Mr. PAMBOU-TCHIVOUNDA commended the Special Rapporteur for his excellent work on the topic and said it was surprising, indeed disturbing, that in a draft on the subject of prevention the preamble should make no mention of that notion.

47. In the French version, the term *jurisdiction* should be replaced by *compétence* and a number of other changes were also required.

48. Mr. KUSUMA-ATMADJA commended the admirable work done by the Special Rapporteur and the Draft-

ing Committee, which he could not but wholeheartedly endorse.

49. Mr. HERDOCIA SACASA praised the dedication of the Special Rapporteur, Mr. Sreenivasa Rao, in building on the achievements of previous special rapporteurs in order to bring the work on the topic to a successful conclusion. One of the principal achievements of the draft was its affirmation, in a preamble which set the topic in a broader context, of the principles of sustainable development, permanent sovereignty of States over the natural resources within their territory, protection of the environment, and cooperation between States. With regard to the latter principle, a particularly valuable achievement of the draft was its establishment of a framework for dialogue and consultation between States.

50. No doubt the Commission could have gone much further in the provisions on the environment but, as Mr. Pellet had himself had occasion to point out in another context, the law was to some extent the art of the possible. Personally, he thought that the draft incorporated some of the most important principles relating to the topic, systematizing the duty of prevention and highlighting the requirements for prior authorization and assessment of risk, including an environmental impact assessment; and drawing the necessary distinction between State responsibility and international liability.

51. Lastly, reverting to the preamble, he wished to draw attention to the important proviso contained therein, that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control was not unlimited. The concept of sovereignty was not being eroded in contemporary international law; on the contrary, it was to be affirmed within a process of interaction enriched by the principle of international cooperation.

52. Mr. KAMTO joined others in congratulating the Special Rapporteur and the Drafting Committee for completing their work on the topic. Admittedly, it would have been difficult to achieve anything revolutionary after the mutilation to which the original draft articles on strict liability had been subjected. Nonetheless, he could to some extent sympathize with the somewhat muted welcome—to say the least—extended by Mr. Pellet to the draft articles. It ought to have been possible, even in the area of prevention, to introduce some new elements taking account of current developments in international environmental law.

53. Several points needed to be dealt with more fully in the commentaries to the articles. First, some explanation should be given of the difference between the new notion of "implementation" and the more classical notion of "application". Secondly, with regard to the highly regrettable absence of any reference to the principle of precaution in article 3—an absence to which Mr. Pellet had also alluded—the commentary should make it clear that the term "prevention" was to be understood in a broad sense, as including the principle of precaution. Thirdly, the commentary to article 17 should indicate that the provisions of that article, requiring the State of origin to provide the State likely to be affected with all relevant and available

<sup>9</sup> *Yearbook* . . . 1994, vol. II (Part Two), p. 134.

information, were subject to the provisions of article 14, on national security and industrial secrets.

54. Mr. Sreenivasa RAO (Special Rapporteur) said that, given the evident strength of his views on the draft articles, it was a pity that Mr. Pellet had been unable to find the time to involve himself more closely in the drafting process. Nonetheless, Mr. Pellet's comments were well taken, nor was he alone in expressing the view that the draft fell short of expectations. The same criticism had been made by other members, as well as by representatives in the General Assembly. It should be borne in mind, however, that between the forty-sixth session, in 1996, and the current session, the draft had passed through no fewer than four readings, in the course of which, as Special Rapporteur, he had had, to the best of his abilities, to take account of members' many comments and suggestions.

55. In his view, there was no substance to the accusation that the draft contained no progressive elements. It highlighted the management of risk as fundamental; it introduced mandatory notification and information; and made authorization a fundamental precondition for any activity to continue, and such authorization applicable even to pre-existing activities once the draft articles had been adopted. Furthermore, as the commentaries should make abundantly clear, such authorization should include all the most modern management techniques as they became available. Such institutional mechanisms would evolve with time, keeping pace with technological advances. Many States had also indicated that non-discrimination, information to the public and other aspects of emergency preparedness were elements of progressive development, rather than current practice in international law.

56. Consequently, the view that the draft was totally "decaffeinated", that it fell short even of existing principles of codification, and that it contained no elements of progressive development was an assertion belied by the facts and contradicted by the views of Governments and members of the Commission alike, though Mr. Pellet was of course fully entitled to his opinion. For his own part, as Special Rapporteur he saw the adoption of the draft after a process that had lasted 23 years as a momentous occasion, albeit one for which credit was due, not to himself, but to his hard-working predecessors. He was happy at the current time to leave it to States to decide whether there was scope for further development of the draft articles.

57. Mr. LUKASHUK said that the extremely emotional statement by Mr. Pellet provided the strongest possible affirmation of the soundness of the Special Rapporteur's draft. If the Commission were to follow Mr. Pellet's proposal, it would need at least another 20 years to come up with any real results. The road to hell was paved with good intentions, and there was no need for the Commission to take that road before its time. Nor was there any need for the Special Rapporteur to justify himself: the draft was profoundly realistic and would make a substantial contribution to the development of international law.

58. Mr. BROWNLIE said that, in point of fact, the draft was not about transboundary harm, but about the management of risk. It was in effect a new subject, and one

that had proved difficult to deal with. As many members who had refrained from taking the floor at the current meeting were aware, the draft was creative, and in certain respects, indeed, radical.

59. Mr. GALICKI said that the subtopic of prevention of transboundary damage from hazardous activities had been fully accepted by the Commission for an in-depth study and the results had been presented by the Special Rapporteur. The question of whether or not to continue the consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law was a matter for States to decide. He would like to suggest that the Commission should pay a tribute to the Special Rapporteur, which he truly deserved for the commitment with which he brought the work on the subtopic to a successful completion.

60. The CHAIRMAN said the Commission would return to the question of its recommendation regarding the form of the draft articles at a later stage, following informal consultations.

**State responsibility<sup>10</sup> (*continued*) (A/CN.4/513, sect. A, A/CN.4/515 and Add.1-3,<sup>11</sup> A/CN.4/517 and Add.1,<sup>12</sup> A/CN.4/L.602 and Corr.1 and Rev.1)**

[Agenda item 2]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

61. Mr. CRAWFORD (Special Rapporteur), reporting on the outcome of the consultations concerning the form of the draft on State responsibility and the provisions on dispute settlement, said that, following a discussion involving a considerable number of members, agreement had been reached on four points. First, the report would have fully to reflect the different trends on the issue in the Commission, and to give full weight to the very significant view of many members that the work on State responsibility ought, if not immediately, then in due course, to result in a convention.

62. Secondly, there had been endorsement for the two-stage approach suggested by a number of members, prominent among them Mr. Lukashuk and Mr. Melescanu, that the Commission should recommend in the first instance that the General Assembly should in a resolution take note of and annex the text, with appropriate language emphasizing the importance of the subject and the gap in the present state of codification and progressive development of international law due to the absence of a concluded text on State responsibility. A useful precedent existed for that first stage, in Assembly resolution 55/153 of 12 December 2000, on nationality of natural persons in relation to the succession of States. Obviously, other elements that could be contained in such a resolution might be mentioned in the report. The second phase would be the further consideration of the

<sup>10</sup> For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

<sup>11</sup> See footnote 1 above.

<sup>12</sup> *Ibid.*

question at a later session of the Assembly, with a view to the possible conversion of the articles into a convention, if the Assembly judged such a course to be appropriate, as did many members of the Commission.

63. Thirdly, it did not seem necessary for the Commission to specify when that should occur. In any case, that was a matter for the internal organization of the Sixth Committee, which had a number of other texts before it. But the second stage would involve, in due course, consideration of that question.

64. Fourthly, the articles that, it was to be hoped, the Commission would adopt and the General Assembly note in general terms in its resolution, would not contain machinery for dispute settlement, which was not appropriate for articles as such. That was of course without prejudice to the question of provisions on the relationship between countermeasures and dispute settlement and on the Chinese proposal, in the comments and observations received from Governments (A/CN.4/515 and Add.1–3), should the Drafting Committee find it appropriate in the light of the debate to deal with those issues in the text. To repeat, there would be no provision in the articles for dispute settlement machinery. However, the Commission would draw attention to the desirability of settlement in disputes concerning State responsibility; to the machinery elaborated by the Commission in the draft adopted on first-reading<sup>13</sup> as a possible means of implementation, but also to other possibilities; and would leave it to the Assembly in the second phase to consider whether and what provisions for dispute settlement could be included in an eventual convention.

65. It was thought that a procedure along those lines could contribute to the adoption of the articles by consensus, along with a consensus approach to the question of their future treatment.

*The meeting rose at 12.05 p.m.*

<sup>13</sup> See 2665th meeting, footnote 5.

## 2676th MEETING

*Tuesday, 15 May 2001, at 10. a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

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

[Agenda item 1]

1. The CHAIRMAN invited Mr. Hafner, the Chairman of the Planning Group, to announce the final composition of the Group.

2. Mr. HAFNER (Chairman of the Planning Group) said that the Planning Group would be composed of the following members: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Galicki, Mr. Idris, Mr. Kamto, Mr. Kusuma-Atmadja, Mr. Pellet, Mr. Rosenstock, Mr. Yamada and Mr. He (ex officio).

*The meeting rose at 10.05 a.m.*

\* Resumed from the 2673rd meeting.

## 2677th MEETING

*Friday, 18 May 2001, at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

## Statement by the Legal Counsel

1. The CHAIRMAN invited Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, to brief the Commission on the latest legal developments in the United Nations.

2. Mr. CORELL (Under-Secretary-General for Legal Affairs, the Legal Counsel) said that the report of the Secretary-General, "We the peoples: the role of the United Nations in the twenty-first century" (Millennium Report),<sup>1</sup> to the Millennium Summit, held from 6 to 8

<sup>1</sup> A/54/2000.

September 2000, contained many references to the legal elements of the work of the United Nations. In the run-up to the Summit, the Office of Legal Affairs had suggested that attention be drawn to the opportunity it provided for Heads of State and Government to sign and ratify conventions. In an unprecedented development, over the three days of the Summit a total of 273 treaty actions had been taken. That successful experiment was henceforth to be repeated at each General Assembly: every Spring, delegations would be reminded that Heads of State and Government attending the Assembly could use the occasion to sign and ratify conventions at the Office of Legal Affairs, in the presence of the media. The United Nations Millennium Declaration, adopted by the Assembly in resolution 55/2 of 8 September 2000, also contained very strong commitments to the rule of law, particularly in paragraphs 9, 24 and 25, laying down parameters that could subsequently be extended, and several references to ICJ and the desirability of settling conflicts by peaceful means.

3. He wished to congratulate the Commission on the progress it had made with regard to the topics on its agenda. The General Assembly, too, had expressed its appreciation for the work accomplished. It was very much to be hoped that work on the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) would be concluded at the current session. As members were aware, the Assembly had taken note of that part of the report of the Commission on the work of its fifty-second session concerning the length, nature and place of future sessions of the Commission.<sup>2</sup> He could not emphasize strongly enough the need for the Commission to make rational and efficient use of its time and resources. There was no doubt that the Assembly would exercise extreme vigilance with regard to the coming split sessions, which must not prove more costly or less productive than the continuous sessions. It was expected that all costs for the current session would be covered from funds within existing resources. With regard to future sessions, provision had been made for a 10-week split session for the fifty-fourth session of the Commission.

4. In its resolution 55/153 of 12 December 2000, the General Assembly expressed its appreciation to the Commission for its valuable work on the topic of nationality of natural persons in relation to the succession of States; took note of the articles on the topic; and invited Governments to take into account, as appropriate, the provisions contained in the articles in dealing with issues of nationality of natural persons in relation to the succession of States. It also recommended that all efforts be made for the wide dissemination of the text of the articles—a recommendation pursuant to which the articles had since been made available on the Internet, while further options were also currently being discussed. Lastly, the Assembly decided to include the topic on the agenda of its fifty-ninth session, the purpose being to consider the possibility of concluding a convention.

5. On jurisdictional immunities of States and their property, the General Assembly, in resolution 55/150 of 12 December 2000, had established an Ad Hoc Committee on Jurisdictional Immunities of States and Their Property to meet for two weeks in March 2002, to further the work done on the topic, consolidate areas of agreement and resolve outstanding issues with a view to elaborating a generally acceptable instrument.

6. In June 2000, the Preparatory Commission for the International Criminal Court had completed its work on the draft text of the Rules of Procedure and Evidence, and on the Elements of Crimes. In the course of its work the Preparatory Commission had brought to light some technical inadvertencies in the text: hence the delay in issuing the final text of the Rome Statute of the International Criminal Court. A final version should be issued shortly, whereupon parliaments could proceed to ratification.

7. The Preparatory Commission was currently considering five items: the draft relationship agreement between the International Criminal Court and the United Nations; the draft agreement on the privileges and immunities of the Court; the rules of procedure of the Assembly of States Parties; the draft financial regulations and rules; and the definition of the crime of aggression. Substantive progress had been made on several of those topics, some of which were expected to be completed at the Preparatory Commission's next session, to be held from 24 September to 5 October 2001. The Preparatory Commission had already begun to look at practical arrangements for the establishment of the Court. Many believed that the Rome Statute of the International Criminal Court, which had received 139 signatures and 31 ratifications, would come into force by mid-2002. Paraguay was the latest State to have ratified the Rome Statute, on 14 May 2001.

8. As to efforts to establish international criminal courts in Sierra Leone and Cambodia, the Security Council, by resolution 1315 (2000) of 14 August 2000, requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court, not, as in the cases of the former Yugoslavia and Rwanda, under Chapter VII of the Charter of the United Nations, but under a *sui generis* arrangement. On 1 January 2001 agreement had been reached between the Government of Sierra Leone, the Council and the Secretary-General on the establishment of a court and on its statute. On 23 March 2001 the Secretary-General had invited Member States to submit pledges of voluntary contributions to the funding of the court by 22 May 2001. Meanwhile, he had met personally several times with a group of interested States, and a small management committee would shortly be created to ascertain whether the voluntary contributions pledged would provide the funding necessary to run the court.

9. Cambodia was a more complex case: a national court was envisaged, but one with an international presence. In 2000 he had visited Phnom-Penh twice to negotiate with Mr. Sok An, Senior Minister in charge of the Council of Ministers, the text of an agreement between the United Nations and the Government of Cambodia. However, it was not until January 2001 that the National Assembly and Senate had adopted a national law on the question,

<sup>2</sup> *Yearbook* . . . 2000, vol. II (Part Two), paras. 734–735.

a text that had subsequently been referred to the Constitutional Council for review. Some issues of national concern clearly still remained, and the Office of Legal Affairs was currently awaiting an official translation of the law adopted by the Parliament, whereupon the agreement would be finalized.

10. On terrorism, the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 had held its fifth session from 12 to 23 February 2001 and had continued its consideration of a draft international convention for the suppression of acts of nuclear terrorism, as well as of a draft comprehensive convention on international terrorism. Pursuant to its mandate, the Ad Hoc Committee had also addressed the question of convening a high-level conference on terrorism. The Ad Hoc Committee's mandate had been renewed by General Assembly resolution 55/158 of 12 December 2000.

11. The United Nations Convention against Transnational Organized Crime (Palermo Convention), and the Protocols thereto (Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime), had been opened for signature at the High-level Political Signing Conference held in Palermo, Italy, from 12 to 15 December 2000, the opening ceremony of which had been attended by the Secretary-General of the United Nations. In an overwhelming expression of multilateral solidarity, 124 countries had signed the Convention, while the two Protocols thereto had received 82 and 79 signatures respectively. The numbers of signatures currently stood at 126, 85 and 82, but no ratifications or accessions had yet been lodged. The objective of the Convention and the Protocols was to enhance international cooperation in combating organized crime, including money laundering. Provision was made, *inter alia*, for cooperation on judicial matters, synchronization of national legislation, exchange of information, extradition and protection of witnesses. The Convention also established a funding mechanism to assist needy countries in implementing their international legal obligations in the domestic arena. Further protocols would be negotiated under the Convention. The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime had already been completed and would shortly be open for signature. The Signing Conference had been accompanied by a well-attended Symposium entitled, "The Rule of Law in the Global Village – Issues of Sovereignty and Universality", covered extensively by the international media. In his capacity as the Legal Counsel, he had participated as a keynote speaker in the Symposium, which had covered a range of current issues of concern, including cybercrime.

12. On the law of the sea, the eleventh Meeting of States Parties to the United Nations Convention on the Law of the Sea was being held in New York from 14 to 18 May 2001, and was considering items such as the revised Financial Regulations of the International Tribunal for the

Law of the Sea; rules of procedure of the Meeting of States Parties; the establishment of a finance committee; and matters related to the United Nations Convention on the Law of the Sea, in particular with respect to article 319, which required the Secretary-General to report to States Parties on developments with regard to the law of the sea. At the time the Convention had been drafted, it had not been foreseen that the General Assembly would play such an active role in work on the law of the sea. As his department submitted an annual report to the Assembly on matters relating to the law of the sea, that report should perhaps also suffice for the Meeting of States Parties. The latest report, which was available on the Internet, contained frightening evidence of the many and ever increasing threats to the seas.

13. The United Nations Open-ended Informal Consultative Process established by the General Assembly in its resolution 54/33 in order to facilitate the annual review by the Assembly of developments in ocean affairs held its second meeting from 7 to 11 May 2001 and focused on marine science and the development and transfer of marine technology, as well as on coordination and cooperation on combating piracy and armed robbery at sea.

14. For the past 10 years or more, informal meetings of the legal advisers to ministries of foreign affairs had been held alongside the meetings of the Sixth Committee during the discussion of the report of the Commission to the General Assembly, the purpose being to secure the presence of persons who played a particularly crucial role in coordinating the work of the various national ministries affected by Commission proposals. The next meeting of legal advisers would take place on 29 and 30 October 2001 and would be coordinated by Mr. Sreenivasa Rao.

15. With regard to outreach programmes, on 6 June 2000 he had taken the initiative of circulating a letter, through the legal advisers in capitals, and the newsletter of the American Society of International Law, appealing to deans of law schools worldwide to incorporate the teaching of international law in their curricula. He had also discussed the proposal at a meeting of deans and professors of Russian law schools, held in Moscow in November 2000. The advantages of enhancing the teaching and dissemination of international law at every level were obvious. Follow-up to his initiative must, however, come from academics themselves. Meanwhile, the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law continued. The programme included the organization of courses and seminars, ad hoc legal publications, continuous updating of international law websites, and maintenance and expansion of the United Nations international law audio-visual library. During 2000, a regional seminar for countries of Central Asia and the Middle East, held in Tehran, had been attended by 26 participants from 14 countries of the region.

16. He would like to draw attention to the Office of Legal Affairs web page<sup>3</sup> which was also accessible via the international law link<sup>4</sup> on the main United Nations

<sup>3</sup> <http://untreaty.un.org/ola-internet/olahome.html>.

<sup>4</sup> <http://www.un.org/law/>.

website. The web page includes important links to information from the Legal Counsel and to the "Strategy for an Era of Application of International Law—Action Plan". On the general question of Internet access, he found it regrettable that the United Nations currently charged students for access to the treaty collection. Arrangements were, however, being made for certain categories of user to have access to the site free of charge via a password.

17. The past 10 years had seen remarkable developments in international law. Issues of the rule of law at the national level and in international relations currently occupied a prominent place on the agenda of the United Nations. The Secretary-General was personally deeply committed to that agenda; and the Commission, too, played an important role in that work. Accordingly, he wished members of the Commission every success in their future endeavours.

18. The CHAIRMAN invited members of the Commission to put questions and observations to the Legal Counsel.

19. Mr. MOMTAZ said he was especially grateful to the Legal Counsel for the information he had supplied about the setting up of the special court in Sierra Leone to prosecute war crimes. When the representative of the Secretary-General had signed the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé Agreement)<sup>5</sup> on behalf of the United Nations, he had placed on record the objection of the United Nations against States granting an amnesty to persons accused by the court of war crimes or crimes against humanity. What steps were being taken by the Office of the Legal Counsel to prevent such persons being granted amnesty?

20. Mr. LUKASHUK said the Legal Counsel's lecture in Moscow on developments in international law had been widely appreciated and he hoped members of the Commission would have the opportunity to read it. He emphasized the importance of the work being done by the Legal Counsel and the Office of Legal Affairs in the teaching and dissemination of international law. International law was becoming part of municipal law, and no longer the exclusive preserve of international jurists. In turn, all jurists were affected by that development and, for the sake of avoiding serious consequences, it was important that professional lawyers should not be allowed to remain illiterate in the field, as they too often were. The subject must be more widely taught, not only in its general chapter but also in the specialized fields of international criminal, economic and labour law; otherwise, municipal law might be incorrectly applied. The mass media paid almost no attention to the subject of international law. The United Nations should therefore encourage its teaching, and also the inculcation of a sense of international justice. He asked the Legal Counsel for an account of progress made within the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization.

21. Mr. KATEKA asked why the special court for Sierra Leone was to be funded from voluntary contributions. It was to be hoped that a lack of resources would

not lead to a denial of justice, as tended to happen at the national level. He wondered why the new court was being established on a different basis to those set up to try war crimes and crimes against humanity in Rwanda and the former Yugoslavia. There was a risk that the status of a *sui generis* tribunal would be misunderstood.

22. Mr. SIMMA said he asked for information about the progress of work on the *Repertory of Practice of United Nations Organs*.

23. Mr. DUGARD said he welcomed the emphasis the Legal Counsel had placed on legal education. However, it should be borne in mind that, in most developing countries, universities did not have access to the Internet. It would be helpful if hard copies of United Nations legal materials could be distributed to African universities.

24. Mr. YAMADA said it was always difficult to obtain the necessary resources for the work of the Commission, and he was grateful for the Legal Counsel's efforts in that direction. He hoped the Legal Counsel would assure members of the Advisory Committee on Administrative and Budgetary Questions that the Commission was determined to implement the cost-saving measures decided upon at its fifty-second session.

25. Mr. CRAWFORD said he welcomed the improvements made by the Office of Legal Affairs in providing electronic access to its documentation. He made extensive use of the treaty database, which had greatly improved over the past five years, but the coverage of registered treaties, especially bilateral treaties, in the United Nations *Treaty Series* was quite uneven. Many States registered hardly any of their treaties, in spite of the provision of the Charter of the United Nations requiring them to do so. The attention of States should be drawn to the desirability of registering treaties, so that the database would reflect more accurately the state of treaty relations among States.

26. Mr. GALICKI said he, too, was concerned about the registration and publication of treaties. He hoped the process of publication would be speeded up, not delayed, by the introduction of electronic publishing techniques.

27. Mr. CORELL (Under-Secretary-General for Legal Affairs, the Legal Counsel), replying to the questions put by members of the Commission, said that during the negotiations for the Lomé Agreement there had indeed been a provision made to grant a general amnesty, to which the representative of the Secretary-General had objected by entering a reservation on behalf of the United Nations. The Government had assured him that there was no question of persons guilty of genocide, war crimes or crimes against humanity being granted an amnesty in Sierra Leone. The Truth and Reconciliation Commission established under the Lomé Agreement would be addressing all those issues. As for the nature of the Sierra Leone special court, it was for the institutions that set up a court to decide what kind of court it should be. Unlike the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, which had been established by the Security Council under Chapter VII of the Charter of the United Nations, in the case of Sierra Leone the Secretary-General had been assured by the Government of

<sup>5</sup> S/1999/777, annex.

its cooperation, and had been requested to negotiate the arrangements for the special court. The Council had not, therefore, felt any need to apply Chapter VII of the Charter and the court would be constituted on a different technical and legal basis. As for the court in Cambodia, there had been no involvement at all on the part of the Council or the Assembly, so the Secretary-General had had to act alone in responding to a request from Cambodia for assistance in setting up a court, and in negotiating for international support. However, the standards applied must be no less stringent, and in negotiating agreements with both Sierra Leone and Cambodia he had himself insisted that the courts must uphold existing standards, especially those of article 14 of the International Covenant on Civil and Political Rights. As for the funding, a United Nations institution would normally be funded from assessed contributions, but that had not been thought necessary in the case of the Sierra Leone special court.

28. As to the comments on the teaching and dissemination of international law, he had been encouraged, during his visit to Moscow, by the presence at his lecture of a number of deans of law schools and by the keen interest in the subject within the Russian Federation.

29. With reference to Mr. Simma's question, there had been a considerable refinement of methods for measuring work within the Office of Legal Affairs since he had become Legal Counsel in 1994. At that time, the Treaty Section had been dealing with an 11-year backlog in the publication of treaties, the equivalent of 540 volumes in the *Treaty Series*. The intake of treaties amounted to about 50 volumes a year. The introduction of computer systems and desktop publishing had reduced the backlog considerably and it was expected to disappear altogether in 2002, but that meant publishing three times as many volumes a year as would appear under a normal production schedule. Once the backlog had been disposed of, the Treaty Section would have to be revamped to take account of the new situation. Again, in regard to the *Repertory of Practice of United Nations Organs*, there was a significant backlog amounting to 17 years' work, and because the task of compilation involved several departments in the Office of Legal Affairs, not the Treaty Section alone, it was no easy matter to devise an appropriate strategy to overcome it. However, in 2000 he had been able to secure funds from several departments to tackle the work outstanding, and he was monitoring progress very closely. Since the 1990s the Sixth Committee had shown a renewed interest in the *Repertory*, as a record of the history of the Organization.

30. Hard copies of legal materials were already being provided for developing countries. With the spread of new technology and the more rapid dissemination of information, access to the materials would improve.

31. He assured Mr. Yamada that he would convey his view on funding to the Advisory Committee on Administrative and Budgetary Questions. As for Mr. Crawford's concern about the registration of treaties, Article 102 of the Charter of the United Nations reflected the Organization's determination, after the experience of the 1930s and 1940s, that there would be no more "secret" treaties. The Office of Legal Affairs would persevere in reminding States of their obligation to register their treaties. The

Secretary-General was the depositary for over 520 multilateral treaties, and every time an action took place on any of them, Member States had to be notified, something that was currently being done automatically through a computer process. Treaty registration data were likewise logged automatically and thus kept fully up to date.

32. A summary of the proceedings of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization could be found on the Codification Division website. Some of the Committee functions, especially those of a political nature, had been taken away from the main Committee and entrusted to a working group under the chairmanship of the President of the General Assembly.

33. In sum, he could assure the Commission that the Organization's lawyers were at all times in the mainstream of its work.

**Reservations to treaties<sup>6</sup> (A/CN.4/508 and Add.1–4,<sup>7</sup> A/CN.4/513, sect. D, A/CN.4/518 and Add.1–3,<sup>8</sup> A/CN.4/L.603 and Corr.1 and 2)**

[Agenda item 5]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR

34. The CHAIRMAN recalled that at the fifty-second session the Commission had completed its discussion of Part I of the fifth report of the Special Rapporteur on reservations to treaties (A/CN.4/508 and Add.1–4). It would now take up Part II of the report.

35. Mr. PELLET (Special Rapporteur), introducing Part II of his fifth report, said that his sixth report (A/CN.4/518 and Add.1–3) would be ready for consideration during the second part of the session. He drew attention to his introduction of chapter III of the fifth report<sup>9</sup> and to the coverage of the topic of reservations to treaties in the report of the Commission to the General Assembly on the work of its fifty-second session.<sup>10</sup>

36. The 14 draft guidelines and three model clauses accompanying guideline 2.3.1 that remained for consideration by the Commission all concerned the moment of formulation of reservations and interpretative declarations, whether simple or conditional. They filled something of a gap in the definition in the 1969 Vienna Convention and in the part of the Guide to Practice that incorporated and expanded on that definition. The draft guidelines fell into two groups. The first was those relating to the obligation of formal confirmation of reservations and interpretative declarations and the limitations thereon (guidelines 2.2.1 to 2.2.4 on reservations and 2.4.3 to 2.4.6 on interpretative declarations). The subject of the second group was

<sup>6</sup> For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth, fifty-first and fifty-second sessions, see *Yearbook* . . . 2000, vol. II (Part Two), para. 662.

<sup>7</sup> See *Yearbook* . . . 2000, vol. II (Part One).

<sup>8</sup> Reproduced in *Yearbook* . . . 2001, vol. II (Part One).

<sup>9</sup> *Yearbook* . . . 2000, vol. I, 2651st meeting.

<sup>10</sup> *Ibid.*, vol. II (Part Two), paras. 638–661.



the more delicate issue of late reservations and interpretative declarations (guidelines 2.3.1 to 2.3.4 and 2.4.7 and 2.4.8).

37. The general philosophy behind the second group was that late reservations constituted a threat to the stability of treaty situations. He himself did not approve of late reservations, but they existed and were undoubtedly a useful safety valve. Where a treaty accorded States parties the right to denounce the treaty, it was absurd to compel them to denounce the treaty in order subsequently to accede to it with reservations, as long as all the other States parties had no objection. In other words, that particular dog was less dangerous than some that the Commission had handled before, and while it might not have to be muzzled, it should at least be kept on a short leash. That was the very purpose of the draft guidelines outlined in paragraphs 279 to 325 of his fifth report, namely, to limit the possibility of making late reservations, so as to ensure that they remained exceptional and under the control of all the States parties.

38. The report of the Commission to the General Assembly had set out in a footnote the 14 draft guidelines still under consideration,<sup>11</sup> thereby enabling delegations to address them in their statements in the Sixth Committee. In addition, in February he had received valuable comments from the United Kingdom. In the main, observations had been made in connection with guidelines 2.2.1 (Reservations formulated when signing and formal confirmation) and 2.2.2 (Reservations formulated when negotiating, adopting or authenticating the text of a treaty and formal confirmation). One suggestion in the Sixth Committee had been that they should be merged; the United Kingdom, for its part, feared that the inclusion of guideline 2.2.2 might enshrine a practice that was devoid of legal foundation. Guideline 2.2.4 (Reservations formulated when signing for which the treaty makes express provision) had been the subject of a number of comments, including whether the rule it enunciated amounted to *lex specialis* and, accordingly, whether it was proper to include it.

39. Guideline 2.3.1 (Reservations formulated late) had been discussed. Quite a number of speakers had concurred with his dislike of late reservations and had underscored the need to limit their use. In that connection, several delegations had welcomed the decision of the Secretary-General to extend to 12 months the time period within which States could react to a late reservation. Personally, he found that time period too long, but proposed to adopt it for the purposes of the draft guidelines. Many States had expressed their views on the rules that should apply to the modification of reservations, and he had taken due note of them in drafting his sixth report.

40. The sixth report referred to recent developments with regard to reservations to treaties, of which he wished to mention one. At its fiftieth session, the Subcommittee on the Promotion and Protection of Human Rights had, in its decision 1998/113 of 26 August 1998, requested one of its members, Ms. Françoise Hampson, to submit a working paper on the question of reservations to human rights

treaties, which she had done at the fifty-first session of the Subcommittee, in 1999,<sup>12</sup> and the Subcommittee had taken note of that document. In response, the Commission on Human Rights had asked the Subcommittee to request Ms. Hampson to submit to the Subcommittee revised terms of reference for her proposed study, further clarifying how the study would complement work already under way on reservations to human rights treaties, in particular by the International Law Commission. In the light of that decision, no document had been submitted by Ms. Hampson to the Subcommittee at its fifty-second session, in 2000.

41. Despite the decision adopted by the Commission on Human Rights, the Subcommittee, in its resolution 2000/26 of 18 August 2000, had confirmed its previous position by establishing a timetable for Ms. Hampson's work and had requested her to seek the advice and co-operation of the Special Rapporteur of the International Law Commission and of all the relevant treaty bodies and, to that end, had requested the authorization of a meeting between Ms. Hampson and the Special Rapporteur of the International Law Commission and the Chairpersons of the relevant treaty bodies.

42. Even before that resolution had been adopted, he had contacted Ms. Hampson, as the International Law Commission had authorized him to do. It was his understanding on the basis of that informal contact that her study would not necessarily duplicate the work of the Commission, and could in fact provide material that would advance that work if, as she had assured him, the study dealt exclusively with State practice in the area of reservations to human rights treaties. If, however, the study followed the course charted in her first working paper—endorsed by the Subcommittee at its fifty-first and again at its fifty-second session—it would go far beyond a catalogue of State practice to deal with the specific regime applicable to reservations to human rights treaties, assuming such a regime existed. That would inevitably duplicate the efforts of the International Law Commission.

43. The Commission on Human Rights appeared to share his concern, for in decision 2001/113 of 25 April 2001, it had again requested the Subcommittee to reconsider its request in the light of the work under way by the International Law Commission. To be honest, he was not sure what was to be done. The Subcommittee might well pursue its course, over the objections of the Commission on Human Rights. It would be inappropriate for the International Law Commission to become involved in the relations between the two bodies, however. If the Commission agreed, he would write to Ms. Hampson, asking about her intentions and assuring her of his readiness to work with her in accordance with the decisions adopted by the Commission on Human Rights. He would also provide her with the views of the International Law Commission on the topic, and to that end, he would welcome contributions from members.

44. Lastly, he hoped that the 14 draft guidelines and 3 model clauses set out in his report could be referred to the Drafting Committee.

<sup>11</sup> *Ibid.*, footnote 199.

<sup>12</sup> E/CN.4/Sub.2/1999/28 and Corr.1.

**State responsibility<sup>13</sup> (continued)\* (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,<sup>14</sup> A/CN.4/517 and Add.1,<sup>15</sup> A/CN.4/L.602 and Corr.1 and Rev.1)**

[Agenda item 2]

**FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(concluded)\***

45. Mr. CRAWFORD (Special Rapporteur), reporting on two meetings of the open-ended working group convened to provide guidance to the Drafting Committee on the remaining questions of principle relating to the draft articles on State responsibility, said the Committee had already resolved the issues relating to terms such as “injured State”, “injury” and “damage”. Two groups of issues of general concern had remained, however. The first related to Part Two, chapter III (Serious breaches of essential obligations to the international community), and the second to Part Two *bis*, now renumbered as Part Three, chapter II (Countermeasures). A helpful discussion had been held and the Committee had already implemented the results by completing, in a form that was extremely satisfactory, a new version of Part Two, chapter III.

46. Part Two, chapter III, had been the subject of lengthy and difficult discussion. It was generally agreed that it could be retained, with the deletion of paragraph 1 of article 42 (Consequences of serious breaches of obligations to the international community as a whole), which referred to damages reflecting the gravity of the breach, but with the possible substitution, to be considered by the Drafting Committee, of a category dealing with serious breaches of an obligation established by a peremptory norm of general international law. Apart from the fact that the notion of a peremptory norm was well established by the 1969 Vienna Convention, it had seemed sensible to envisage the effect of such fundamental obligations as relating to the underlying issues of obligation covered in Parts One and Two. The notion of obligations to the international community as a whole related more to questions of invocation, as ICJ had put it in the *Barcelona Traction* case. It had also been proposed that the Committee should give further consideration to aspects of the consequences of serious breaches, as contained in article 42.

47. As to Part Three, chapter II, the working group had thought it undesirable to try to incorporate all or a substantial part of the articles on countermeasures into article 23 (Countermeasures in respect of an internationally wrongful act), which was about only one aspect of the problem. Article 23 would be retained, as would Part Three, chapter II, but article 54 (Countermeasures by States other than the injured State) had been extremely controversial and would be replaced by a saving clause, the terms of which were still to be discussed by the Drafting Committee. Article 53 (Conditions relating to resort

to countermeasures) would be reconsidered, as many members of the Commission had cast doubt on the value of the distinction drawn between provisional and urgent countermeasures on the one hand, and other countermeasures, on the other. Among other things all countermeasures were provisional, in a sense. It had also been felt that article 53 should be simplified and brought into line with the decisions of the arbitral tribunal in the *Air Service Agreement* case and of ICJ in the *Gabčíkovo-Nagymaros Project* case. In addition, articles 51 (Obligations not subject to countermeasures) and 52 (Proportionality) stood in need of some reconsideration.

48. After discussion and clarification of those issues, the working group had agreed that an acceptable text could be developed and had suggested that the Drafting Committee be asked to give effect to the results of the discussion.

*The meeting rose at 11.30 a.m.*

## 2678th MEETING

*Tuesday, 22 May, 2001 at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

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

**Reservations to treaties<sup>1</sup> (continued) (A/CN.4/508 and Add.1–4,<sup>2</sup> A/CN.4/513, sect. D, A/CN.4/518 and Add.1–3,<sup>3</sup> A/CN.4/L.603 and Corr.1 and 2)**

[Agenda item 5]

\* Resumed from the 2675th meeting.

<sup>13</sup> For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

<sup>14</sup> See footnote 7 above.

<sup>15</sup> *Ibid.*

<sup>1</sup> For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth, fifty-first and fifty-second sessions, see *Yearbook . . . 2000*, vol. II (Part Two), para. 662.

<sup>2</sup> See *Yearbook . . . 2000*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR  
(continued)

1. Mr. GAJA said that the Special Rapporteur's in-depth analysis in Part II of his fifth report (A/CN.4/508 and Add.1-4) had shown that the practice of States with regard to reservations to treaties was actually much more complex than it might appear to be. It was probably not the Commission's task to dwell on all hypotheses, but it certainly should focus on the question of late reservations, of which practice offered many examples, even within the Council of Europe, notwithstanding the critical position on that subject adopted by the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI). Late reservations were reservations formulated after the latest possible moment, according to article 2, paragraph 1 (*d*), and article 19 of the 1969 Vienna Convention, and they were permissible, as the Special Rapporteur rightly held, only provided that the other States parties did not raise any objection. That practice was sometimes contested, but it met the need for a degree of flexibility, especially when it enabled a State to achieve the same result that the State would have reached by first denouncing the treaty and then ratifying it again with the desired reservation. In some cases, it aimed to remedy mistakes which a State might have made or hasty choices that had led it to fail to make reservations when ratifying the treaty. Reservations made late might be expressly allowed by the treaty, as in the case of the late reservations formulated by the Governments of Greece and the United Kingdom to article 1, paragraph 3, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>4</sup> In other words, late reservations could be perfectly permissible in terms of their content. Since the reserving State went back in a sense on its consent to be bound, it was clear that all the other contracting parties must somehow agree to the reservation being made. To that end, it was reasonable to allow the other contracting parties an appropriate period of time to evaluate the late reservation, 12 months being the current practice of the Secretary-General, during which the contracting parties might indicate whether they had an objection to both the reservation's lateness and content or simply to the latter. It was in that spirit that he endorsed the Special Rapporteur's guidelines 2.3.1 (Reservations formulated late) and 2.3.2 (Acceptance of reservations formulated late).<sup>5</sup>

2. If the objection related solely to the content of the reservation, it should affect only the relations between the reserving State and the objecting State. The Special Rapporteur recognized the distinction between the two types of objection. That distinction should be given greater prominence in guideline 2.3.3 (Objection to reservations formulated late). A reference should be made in the text to the objection to a reservation being formulated late, thus also bringing the text into line with that of guideline 2.3.2.

3. The permissibility of late reservations gave rise to a problem of consistency with the regime established by

the 1969 Vienna Convention. Although it could be argued that the Convention did not resolve the issue and that the draft guidelines on late reservations merely filled a gap, the definition of reservations in article 2, paragraph 1 (*d*), and the text of article 19 of the Convention remained. Moreover, the definition of reservations in guideline 1.1 excluded late reservations. The problem was thus what to call late reservations. Since the term "reservations" was used in practice and the regime of those reservations, once permitted, was the same as that for other reservations, it was difficult to propose another term, at least once the late reservation had been permitted in the absence of an objection within the allowed time limit. Perhaps it would be better to refer not to "late reservations", but to "tentative reservations" until the time limit had expired. Although that question of terminology might be elucidated in the commentary, it would be a good idea to consider whether it might not be dealt with in the part of the draft guidelines dealing with definitions.

4. Late reservations were nonetheless a factor that complicated contractual relations and, as the Special Rapporteur rightly pointed out in paragraph 311 of his fifth report, they should be avoided as far as possible. There was thus no reason for the model clause, "reservations formulated after the expression of consent to be bound", in guideline 2.3.1, in any of the three alternatives proposed by the Special Rapporteur, since it appeared to encourage the phenomenon of late reservations by providing for the possibility of the inclusion in a treaty of a clause recognizing the permissibility of late reservations in a much more general manner.

5. He also did not see why the rule of the unanimity of the other contracting parties should also be applicable to simple interpretative declarations formulated late. The wording of guideline 2.4.7 (Interpretative declarations formulated late) was modelled on guideline 2.3.1, whereas, in general, there was no time limit for formulating an interpretative declaration and there could thus be no such thing as a late interpretative declaration. Although some treaties did set time limits, the draft guideline should cover only normal cases, with the usual wording "Unless the treaty otherwise provides". The unanimity of the contracting parties should be required only in cases in which a time limit had been set in the treaty itself.

6. In conclusion, he said that he generally agreed with the Special Rapporteur's proposals on late reservations and conceded that some of his comments were more a matter for the Drafting Committee, although they also related to substance.

7. Mr. HE said that the fifth report further clarified and supplemented the regime of reservations provided for by the 1969 and 1986 Vienna Conventions. Received with considerable interest by States and the Sixth Committee, the draft guidelines submitted so far successfully combined the regime of reservations of the Conventions with their application in practice. Although Part II of the report under consideration dealt with procedural questions regarding reservations and interpretative declarations in an in-depth, lucid and logical manner, the draft guidelines contained therein called for a number of comments.

<sup>4</sup> *Multilateral Treaties Deposited with the Secretary-General: Status as of 31 December 2000* (ST/LEG/SER.E/19) (United Nations publication, Sales No. E.01.V.5), vol. II, pp. 254, 257 and 259.

<sup>5</sup> See 2677th meeting, footnote 9.

8. The content of guidelines 2.2.1 (Reservations formulated when signing and formal confirmation) and 2.2.2 (Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation) did not give rise to any problem, but, as they both related to the same issue, namely, the formal confirmation of each reservation, it would be appropriate to combine the two in a single guideline, despite the reasons given by the Special Rapporteur in introducing his fifth report at the previous session.<sup>6</sup> With regard to guideline 2.2.3 (Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]), he thought that the words in the first brackets should be deleted because the concept of “agreement in simplified form” was not commonly used in State practice. The second phrase in brackets should be retained. The same comment applied to guideline 2.4.5 (Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]).

9. The question of late reservations was extremely delicate and was the focus of discussion in literature and practice. The general view was that it should be strictly regulated; otherwise, the principle of *pacta sunt servanda* could be undermined and the stability of the international legal order endangered. As no fewer than four draft guidelines dealt with that issue, namely, guidelines 2.3.1, 2.3.2, 2.3.3 and 2.3.4 (Late exclusion or modification of the legal effects of a treaty by procedures other than reservations), he wondered whether it was not possible to combine and reduce them to, say, two draft guidelines. As a general rule, a State could not formulate a reservation to a treaty after expressing its consent to be bound by it. But it should also be acknowledged that that rule was not absolute. If the permissibility of a late reservation was subject to strict conditions, such as unanimous or tacit acceptance by all the States parties or international organizations parties to a treaty, that would be a sufficient guarantee to prevent any abuse. In any case, the issue should be examined in depth, particularly in the Drafting Committee, bearing in mind the potential consequences for current law and State practice.

10. In closing, he said that he was in favour of referring the draft guidelines contained in Part II of the fifth report to the Drafting Committee.

11. Mr. LUKASHUK said that he welcomed the progress made in codifying the rules on reservations to treaties and supported the Special Rapporteur’s decision to rely on the provisions of the 1969 Vienna Convention. However, he was not convinced that there was any great significance in the distinction between the verbs “formulate” and “make”. Although it seemed more appropriate to say that a reservation was “formulated” rather than “made” at the time it was entered, in practice the two terms were used interchangeably, as, for example, in articles 19 and 20 of the Convention.

12. Commenting on the draft guidelines contained in the fifth report, he said that guideline 2.2.2 seemed to

be self-evident and would be better placed in the commentary. Concerning guideline 2.2.4 (Reservations formulated when signing for which the treaty makes express provision), he found the idea that such a reservation did not require confirmation unacceptable from a legal point of view. Reservations made in those circumstances were no less important than the others and, in any case, the idea was not borne out by practice.

13. He also suggested that guidelines 2.4.3 (Times at which an interpretative declaration may be formulated), 2.4.5 and 2.4.6 (Interpretative declarations formulated when signing for which the treaty makes express provision) should be combined and replaced by a single provision stating that interpretative declarations could be made at any time if they were not conditional. That possibility was provided for in the 1969 Vienna Convention. He was not convinced by guideline 2.4.7 because, if such declarations could not be formulated at any time, the treaty could not exist. Guideline 2.4.8 (Conditional interpretative declarations formulated late) dealt with the exception rather than the rule. Like the Special Rapporteur, he believed that, in such a case, the unanimous consent of the States concerned would be required. Pointing out that the Convention included a special regime for reservations to multilateral agreements endorsed by a limited number of States, he wondered whether it might be desirable to make it compulsory in such a case to have prior approval for reservations.

14. He agreed that the sixth report (A/CN.4/518 and Add.1–3) should be better focused. Establishing co-operation between the Special Rapporteur and the Special Rapporteur of the Subcommission on the Promotion and Protection of Human Rights seemed a legitimate aim, but since work on the question of reservations was only in its early stages, it was not essential for the moment. In conclusion, he noted that the report reflected the view he had himself expressed and the observations made by the Sixth Committee.

15. Mr. DUGARD said that he did not agree with the view Mr. Lukashuk had expressed on the work on reservations to human rights conventions. Mr. Pellet had referred to developments in that field, including the decision of the Human Rights Committee in the *Rawle Kennedy* case. The Commission could, of course, adopt a wait-and-see approach, but, in a field where things were developing quite rapidly, it could find itself overtaken by events. He thought that it would be better to encourage Mr. Pellet to adopt a proactive approach and cooperate from now on with the bodies concerned in order to reach an early joint decision on the matter.

16. Mr. ECONOMIDES, referring to the draft guidelines submitted in the report, said that he supported guideline 2.2.1 as to substance, but, from the drafting point of view, he would prefer the words “the treaty subject to ratification” to be replaced by the words “the treaty being ratified”. In guideline 2.2.2, he wondered whether reference could be made to a “reservation” in connection with a text in the negotiation stage. The legal concept of a reservation applied to a text which had already been drafted, adopted and authenticated. At the time of negotiation, there were no reservations in the legal sense of the term, but only political positions. The wording of

<sup>6</sup> *Ibid.*

that guideline and of the other guidelines that referred to negotiations, especially guideline 2.4.4 (Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation), was open to criticism in that regard. Like the Special Rapporteur, he believed that guidelines 2.2.1 and 2.2.2 could be combined.

17. With regard to guideline 2.2.3, he agreed with Mr. He's preference for the second of the two bracketed expressions, which was more commonly used. He proposed that that guideline should be combined with guideline 2.2.4, the substance of which he also found satisfactory.

18. Guidelines 2.4.5 and 2.4.6 were also acceptable in substance. In guideline 2.4.3, the words "at any time" could be misleading and perhaps a starting point should be given to make it clear that the interpretative declaration could be formulated at any time after the final completion of the text.

19. Guideline 2.3.4 did not seem to fit into the Guide to Practice, since it was not useful and only complicated matters without adding anything new.

20. He agreed with the Special Rapporteur that late reservations should not be ruled out altogether, but should be placed in a strict framework, and the one proposed by the Special Rapporteur seemed reasonable and in line with international practice. Guidelines 2.3.1, 2.3.2 and 2.3.3 were therefore satisfactory. However, he did not think it wise at the present stage to insert model clauses, such as the one in guideline 2.3.1, which complicated the drafting of the text. Room could be made for such clauses later, when the work had been finished.

21. He had nothing to add on the substance of guidelines 2.4.7 or 2.4.8.

22. Mr. PAMBOU-TCHIVOUNDA said he agreed with Mr. Economides that it was necessary to specify the moment from which reservations could first exist and that such a concept should be included in the draft guidelines. At the time of the negotiation of a treaty, there could not be any reservations in the true sense; like interpretative declarations, reservations could come into play only from the time when the parties had, without yet committing themselves, reached agreement on the text of the treaty.

23. Mr. SIMMA said he agreed with Mr. Economides and Mr. Gaja that late reservations were undesirable in principle. He was not sure that that was made clear in the proposals by the Special Rapporteur. It was vital to avoid encouraging late reservations.

24. He also objected to the use of the term "authenticating" in the draft guideline that was proposed in paragraph 258 of the report as a merger of guidelines 2.2.1 and 2.2.2 and was to be entitled "Reservations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation", as well as in guideline 2.4.4. Article 10 of the 1969 Vienna Convention made it clear that signing was one of a number of procedures for authentication, so that signing and authentication should not be treated as equivalent. It would be helpful if the Special Rapporteur could clarify that point.

25. He agreed with Mr. Economides that reference could not be made to reservations at the negotiating stage and that in order to exist, a reservation must be expressly stated at the time of signature or ratification. The definition of a reservation should not be stretched beyond its ordinary meaning.

26. He encouraged the Special Rapporteur to follow closely the practice of reservations to human rights treaties and the work being done in that regard in the relevant treaty bodies as well as in the Sub-Commission on the Promotion and Protection of Human Rights. He also urged him to carry on with his in-depth work on those treaties.

*The meeting rose at 11.05 a.m.*

## 2679th MEETING

*Wednesday, 23 May 2001 at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

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

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

[Agenda item 1]

1. Mr. TOMKA (Chairman of the Drafting Committee) said that, following consultations, the Drafting Committee for the topic of reservations to treaties would be composed of the following members: Mr. Pellet (Special Rapporteur), Mr. Al-Baharna, Mr. Candioti, Mr. Economides, Mr. Gaja, Mr. Hafner, Mr. Kamto, Mr. Melescanu, Mr. Rosenstock, Mr. Simma and Mr. He (*ex officio*).

\* Resumed from the 2676th meeting.

**Reservations to treaties<sup>1</sup> (*continued*)** (A/CN.4/508 and Add.1–4,<sup>2</sup> A/CN.4/513, sect. D, A/CN.4/518 and Add.1–3,<sup>3</sup> A/CN.4/L.603 and Corr.1 and 2)

[Agenda item 5]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR  
(*continued*)

2. Mr. PAMBOU-TCHIVOUNDA commended the Special Rapporteur for his excellent fifth report (A/CN.4/508 and Add.1–4) on a critical aspect of the procedure regarding reservations and interpretative declarations. In reading it, he had realized that the topic constituted a major “off-shore deposit” with regard to the great mainland deposit constituted by the law of treaties. The subject-matter was difficult to codify, as could be seen by the body of work that had emerged from the 1969 and 1986 Vienna Conventions.

3. He was grateful to the Special Rapporteur for stressing the role of time in the formation of international legal norms and addressing incidents that could have an impact on their implementation. The Special Rapporteur’s seemingly commonplace report was particularly revealing for three reasons. First, it was a reminder of the dynamic nature of reservations that was virtually inherent in their formulation, because the formulation was, as stated in paragraph 228, part of a process. Secondly, it showed the relative nature of reservations, which were valid solely by virtue of the subsequent echo to which their formulation must give rise, whether the echo was positive or negative. In any case, that echo had to be viewed in a temporal context. The Special Rapporteur rightly noted that the reservation was not enough in itself. Thirdly, and above all, the report demonstrated the strategic nature of reservations. The motivations behind the formulation of a reservation did not always yield to the logic of codified time. Whereas those motivations were more a part of the legal policy of States or international organizations, a reservation lent itself instead to a discretionary definition. Such motivations were likely to lead States and international organizations to dissociate themselves from a treaty, even though they had not yet committed themselves to applying it or, if they had, to withdraw from the circle of contracting parties. The formulation of a reservation was a politically charged moment and a politically self-interested act, the relevance of which, in the eyes of the other contracting parties, must be evaluated in the light of its validity.

4. In that connection, since the fiftieth session, in 1998, the Commission had accepted the fact that the 1969 and 1986 Vienna Conventions were limited and that the regime codified by articles 19 onwards of the Conventions were very incomplete. Part II of the fifth report, which was devoted precisely to the question of the critical moment at which a reservation was formulated, highlighted the discrepancy between practice and written law. The

aim of the draft guidelines was to reduce the discrepancy, but that depended largely on practice, which itself depended on how States and international organizations made use of the guidelines, something that was not unique to reservations. But it would have to be certain that the reservations concerned were those that fell in the *ratione temporis* class.

5. He had already expressed the view that the notion of reservations was unsuited to the notion of negotiation. The purpose of negotiations was to conclude a treaty, and they preceded the treaty. Conversely, since it aimed to exclude or amend the legal effect of a treaty provision, a reservation could be formulated only in relation to a treaty—or in any case to a text adopted following negotiations. Thus, the adoption of a text was the reasonable starting point for an acceptable formulation of a possible reservation. Owing to its intrinsic nature as a unilateral act, a reservation did not lend itself to negotiation. At the other extremity of the *ratione temporis* chain, the formulation of a reservation depended upon the expression of consent by the State or the international organization to be bound through the modalities set out in positive law or, in exceptional cases, after the expression of consent to be bound. That was the temporal framework of late reservations or interpretative declarations, which the Special Rapporteur agreed were admissible provided they were unanimously accepted by the parties to the treaty.

6. Personally, he was somewhat uneasy about the temporal framework of late reservations and interpretative declarations. Some difficulty was posed by the situation of late reservations formulated after the expression of consent to be bound if no account was taken of an essential factor that had not been given due attention in the report, namely, the deferred entry into force of the treaty. Must the same consequences be attributed, on the one hand, to a reservation formulated after the expression of consent to be bound but prior to the entry into force of the treaty and, on the other, to a reservation formulated after the entry into force of the treaty? The Special Rapporteur had not addressed that question, although it directly concerned the determination of the moment of formulation of reservations or interpretative declarations. That question highlighted the role of the depositaries and, had it been dealt with properly, would have resulted in late reservations being treated differently in a guideline or guidelines, namely as an absolute prohibition on reservations formulated after the entry into force of the treaty. That subject should have at least been evoked.

7. As to guideline 2.2.1 (Reservations formulated when signing and formal confirmation), he agreed with what the Special Rapporteur had suggested on the economy of the draft, provided that the terminological confusion caused by the phrase “a reservation must be formally confirmed by the reserving State or international organization” was addressed. The 1969 and 1986 Vienna Conventions did not attribute the same meaning or scope to formal confirmation. He proposed the insertion, after the words “by the reserving State” of the phrase: “in the instrument of ratification, acceptance or approval”. It would distinguish between confirmation by the State and formal confirmation by an international organization, as defined in article 2, paragraph 1 (*b bis*), of the 1986 Vienna Convention, namely the “act corresponding to that of ratification . . . ,

<sup>1</sup> For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth, fifty-first and fifty-second sessions, see *Yearbook . . . 2000*, vol. II (Part Two), para. 662.

<sup>2</sup> See *Yearbook . . . 2000*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

whereby an international organization establishes . . . its consent to be bound”.

8. The word “negotiating” should be deleted from the title and the text of guideline 2.2.2 (Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation). The addition that he had suggested for guideline 2.2.1 regarding the notion of the formal confirmation by the State should be inserted in guideline 2.2.2. Again, a more direct wording for the beginning of the first sentence would read: “A reservation formulated when . . . of the treaty . . . must be . . .”. He was not in favour of a condensed wording of guidelines 2.2.1 and 2.2.2 as suggested by the Special Rapporteur in paragraph 258 of the report.

9. The words in square brackets “an agreement in simplified form”, in guideline 2.2.3 (Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]), should be deleted for the sake of consistency with the usual terminology in the law of treaties. With reference to guideline 2.2.4 (Reservations formulated when signing for which the treaty makes express provision), he was not certain that the confirmation was not required where, or even because, the treaty made express provision for an option to formulate a reservation at the time of signature. He was not convinced about the exclusion of the confirmation requirement, because the effects of signature in the case of guideline 2.2.4 were not identical to those under guideline 2.2.3. Guideline 2.2.4 should therefore be recast to include the confirmation requirement. By and large, his comments on reservations could be transposed to interpretative declarations, with the exception of a few nuances.

10. Lastly, with regard to conduct after the expression of consent to be bound, he was in favour of guideline 2.3.4 (Late exclusion or modification of the legal effects of a treaty by procedures other than reservations), namely late reservations or interpretative declarations. He would simply advocate replacing the word “unless” towards the end of guideline 2.3.1 (Reservations formulated late) by “provided”. He wished to join other members in proposing that the draft guidelines be referred to the Drafting Committee.

11. Mr. HAFNER said that the Special Rapporteur had made a serious attempt to address all the complex ramifications of a topic that went to the very core of treaties, in particular the basic rule of *pacta sunt servanda*, which was certainly part of *jus cogens*.

12. In his view, paragraph 248 of the report gave a wrong impression about confirmation and reservations in the case of State succession. It spoke only of the successor State as such, and the footnote thereto referred to article 20, paragraph 1, of the 1978 Vienna Convention. That was incorrect, since that article of the Convention related only to newly independent States and hence could not be generalized. To be faithful to that instrument, a clear distinction must be drawn between the two categories of States.

13. He also wondered why it was necessary to distinguish between the different occasions when a reservation

could be formulated. As he saw it, a reservation could be formulated at any time prior to the expression of consent to be bound. The point was that, if it was formulated earlier, it must be confirmed. Consequently, guidelines 2.2.1 and 2.2.2 could simply be merged to read: “If formulated prior to expressing the consent to be bound, a reservation must be . . .”.

14. Again, was guideline 2.2.4 really needed? Was it necessary to reflect in the draft guidelines, which were of a general nature, every treaty possibility? Would not a reference to a *lex specialis* rule suffice? If the Commission tried to cover everything, it might forget one possibility or another, and then the question of interpretation would arise. A simple solution was therefore preferable: to say that the Commission was not dealing with *lex specialis*, but with general rules.

15. As to conditional interpretative declarations, he was compelled to confess that he had difficulty following the line of reasoning. Did an interpretative declaration become conditional only because States expressed their wish to confirm it? Who decided, for example, that the declaration by Austria<sup>4</sup> upon signing the European Convention on the Protection of the Archaeological Heritage was conditional? He did not recall any discussion in Austria on whether it was a “conditional” or “normal” interpretative declaration. Was an interpretative declaration conditional only because it was confirmed in the instrument of ratification? If it had not been confirmed, was it an ordinary interpretative declaration or did it not count? Paragraph 269 referred to the appropriateness of applying the regime of reservations to those declarations. Why was it appropriate?

16. As for late reservations, guideline 1.1 (Definition of reservations) implied that time was necessarily part of the very definition of a reservation. After a long discussion, the Commission had accepted the need for a definition and expressed its intention not to deviate from the 1969 Vienna Convention, a view that had been firmly endorsed by the General Assembly. That also included the article on the definition of reservations. The question thus arose as to why the Commission should care about something called a “late reservation”. If the definition in the Guide to Practice was a true definition, a late reservation was either a contradiction or simply did not exist.

17. He was, of course, fully aware that a certain practice did exist. But it meant either that the definition was wrong or that the acts in question were not reservations. One could imagine that so-called late reservations were also reservations, but as such inadmissible. But that would blur the definition; such an argument was reminiscent of the earlier discussion in the Commission on the difference between definition and conditions of admissibility.

18. If the Commission altered the definition, the whole regime of reservations would apply to late reservations. There was no legal justification for another regime since the 1969 Vienna Convention did not offer one. If the definition were changed, it would be an invitation to States to make such reservations, since no treaty explicitly excluded late reservations. Hence, States could always make

<sup>4</sup> United Nations, *Treaty Series*, vol. 788, No. 11212, p. 240.

reservations within the limits of article 19 of the Convention. Accordingly, and given the definition provided by the Convention and the determination of the Commission to respect that definition, there was no other choice but to call the instruments in question something other than reservations. He shared the concerns expressed by Mr. Pambou-Tchivounda about late reservations. Of course, the Special Rapporteur was quite right: those instruments were in fact called reservations, but it was a matter of no relevance to the definition. There was no need to call them reservations, since the Commission did not apply exactly the same regime as it did to genuine reservations. Why could they not be referred to as a particular form of *inter se* treaties? The Convention allowed for such a possibility. Any other solution would only complicate matters. For example, did guideline 2.3.2 (Acceptance of reservations formulated late) also apply to reservations to the constituent instruments of international organizations? Plainly, there was no need to deal with late reservations. One could imagine a guideline stating the obvious, which could already be deduced from the definition, namely: “A declaration made after expressing the consent to be bound by a treaty is not a reservation, however phrased or named.”

19. With regard to late interpretative declarations, he wondered how far the relevant guidelines were in conformity with article 31, on the general rule of interpretation, of the 1969 Vienna Convention. Under paragraph 3 of that article, an agreement had to be reached in order to influence the interpretation of the treaty. The guidelines seemed to make that requirement only for so-called conditional interpretative declarations. Thus, a certain vagueness remained. Article 31 of the Convention must be taken into account in dealing with late interpretative declarations.

20. Lastly, the draft guidelines should be referred to the Drafting Committee on the understanding that the Committee addressed the problems to which he had alluded.

21. Mr. MOMTAZ, commending the Special Rapporteur for the calibre of his report, said he was in full agreement as to the utility of late reservations. Such an “institution” might simplify the search for universality in treaty instruments and broaden the scope of closed multinational treaties. They might correct a number of errors committed during the ratification of treaties and in certain cases even enable the executive to allow for a change in the policy of parliament following a change in the political majority. Thus, the use of a late reservation might possibly allow a State to avoid withdrawing from a treaty instrument. Despite its incontestable advantages, it was important not to underestimate the threat that abuses of that practice might pose to the stability of treaty relations. To allow a State that had accepted an obligation to go back on its decision was undoubtedly contrary to the principle of *pacta sunt servanda*, a norm of *jus cogens*. Consequently, such a reservation should be subject, at least where treaties with a limited number of parties were concerned, to the consent of all the contracting parties. It should in any case be emphasized that recourse to that practice was justifiable only in quite exceptional circumstances and that the State formulating such reservations must invariably justify them. The proposed guideline must in no circumstances be interpreted as an encourage-

ment to States to have recourse to that practice. Furthermore, such reservations should perhaps go by a different name: they did not, strictly speaking, constitute reservations since the regime proposed was quite different from that of reservations or from the regime of general law.

22. He fully shared the view expressed by Mr. Gaja on late interpretative declarations. Every State party to a treaty instrument was entirely free to make, at any time, declarations concerning the treaty to which it was a party. Accordingly, no restriction must be imposed on States in that regard. What was important was to avoid the increasingly frequent practice whereby interpretative declarations were transformed into disguised reservations and used to circumvent clauses in multilateral treaties restricting or prohibiting recourse to reservations.

23. Lastly, he wished to endorse Mr. Economides’s comments regarding the possibility open to the parties to a negotiation to formulate reservations. He entirely agreed that a threshold should be established beyond which it would be permissible to formulate reservations. In the case of multilateral treaties, a text authenticated by the negotiators and adopted would seem an acceptable threshold. To allow reservations to be formulated at the negotiating stage would jeopardize the negotiation process and it would contravene the principle of good faith on which the negotiations must be based. In conclusion, it was his view that the draft guidelines contained in Part II of the fifth report should be referred to the Drafting Committee at the current time.

24. Mr. MELESCANU said that the hardest part of the exercise in which the Commission was engaged was to reconcile two conflicting needs. On the one hand, there was a legitimate concern to ensure the stability of international treaties and their legal effects. Clearly, a very restrictive approach to reservations was one way of securing application of the *pacta sunt servanda* principle. On the other hand, the *rebus sic stantibus* principle must also be respected: States had the right to express their wishes with a view to creating legal obligations. Consequently, too rigid an approach to the institution of reservations was undesirable, and, in his view, interpretative declarations served as the most valuable instrument available in that regard. Furthermore, while the first concern of the Commission should be to codify existing rules on the basis of the provisions of the Vienna Conventions and State practice, interpretative declarations offered fertile ground for the progressive development of international law. The Special Rapporteur deserved a special vote of thanks for his ground-breaking work on developing the institution of interpretative declarations, an institution that was to be accorded full recognition at the current time. The Special Rapporteur’s proposals should be referred to the Drafting Committee for early finalization.

25. Having been absent from the previous session of the Commission, he wished to take the opportunity to make a few general comments and suggestions on the topic of reservations to treaties. First, on a drafting matter, he agreed that the term “formulation” was the one that should be applied to reservations and interpretative declarations. Secondly, he fully endorsed the view that reservations could not be formulated when negotiating an international treaty. Such reservations would, in effect,



simply be proposals to change the provisions of the treaty under negotiation. As Mr. Economides had pointed out, a reservation to a specific provision could be formulated only once the text of the treaty was open for signature. Nevertheless, to set the record straight, it should be noted that the Special Rapporteur was not proposing to extend the institution of reservations to include reservations formulated at the time of negotiation. Instead, the Special Rapporteur was proposing that, were a State to announce during the negotiation phase that it was formulating a reservation—and a State could not be prevented from so doing—that reservation must be confirmed before it could be considered a reservation within the meaning of the rules that the Commission was considering. The issue was thus essentially one of drafting, and it could be left to the Drafting Committee to find a formula that, without encroaching on the right of States to express themselves freely, took account of the fact that it was not possible to formulate a reservation to a provision that did not yet exist in final form. He thus expressed his own reservation with regard to guideline 2.2.2. Either the reference to “reservations formulated when negotiating” should be deleted, or else it should be clearly stated that it was not possible to formulate reservations before a final text had been agreed.

26. *Pace* Mr. Pambou-Tchivounda, the idea of combining guidelines 2.2.1 and 2.2.2 was attractive: the two could easily be combined into a single, unambiguous provision eliminating interpretations that had not been intended by the Special Rapporteur. He also disagreed with Mr. Economides’s expressed preference with regard to the formulation of guideline 2.2.3, also supported by Mr. Pambou-Tchivounda. The generic expression “an agreement in simplified form” was greatly preferable to the variant proposed.

27. For reasons given earlier, he regarded guidelines 2.4.3 (Times at which an interpretative declaration may be formulated), 2.4.4 (Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation), 2.4.5 (Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]) and 2.4.6 (Interpretative declarations formulated when signing for which the treaty makes express provision) as extremely important provisions that would enable the Commission to resolve a number of problems raised by the application of a strict regime to reservations and a flexible one to interpretative declarations.

28. As for late reservations and interpretative declarations, the guidelines should be very restrictive in the case of late reservations but more flexible, indeed, perhaps very flexible, in the case of late interpretative declarations, which enabled States to express their wishes and political position on developments in application of an international agreement, while safeguarding the stability of the treaty. He urged the Special Rapporteur to consider the possibility of including a separate guideline on agreements between a limited number of parties. The consent of States parties should be required before a late reservation to such a treaty could be formulated. An obvious example was article 5 of the North Atlantic Treaty. If the possibility of formulating a reservation to that article without the

consent of the other States parties was accepted, the very existence of the Treaty, or at least the continuing status of the State as a party thereto, would be jeopardized. He endorsed the view that two conditions must be met in the case of late reservations, one substantive and the other procedural. If the treaty contemplated the possibility of formulating reservations regarding certain provisions, or of formulating late reservations, flexibility should be the rule. As for the timing of the formulation, the consent of the other parties was a fundamental element that must always be taken into account.

29. Mr. ECONOMIDES said that the Commission could not prohibit States from formulating late reservations, even if it wished to do so. Late reservations were not unilateral reservations, but proposals for reservations that were subsequently accepted by all the other States parties, not expressly but tacitly, in a process whereby international agreement emerged on the proposed reservation. In such a situation, the late reservation ceased to be a unilateral act of a State, instead falling within the realm of treaty relations. Accordingly, sovereign States could not be told that they had no right to accept such a reservation.

30. Mr. CRAWFORD said he agreed with Mr. Economides and, indeed, would go further. There were severe risks in assimilating late reservations to reservations proper, given the extremely liberal regime that had developed in the context of reservations to the law of treaties. A late reservation was in effect a proposal to amend the treaty. It also posed the serious difficulty that it was not enough merely to give an objecting State the right to exclude the effect of the late reservation in its relations with the late-reserving State; there were existing treaty relations, and other States were entitled to the benefit of the *pacta sunt servanda* principle vis-à-vis the other parties to the treaty in the absence of general agreement to the contrary.

31. Mr. KAMTO said that the Special Rapporteur was to be congratulated on Part II of his fifth report, which cast new light on an austere and potentially arid topic. Nonetheless, the Special Rapporteur’s commendable wish to treat the topic exhaustively risked sowing confusion in the minds of the ultimate addressees of the draft guidelines, namely, States.

32. Guideline 2.2.1 posed no problem. The difficulties commenced with guideline 2.2.2, which appeared to modify the regime of the Vienna Conventions. It was doubtful whether the provision was in fact modelled on article 23, paragraph 2, of the 1986 Vienna Convention, as the Special Rapporteur claimed in paragraph 257 of his report, for it referred to reservations formulated “when negotiating, adopting or authenticating” the text of the treaty, whereas the article cited referred only to reservations formulated “when signing the treaty subject to ratification . . .”. It had been pointed out that what could be called a reservation formulated at the negotiating stage was generally only a negotiating position, often one abandoned before the conclusion of the treaty. However, it sometimes happened that, during the negotiations at a diplomatic conference at which the provisions of the treaty were subsequently adopted by consensus without the treaty itself being adopted as a whole, a State formu-

lated a reservation regarding a specific provision whose adoption by consensus it did not wish to block. An example was the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court that had led to the adoption of the Rome Statute of the International Criminal Court, where precisely such reservations had been formulated in the interests of preserving consensus. Nonetheless, it had to be acknowledged that the concept of a “reservation” was premature at the negotiating stage, a stage at which the text of the treaty remained provisional pending the adoption of the treaty as a whole. The draft guidelines would thus benefit from the exclusion of reservations formulated at the negotiating stage.

33. He had no strong views on merging guidelines 2.2.1 and 2.2.2. Mr. Hafner’s proposal was attractive, but the pedagogical considerations underlying the draft guidelines perhaps pleaded in favour of keeping the two separate.

34. With reference to guideline 2.2.3, the expression “an agreement in simplified form” was well established in doctrine, yet its precise meaning might not be apparent to all. Nor was the second option, the expression “a treaty that enters into force solely by being signed”, entirely acceptable, as such treaties in fact entered into force only when a specified number of signatures had accumulated. The best formulation would thus be “a treaty not subject to ratification, act of formal confirmation, acceptance or approval”.

35. While conceding that some State practice did exist with regard to late reservations, he was of the view that the elaboration of a guideline on the question fell within the realm of progressive development of international law. The guideline clashed with the *chapeau* of article 19 of the 1969 Vienna Convention and also conflicted with a substantial body of doctrine. But the Special Rapporteur’s explanation argued in favour of the Commission looking into the matter in greater depth. The real and serious risk of destabilization of the treaty posed by such a practice had been sufficiently stressed: the legal security of the States parties to a system of multilateral treaty obligations was at stake. Accordingly, late reservations could be admissible only if more rigorous conditions were set for their formulation.

36. The condition contained in guideline 2.3.1, mentioned in paragraph 310, was not entirely satisfactory. To reflect the requirement of unanimity—rather than the acceptance or otherwise of its content—on which the principle of the formulation of a late reservation was conditional, the Special Rapporteur used the formulation “unless the other contracting Parties do not object to the late formulation of the reservation”. The absence of an objection as a condition for the formulation of a late reservation meant, *a contrario*, that the silence of a party to the treaty would be interpreted as acquiescence. Yet, for a variety of reasons, many States were unable to monitor meticulously the life of treaties, even those by which they were bound. The absence of an objection could result in the surreptitious acceptance of late reservations to which those States would probably be opposed. Thus, the mere absence of objections would not suffice: each and every party to the treaty must give its express consent to the

formulation of the late reservation. In that connection he endorsed Mr. Gaja’s suggestion concerning dispensatory agreements, which would amount to a series of bilateral agreements between the various parties to the treaty on the one hand, and the State wishing to formulate the reservation on the other. In no circumstances must unanimity be taken for granted. Provided there were such express unanimity, a late reservation might appear in some cases to be an offer of revision or amendment, and might well be interpreted as such. In any case, the regime governing the principle of late reservations could be a special agreement concerning the original convention, whereby States were enabled to state their position. That could serve to limit the risks mentioned by members of the Commission. He agreed that the regime for late reservations must be the same as for ordinary ones, but it was reasonable to argue that an objection to a late reservation could itself be made late, rather than at the time the reservation was made. It was not clear from guideline 2.3.1 whether a late reservation was possible when the treaty was the constituent instrument of an international organization. In that case, he wondered whether the acceptance in principle of such a reservation would be the prerogative of the international organization, as would be the case for ordinary reservations under article 20, paragraph 2, of the 1969 Vienna Convention, or whether each member State of the organization had to be consulted individually. That question warranted examination.

37. As for conditional interpretative declarations, he had concluded that many of them, in practice, were really disguised reservations, and he supported the Special Rapporteur’s efforts to place them in the same framework, especially as they posed a real threat to the principle of *pacta sunt servanda*. That was not the case with late reservations, which, because of the manner of their acceptance, were treaty-based and did not infringe the principle.

38. Mr. GAJA said that, according to Mr. Kamto, express consent should be required for late reservations, although in practice it was not. If a hundred or so States were required to express a positive attitude towards a late reservation, the risk would be too much flexibility, allowing late reservations with regard to the accepting States. The unanimity rule as framed in guideline 2.3.1 was much stricter than that. Referring to paragraph 304 of the fifth report he explained that his position had been misunderstood: the original text from which the quotation was drawn referred to the unanimity of other contracting States in acquiescing to late reservations.

39. Mr. CRAWFORD said that, in appearing to tolerate late reservations, the Commission must be careful not to contradict article 41 of the 1969 Vienna Convention, on the modification of multilateral treaties between two or more parties. Even where two parties entered into an express agreement that had the effect of modifying a multilateral treaty, they could do so only in the circumstances laid down in that article. A general right of a State to enter a late reservation on condition of passive acquiescence by other States could easily contradict the principles of the Convention, and especially article 41, paragraph 1 (b) (ii), since it would not relate to a provision derogation from which was incompatible with the object and purpose of the treaty as a whole. There was an important connection

between the question of late reservations and the question of the compatibility of reservations generally. If late reservations were equated with reservations made at the time, following the understandable argument that a State was under no obligation to become a party to a treaty and was therefore entitled to insist on something, the same argument lost all its force when applied to late reservations. In the case of late reservations, there must be some objective test or the principle of *pacta sunt servanda* would be abrogated.

40. Mr. PELLET (Special Rapporteur) said that, although one could agree that a late reservation was an offer to amend a treaty, it was not an offer to amend the substance of the treaty, merely to amend the reservation clause, whether such a clause existed or not. That was why he had drawn a careful distinction between objection or the absence of objection to the principle of late reservations, and the situation that arose once that principle was accepted. A reservation did not in itself amend a treaty.

41. Mr. HAFNER said he was anxious to clarify the distinction drawn by the Special Rapporteur. Was the first of the cases to which he was referring an agreement to modify a treaty so as to make late reservations admissible, and the second an agreement on the late reservation itself? There was a difference. He was very much in favour of considering late reservations as *inter se* agreements in accordance with article 41 of the 1969 Vienna Convention. However, if it was said that there was an agreement on late reservations, did that mean that other States could also make use of such an agreement, or did the agreement in question relate only to a specific case of a specific late reservation?

42. Mr. KAMTO explained that by a “bilateral agreement” he had meant that if unanimity was required, in practical terms a single objection would scupper acceptance of the principle of a reservation. As he understood it, the global agreement on acceptance would comprise a series of bilateral agreements, like some multilateral treaties which themselves consisted of a set of bilateral obligations. Thus a general agreement, if unanimously achieved, would constitute a series of bilateral agreements among the reserving States and each of the parties to the convention in question. Logically speaking, therefore, the result would be a new agreement offering to amend or revise it. He agreed with the Special Rapporteur that such an agreement would relate only to the principle of the reservation or the reservation clause. Mr. Hafner had asked whether any other State could use the agreement to formulate a reservation. The answer must be in the affirmative; otherwise, it was difficult to see how special status could be granted to any State, which had requested a revision, and not to others.

43. Mr. RODRÍGUEZ CEDEÑO said he agreed that the procedure for making reservations and interpretative declarations could not be regarded as analogous to the conclusion of treaties, the two being distinct in a formal sense. Reservations and interpretative declarations were independent unilateral acts in the context of treaty relations, even though they required the consent of other parties to the treaty, or their subsequent acceptance, in order to have legal effect.

44. In referring to reservations and interpretative declarations, the Special Rapporteur used the term “formulate” rather than “make” as sometimes used in the 1969 and 1986 Vienna Conventions. Such acts, being dependent on the consent of others, did not take legal effect until authorized by the treaty, whereas independent unilateral acts took effect from the time of their formulation, although they could not be concretized until the addressee made use of the right granted by the author of the act. A distinction should be drawn between the origin or formulation of a unilateral act and its concretization, which occurred when the relationship became a bilateral one outside the treaty framework. The use of the term “formulate” in the draft guidelines submitted by the Special Rapporteur was appropriate, except in guidelines 2.3.1, 2.4.7 (Interpretative declarations formulated late) and 2.4.8 (Conditional interpretative declarations formulated late), which spoke of the formulation of reservations or declarations if they did not elicit objections from the other parties. There appeared to be a confusion between “formulation” and “concretization”. The State or an international organization could formulate a reservation at any time; the question was whether it was admissible or accepted and produced its legal effect. He would prefer to redraft those guidelines to say, “the formulation of a reservation or interpretative declaration will not produce effects . . .”. However, with reference to guideline 2.2.2 he fully agreed with the remarks of other members, including Mr. Economides and Mr. Pambou-Tchivounda, about the formulation of reservations during the negotiation phase. At that stage, the legal act had not been concluded; the “reservation” would be formulated in relation to a legal instrument in the drafting stage and could not produce any legal effects. It would have political implications that could not go beyond the negotiating process. The reservation would have to be reiterated—not confirmed—at the time of signing or ratification, when the consent of the State to be bound became complete. He approved of the wording of guideline 2.2.1. If the treaty was formally ratified or confirmed, the reservation should be regarded as being formulated at that time. However, in the case of agreements in simplified form, reservations or interpretative declarations could be formulated when signing and did not require subsequent confirmation, as made clear in guidelines 2.4.5 and 2.2.3. He also agreed with guideline 2.2.4: a reservation formulated at the time a treaty was signed, and for which express provision was made in the treaty, should be regarded as being valid from that time. As for ordinary and conditional declarations, a State could make the former at any time, but for the reasons explained by the Special Rapporteur, the latter could be made only at the time of signature or of expression of consent to be bound.

45. In a footnote to paragraph 268 of his fifth report, the Special Rapporteur raised the question whether confirmation of an interpretative declaration made when signing constituted an indication of its conditional nature. He doubted whether such a conclusion could readily be drawn. Venezuela had made an interpretative declaration<sup>5</sup> relating to the entry into force of the United Nations Convention against Illicit Traffic in Narcotic Drugs and

<sup>5</sup> See *Multilateral Treaties . . .* (2678th meeting, footnote 4), vol. I, p. 400.

Psychotropic Substances. Its intention in doing so was merely to align the Convention with its own domestic law, not to place conditions on its participation.

46. Lastly, he wished to express concern at the formulation of late reservations and interpretative declarations, which affected the stability of legal relationships among States and undermined the *pacta sunt servanda* principle. Legal theory and jurisprudence were at one in saying that once a legal instrument had entered into force no reservations could be admitted, and the same applied to interpretative declarations. States were not entitled under international law to modify their obligations unilaterally by means of such acts, which imposed on other States obligations to which they had not consented. The ordinary regime of reservations, by comparison, occurred in a treaty context and required the participation of the other parties for the reservation to come into force. The question of late reservations was a very delicate one that must be studied in a balanced manner to avoid the adoption of any rule that might undermine inter-State relations. Indeed, the express consent of other States was fundamental for reservations or interpretative declarations to take effect. He agreed with Mr. Economides that such unilateral acts could not be prohibited, but they were distinct legal acts and must be duly regulated.

47. Mr. YAMADA, referring to guideline 2.2.2, said that, according to several members of the Commission, reservations could not be formulated in the course of negotiating a treaty, because the text of the treaty was not yet finalized. That was true in theory. However, the practice of formulating reservations at the negotiating stage did exist. A reservation was by definition a unilateral statement by a State and in some cases a State would present its reservation to the other parties to the negotiation in order to secure their consent. Such a reservation was part of the negotiation package. When the Special Rapporteur had been dealing with “substitute” reservations, which had resulted in guideline 1.1.6 (Statements purporting to discharge an obligation by equivalent means), he had himself referred to a reservation by Japan to the Food Aid Convention, 1971,<sup>6</sup> a reservation that currently fell under guideline 2.2.2. Japan had sought to ensure that other parties to that Convention would not object to its reservation to providing assistance to developing countries in the form of rice and fertilizer rather than wheat and for that purpose had formulated the reservation during the negotiations, a successful move which was afterwards confirmed when Japan consented to be bound by the Convention. The Special Rapporteur had cited other examples in support of guideline 2.2.2.

48. He agreed with other members that late reservations destabilized the treaty regime and should be discouraged. On the other hand, reservations in themselves afforded a degree of flexibility that helped to secure wider participation in a treaty and to deter parties from withdrawing. He recommended the practice of the United Nations Secretary-General, as depositary for multilateral treaties, which was based on the general principle that the parties to an international agreement may, by unanimous decision, amend the provisions of an agreement or take

such measures as they deem appropriate with respect to the application or interpretation of the agreement. That statement placed a stringent condition of unanimity on the acceptance of late reservations, and he saw no harm in such acceptance provided the unanimity rule was applied. According to Mr. Hafner, a late reservation was no reservation at all. That might be true, and it might have to be called something else, but he would prefer the term “late reservation” to “amendment”.

49. The question of impermissible reservations had been raised by Mr. Crawford and must be dealt with, and the point concerning the legal consequences of late reservations was in fact germane to reservations in general. He therefore supported guideline 2.3.1. However, he was hesitant in supporting the Special Rapporteur’s proposal, in paragraphs 311 and 312, for a model clause to be included in the treaty. Such a clause might help to avoid ambiguity, but might also give the impression that the Commission was condoning the practice of late reservations. He would prefer to decide upon the issue in connection with other model clauses the Commission might formulate.

50. The Special Rapporteur was endeavouring to formulate guidelines on State practice in respect of reservations which had developed since the 1969 Vienna Convention and did not always comply with the regime on reservations in the Convention itself. It was important to deal with such “irregular” reservations.

51. Mr. ROSENSTOCK said that some of the present difficulties in dealing with the topic were due to the use of terms that were slightly odd, such as “a reservation in the negotiation”. The starting point on reservations was the freedom of States to opt in or out of agreements, and the principle of *pacta sunt servanda*. Almost everything else followed, as a matter of common sense, from there. Mr. Kamto wanted to reverse the principle of non-objection by insisting on express and unanimous acceptance of a late reservation. Late reservations were not the end of the world: they reflected a State’s capacity to opt out of a treaty and then to opt back in by negotiating conditions amounting to reservations. That was a cumbersome way to do business, however. The risk to *pacta sunt servanda* was reduced if what would normally be regarded as a reservation after the fact was permissible, as long as nobody objected. Acceptance of a late reservation could be signalled by the absence of objection or, more rigorously, by the agreement of all concerned. What would be useful, in terms both of preserving the integrity of *pacta sunt servanda* and of permitting States to find a way to record and maintain existing agreements, was a largely practical matter. The sooner the Commission began inching its way through the problem, point by point, the better.

52. Care should be taken about making excessive refinements that caused non-existent distinctions to be drawn. He found it hard to understand the difference, in terms both of the intent and of the effect, between a conditional understanding and a reservation.

53. The Commission should at some early point turn its attention once again to the unity of the treaty regime. It had already expressed a preliminary reaction that must eventually become its considered view, and the end of the quinquennium was perhaps appropriate for that purpose.

<sup>6</sup> See *Yearbook* . . . 1999, vol. I, 2597th meeting, para. 9.

54. Mr. KAMTO said that Mr. Yamada's comments aptly illustrated the point that he himself had made earlier. During the negotiation of a treaty, and especially when it was to be adopted by consensus, a State could make what could be called a reservation but was in fact a negotiating position. The Japanese reservation had been discussed and negotiated, and perhaps because no agreement had been reached on its content, it had had to be confirmed later. As long as the provisions of the treaty were evolving and until the treaty was definitively adopted, one could not speak of reservations.

55. As to Mr. Rosenstock's comments, while acceptance of late reservations was primarily a practical matter, all of the practical consequences had to be examined. If one State asked to make a late reservation and was permitted to do so, that meant that all the other States parties could do likewise. The late reservation could thus scuttle the entire treaty. What was the objective of the Commission, to preserve the stability of treaties, or to condone the renegotiation or even negation of a treaty by devious means? Hence the need to strengthen the rules and regulations governing the formulation of late reservations.

56. Mr. AL-BAHARNA said he was grateful to the Special Rapporteur for the thorough analysis in his fifth report. Citing paragraph 220 of the report and the summary of the Special Rapporteur's introduction,<sup>7</sup> he said that the 14 draft guidelines were acceptable on the whole, insofar as they were modelled on the 1969 and 1986 Vienna Conventions. Guideline 2.2.1, for example, followed article 23, paragraph 2, of the 1986 Vienna Convention. It provided that a reservation concerning a treaty that was subject to ratification required formal confirmation at the moment of signature, even if confirmation had been expressed on the occasion of the adoption of the treaty. In such a case, the date of formal confirmation of the reservation was to be considered as the moment of signature or expression of consent to be bound by the treaty.

57. Guideline 2.2.2 related to a reservation formulated during the negotiation of a treaty and indicated that in such a case, in order to be considered valid, the reservation had to be confirmed at the moment of expression of consent to be bound. That, too, was acceptable, on the grounds that a reservation could be made during the stage of negotiation of a treaty. Guidelines 2.2.1 and 2.2.2 should not be combined, because they were of a different nature, for the cogent reasons set out in paragraph 257 of the report and such a course would make the formulation unnecessarily confusing.

58. Guideline 2.2.3 stated that subsequent confirmation of a reservation was not required when the reservation was formulated at the moment of signing a treaty that entered into force upon signature, i.e. without the requirement of ratification. Paragraph 259 of the report referred to such treaties as agreements in simplified form. It went without saying that a reservation made during the process of negotiation or adoption of a treaty required confirmation at the moment of signature. He preferred the second bracketed

eted phrase for both the title and the text of the guideline, "a treaty that enters into force solely by being signed", or an alternative formulation such as "a treaty that enters into force solely on the date of its signature".

59. Guideline 2.2.4 concerned a treaty that expressly provided for the formulation of a reservation upon signature. In such a case, even if formal ratification was required, the reservation did not need formal confirmation upon the expression of consent to be bound. He could not see, however, why a reservation could not also be made at the time of ratification.

60. Guidelines 2.4.4, 2.4.5 and 2.4.6 concerned similar cases relating to interpretative declarations and called for no comments. As for guideline 2.4.3, the first bracketed phrase would be preferable. Guideline 2.3.1 posed no difficulties.

61. Mr. TOMKA said that the Commission had spent several years building solid foundations for the draft guidelines and was currently working on the ground floor. In the case of late reservations and reservations formulated during the negotiation of a treaty, however, he wondered whether the floor was properly nailed to the foundations. In view of the expectations of practitioners, he thought that the first reading of the Guide to Practice should be completed at the fifty-fifth session, in 2003, and the final reading at the fifty-seventh session, in 2005. The Commission should not attempt to reformulate the provisions of the 1969, 1986 (and 1978) Vienna Conventions, but rather to provide clarification of them. He agreed with the Special Rapporteur's opinion, set out in the first footnote to paragraph 259 of his fifth report, about the advantage of deviating as little as possible from those instruments.

62. While he saw no specific problems with guideline 2.2.1, he had serious doubts about guideline 2.2.2. No examples of State practice were provided and the guideline was contrary to the basic provision on reservations in article 19 of the 1969 Vienna Convention. During the negotiation of multilateral treaties, States quite frequently made statements or declarations, but they were not to be viewed as reservations. If a State wished such an utterance to be regarded as a reservation, it had to formulate it when formally signing or acceding to a treaty. There were practical problems as well. The publication entitled *Multilateral Treaties Deposited with the Secretary-General* reproduced no statements or declarations made during the conferences at which conventions or treaties were adopted. Indeed, it would be difficult for it to do so, as the verbatim records and other documents of conferences were as a rule published only after several years had elapsed. He did not think guideline 2.2.2 should be sent to the Drafting Committee, and the Special Rapporteur himself, in paragraph 257 of his report, admitted that the provision was tantamount to adding to the text of the Vienna Conventions a possibility that they did not contemplate.

63. Guideline 2.2.4 gave an interpretation of article 23, paragraph 2, of the 1969 Vienna Convention as being ap-

<sup>7</sup> See 2677th meeting, footnote 9.

plicable only where a treaty was silent about the possibility of making reservations. The Special Rapporteur's argument was that, otherwise, a treaty provision envisaging the possibility of reservations upon signature would have no useful effect, but that was not true: the effect would be to avert a discussion of whether a reservation was or was not admissible. He doubted whether the guideline was firmly grounded in international law and whether it was wise to propose such a "liberal" interpretation of article 23, paragraph 2, of the Convention. It would be better to require formal confirmation of a reservation on the occasion of ratification.

64. Late reservations had occurred in State practice, as pointed out by the Special Rapporteur, but the phenomenon should be avoided to the extent possible. The Commission should not encourage States to make them and therefore the Guide to Practice should not contain any model clauses on reservations formulated after the expression of consent to be bound. Accordingly, he did not endorse any of the three model clauses proposed by the Special Rapporteur.

65. Guideline 2.3.1 posed some drafting problems, since the combination of the clauses "unless the treaty provides otherwise" and "unless the other contracting parties do not object" was awkward. To conform to the definition of a reservation already adopted by the Commission and to reflect the unanimity regime, the text should read: "A declaration intended to have the legal effect of a reservation formulated by a State or international organization after expressing its consent to be bound by the treaty is null and void if any of the other contracting parties has objected to such a declaration."

66. Mr. KATEKA said he agreed with other members that reservations could not be made during the negotiation of a treaty. They could be made only when the text of the treaty was adopted. Guideline 2.2.2 might therefore need to be reviewed. The term "late reservations" was a misnomer. Referring to the definition by the Commission of reservations, which had been borrowed from the 1969 Vienna Convention, he said that "late" reservations were not reservations in the true sense. True, the practice did exist, but it should be discouraged. Consequently, he did not support the inclusion of model clauses on the subject. Late reservations were meant to give States an escape route so that they did not have to opt out of treaties because of a change of Government or some other reason. If provisions on late reservations were included, they should be subjected to a unanimity rule so as to discourage their use.

67. All references to "agreement in simplified form" should be deleted from the guidelines and replaced by references to entry into force on signature, which was the standard formulation. As the Special Rapporteur pointed out in his report, the Commission should not try to rewrite the regime of the Vienna Conventions when formulating guidelines, and the same should hold true for the *travaux préparatoires*. He did not agree with the Special Rapporteur's interpretation of the verbs "to formulate" and "to make" and was among the impatient members of the Commission who wanted to proceed to the study of the legal effects of reservations. While commending the Special Rapporteur for his intellectually stimulating

study of the topic, therefore, he appealed to him to follow the course outlined in paragraph 35 of his sixth report (A/CN.4/518 and Add.1-3).

68. The Special Rapporteur had expressed some concern about the work of Ms. Hampson, Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights on reservations to human rights treaties, and specifically, that her study might go beyond a survey of State practice and the practice of human rights treaty monitoring bodies. He could understand the reason for such concern and the need for coordination, but thought the Commission should not try to circumscribe Ms. Hampson's work and did not need to write to her.

69. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer the 14 draft guidelines contained in the fifth report of the Special Rapporteur to the Drafting Committee.

*It was so agreed.*

70. Mr. PELLET (Special Rapporteur) said he wished to offer some spontaneous reactions to the interesting discussion by the Commission on the topic of reservations to treaties. The decision to refer the guidelines to the Drafting Committee did not, in his opinion, extend to the model clauses that he had proposed for guideline 2.3.1, about which there had been little enthusiasm. In fact, his purpose in proposing them had been simply to illustrate the concept of model clauses, which he saw as examples of clauses that States might use.

71. He concurred with the view expressed by members of the Commission that the inclusion in the Guide to Practice of the specific model clauses proposed would not be a good thing, as it might be seen as encouraging the use of late reservations. Like others, he wanted late reservations to be kept to a minimum. To limit them was one thing, but to deny their existence on grounds such as those advanced by Mr. Hafner which, while intellectually convincing, were completely divorced from practice, would be to defeat the purpose of the Guide. Late reservations was one of two key issues addressed so far, the other being across-the-board reservations. The job of the Commission was to indicate to States what to do in difficult situations, which definitely included that of late reservations. Treaties making provision for late reservations were conceivable. Mr. Hafner had contended that late reservations not expressly provided for in treaties were *lex specialis*, but if that was true, then they were *lex specialis generalis*, since the phenomenon was such a common one.

72. Mr. Melescanu had drawn a distinction between the stance that should be taken in respect of late reservations, which most members agreed should be held to a minimum, and late interpretative declarations, which most agreed could be treated with greater flexibility. It would be hard to find a position on simple interpretative declarations that was more flexible than the one incorporated in the draft guidelines, and conditional interpretative declarations so closely resembled reservations that

their use by States to get around the strict restrictions on late reservations must not be allowed.

73. Mr. Rosenstock was surely doing himself an injustice by claiming not to comprehend the distinction between reservations and conditional interpretative declarations. The two types of unilateral statements served different purposes, and that difference had already been incorporated in the definitions in chapter 1 of the Guide to Practice. On the other hand, his failure to grasp the difference between the relevant legal regimes was understandable. The more he himself delved into the topic, the more strongly he became convinced that the legal regime for conditional interpretative declarations was probably identical, with one or two small exceptions, to that of reservations. Nevertheless, he proposed to stick to the empirical approach used so far, namely to continue to study reservations and interpretative declarations and to try to uncover State practice, and if at the end of the day there seemed to be no need for separate provisions on conditional interpretative declarations, then they could be removed from the Guide.

74. Mr. Economides had raised a very valid point concerning guideline 2.2.2. One could not really say that "reservations" were made at the time of negotiation of a treaty, but there must be a draft guideline to cover the situation. If statements made at that time were not reservations, then they were at least expressions of intent to make a reservation: Sir Humphrey Waldock had spoken of embryonic reservations.<sup>8</sup> The Drafting Committee could certainly recast guideline 2.2.2 to speak of intentions to formulate reservations.

75. Mr. Lukashuk's doubts about the verbs used in connection with reservations were groundless: they were formulated, not made. He understood some members' doubts about guideline 2.2.4 but believed that the phenomenon it addressed should be drawn to the attention of States. The Drafting Committee should consider the matter further. Mr. Lukashuk and many others had said a distinction must be made between open and closed treaties, but he himself had wondered how. Then he had had an idea, while listening to Mr. Kamto and Mr. Melescanu. The requirement of active unanimity was perhaps too rigorous in general terms, but for truly closed treaties, those that were reserved for a limited number of participants, it might be retained.

76. Lastly, he thanked the members of the Commission who had spoken on the topic and expressed the firm conviction that the Drafting Committee would be able to make substantial improvements on the draft guidelines.

*The meeting rose at 1.05 p.m.*

<sup>8</sup> See paragraph (16) of the commentary to article 18 of the draft articles on the law of treaties (*Yearbook . . . 1962*, vol. II, p. 180, document A/5209).

## 2680th MEETING

*Friday, 25 May, 2001 at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

### Diplomatic protection<sup>1</sup> (A/CN.4/506 and Add.1,<sup>2</sup> A/CN.4/513, sect. B, A/CN.4/514<sup>3</sup>)

[Agenda item 3]

#### FIRST AND SECOND REPORTS OF THE SPECIAL RAPPORTEUR

1. Mr. DUGARD (Special Rapporteur) said that, at its fifty-second session, the Commission had considered chapters I (Structure of the report) and II (Draft articles) of his first report on the topic (A/CN.4/506 and Add.1), which contained articles 1 to 8, but had been unable to consider chapter III (Continuous nationality and the transferability of claims) containing article 9. His introduction would thus deal only with that subject, although it was to be hoped that the Commission would find time, during the second part of the session, to consider his second report (A/CN.4/514), which focused largely on the subject of the exhaustion of local remedies.

2. The law of diplomatic protection was an area in which there was a substantial body of State practice, jurisprudence and doctrine and was thus a field one might suppose to be relatively non-controversial and to have produced many widely accepted rules of customary law, so that his task would simply be to choose and formulate those rules that were backed by considerable authority. Unfortunately, that was not the case, as the abundant sources of that law all seemed to point in different directions. In respect of diplomatic protection, the Commission was in the same position as a judge, who was asked not to formulate new rules, but to choose among them, discarding those that had little support in State practice, jurisprudence and doctrine and, where there were competing or conflicting options each backed by authority,

<sup>1</sup> For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook . . . 2000*, vol. I, 2617th meeting, para. 1.

<sup>2</sup> See *Yearbook . . . 2000*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

choosing those that seemed most in accordance with the principle of justice in the particular circumstances. Both at the fifty-second session of the Commission and in the Sixth Committee, his first report had been subjected to some criticism for seeking to inject a human rights dimension into diplomatic protection (see A/CN.4/513, paras. 194 and 195). He had probably erred in expounding a human rights philosophy in chapter I of his report; yet it could not be denied that, unlike most other branches of international law, diplomatic protection was concerned not only with State rights, in accordance with the Vattelian fiction that an injury to a national was an injury to the State,<sup>4</sup> but also with ordinary men, women and children who had been denied justice or injured in some other way by the authorities of a State of which they were not nationals.

3. The question of continuous nationality (art. 9) was a good illustration of those general problems of the law of diplomatic protection. There was a traditional view and aspirant rule on the question, according to which a State could exercise diplomatic protection only on behalf of a person who had been a national of that State at the time of the injury on which the claim was based and who had continued to be a national up to and including the time of the presentation of the claim. That traditional view was supported by some State practice and was to be found in many agreements, including the Algiers Declarations (two declarations by the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States and the Government of the Islamic Republic of Iran)<sup>5</sup> and in the United States and United Kingdom declared practice rules. It was also supported by codification proposals, including those undertaken by the American Institute of International Law in 1925 in Project No. 16 concerning "Diplomatic Protection";<sup>6</sup> by the authors of the Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, prepared by Harvard Law School in 1929;<sup>7</sup> by F. V. García Amador, Special Rapporteur of the Commission, in his third report on international responsibility;<sup>8</sup> and by the Institute of International Law, albeit with important qualifications, in its resolution on "The national character of an international claim presented by a State for injury suffered by an individual" adopted at its Warsaw session, in 1965.<sup>9</sup> It was also supported by some arbitral decisions, including those in the *Stevenson* and *Kren* cases, as well as by the Iran-United States Claims Tribunal in the application of the Algiers Declaration governing the Tribunal. Lastly, it was supported in doctrine, having

been enthusiastically supported by Oppenheim<sup>10</sup> and Borchard.<sup>11</sup> In addition to that support in legal theory and practice, the rationale for the traditional view was that it was designed to prevent the abuses against which Moore<sup>12</sup> and Parker<sup>13</sup> had warned in 1906 and 1924, respectively, by preventing individuals from embarking on a search for the most powerful and "effective" State, the one which would thus offer the most advantageous protection, and by preventing powerful States from being converted into "claims agencies".

4. However, that traditional, well-supported and rational point of view was challenged by another view, also authoritative and based on equally well-supported and rational critical arguments. In the first place, it was difficult to reconcile with the Vattelian principle: if the injury to the national was an injury to the State, any subsequent change in nationality on the part of the individual once the injury had been inflicted would be completely irrelevant. Secondly, judicial pronouncements questioned the validity of the principle. For instance, in *Administrative Decision No. V*, Umpire Parker noted that some tribunals had declined to follow the traditional rule and that others, while following it, had challenged its soundness. In the *Panevezys-Saldutiskis Railway* case, Judge van Eysinga had stated in his dissenting opinion that the practice of continuity had not crystallized into a general rule.

5. Thirdly, the content of the traditional aspirant rule was uncertain because there was no clarity regarding the meaning of the key terms used in its formulation. Did the term "date of injury" mean the date of the actual injury, the date on which justice had been denied or the date on which the respondent State had failed to pay compensation? The notion of continuity was equally deceptive, with codification proposals mentioning only the date of the injury and the date of the presentation of the claim. Was the intervening period completely irrelevant? Was the date until which nationality must have continued (the *dies ad quem*) the date on which the Government endorsed the claim of its national, the date of the initiation of the diplomatic negotiations, the date of the filing of the claim, the date of the entry into force of the treaty of arbitration, the date of the presentation of the claim or the date of the judgement? Those uncertainties were easily explained by the fact that each case was controlled by the language of the particular treaty concluded to regulate it. Fourthly, the rationale for the traditional rule was no longer valid: in the first place, States, particularly the major Powers that would be most effective in presenting such a claim, were very cautious at the current time about conferring nationality; next, since the *Nottebohm* case, it was established that a claimant State must also be able to demonstrate an effective link with the national on whose behalf it submitted a claim. It was thus no longer in an individual's interest to "shop around" for the most

<sup>4</sup> E. de Vattel, *Le droit des gens, ou Principes de la loi naturelle* (*The Law of Nations or the Principles of Natural Law*), English translation of the edition of 1758 in *The Classics of International Law*, vol. III (Washington, D.C., Carnegie Institution of Washington, 1916), p. 136.

<sup>5</sup> See ILM, vol. 20, No. 1 (January 1981), p. 223.

<sup>6</sup> Reproduced in *Yearbook* . . . 1956, vol. II, p. 227, document A/CN.4/96, annex 7.

<sup>7</sup> *Ibid.*, p. 229, annex 9.

<sup>8</sup> *Yearbook* . . . 1958, vol. II, p. 47, document A/CN.4/111, in particular, p. 61, art. 21.

<sup>9</sup> Institut de droit international, *Tableau des résolutions adoptées (1957-1991)* (Paris, Pedone, 1992), p. 59.

<sup>10</sup> R. Y. Jennings and A. D. Watts, eds., *Oppenheim's International Law*, 9th ed., vol. I, *Peace* (London, Longman, 1992), p. 512.

<sup>11</sup> E. M. Borchard, "The protection of citizens abroad and change of original nationality", *Yale Law Journal*, vol. 43, No. 3 (January 1934), pp. 377-380.

<sup>12</sup> J. B. Moore, *A Digest of International Law* (Washington, D.C., 1906), vol. VI, p. 637.

<sup>13</sup> *Administrative Decision No. V*, p. 141.



advantageous State. Fifthly, the traditional rule was unjust in that it could lead to the denial of diplomatic protection to individuals who had changed nationality involuntarily, whether as a result of succession of States—an exception recognized by the Institute of International Law in its formulation of the rule in 1965—or for other reasons, such as marriage or adoption. Sixthly, the rule failed to acknowledge that the individual was the ultimate beneficiary of diplomatic protection. Politis had successfully challenged Rapporteur Borchard's proposal to give approval to the continuity rule, arguing that protection ought to be exercised in favour of the individual, without regard to change of nationality, except in those cases in which that individual made a claim against the Government of his origin or decided to acquire a new nationality only for a fraudulent purpose.<sup>14</sup> The rule was thus subject to two exceptions. Seventhly and lastly, the traditional rule had been, and continued to be, criticized by writers, among them Geck,<sup>15</sup> Jennings,<sup>16</sup> O'Connell<sup>17</sup> and especially Wyler.<sup>18</sup>

6. In the light of that criticism and of the serious doubts cast on the status of the continuity rule as a customary rule, it would seem wise for the Commission to reconsider that traditional view and to adopt a more flexible rule, giving greater recognition to the idea of the individual as the ultimate beneficiary of diplomatic protection. That suggestion had been endorsed by the Draft Convention on the International Responsibility of States for Injuries to Aliens, by Harvard Law School<sup>19</sup> and taken up again by Orrego Vicuña in his report to ILA,<sup>20</sup> which reformulated the two exceptions singled out by Politis. The Commission had considered that matter briefly at its forty-seventh session, during consideration of the topic of State succession and its impact on the nationality of natural and legal persons. In his first report on the topic, the Special Rapporteur had pointed out that neither practice nor doctrine gave a clear answer to the question whether the continuous nationality rule applied to involuntary changes of nationality brought about by State succession.<sup>21</sup> Relying on the *Pablo Najera* case, in which a distinction had been drawn between involuntary and voluntary change of nationality, he had stated that a more flexible solution was required in cases of involuntary change resulting from State succession. Also at the

forty-seventh session, the Working Group on State succession and its impact on the nationality of natural and legal persons had expressed the view that the continuity rule should not apply where change of nationality resulted from State succession, as the purpose of that rule, namely, to prevent the abuse of diplomatic protection, did not apply in the case of State succession.<sup>22</sup>

7. Article 9 took as its starting point the principle that the alleged "rule" of continuous nationality had outlived its usefulness. Essentially, it belonged to the pre-Nottebohm era, when individuals might relatively easily acquire a new nationality, without the need to demonstrate any effective and genuine link between the claimant State and its national. It might have been possible to retain the rule with an exception made in the case of involuntary change of nationality, but that would, in his view, be too restrictive an approach. In article 9, he therefore proposed a rule that abandoned the traditional continuity rule completely, but at the same time retained the safeguards against abuse of nationality that constituted its rationale. Article 9 allowed a State to bring a claim on behalf of a person who had acquired its nationality in good faith after the date of the injury attributable to a State other than the previous State of nationality, provided that the original State had not exercised or was not exercising diplomatic protection in respect of that injury. The safeguards consisted of the priority given to the original State of nationality, in accordance with the Vattelien fiction; the requirements that nationality must have been acquired in good faith and that there must be an effective link between the claimant State and its national, in accordance with the Nottebohm principle; and the fact that a claim could not be brought against the previous State of nationality for an injury that had occurred while the individual had been a national of that State—a safeguard that avoided the difficulties raised by such justly criticized laws as the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act),<sup>23</sup> which allowed Cubans who had become naturalized United States citizens to bring proceedings against the Cuban Government for losses incurred at the hands of that Government while they had still been nationals of Cuba. Paragraph 2 of article 9 also extended that principle to the transfer of claims. Article 9 thus offered a more flexible approach, and one more open to the idea that it was ultimately individuals that were the beneficiaries of diplomatic protection. That being so, the Special Rapporteur left it to the Commission to indicate which choices it wished to make in those circumstances.

8. Mr. YAMADA expressed his sincere admiration to the Special Rapporteur for his report, which was thought-provoking and illustrated his concern for the protection and promotion of human rights.

9. Diplomatic protection was an institution of State-to-State affairs under which a State could claim remedies from another State on behalf of its nationals for an injury individually suffered as a result of an internationally wrongful act attributable to that State. In exercising that right, the first State must fully take into consideration the

<sup>14</sup> *Annuaire de l'Institut de droit international*, Oslo session (1932), pp. 487–488.

<sup>15</sup> W. K. Geck, "Diplomatic Protection", in R. Benhardt (ed.), *Encyclopedia of Public International Law*, vol. I (1992), p. 1045, at p. 1055.

<sup>16</sup> R. Y. Jennings, "General course on principles of international law", *Recueil des cours de l'Académie de droit international de La Haye*, 1967-II (Leiden, Sijthoff, 1969), vol. 121, pp. 476–477.

<sup>17</sup> D. P. O'Connell, *International Law*, 2nd ed., vol. Two (London, Stevens and Sons, 1970), p. 1037.

<sup>18</sup> E. Wyler, *La règle dite de la continuité de la nationalité dans le contentieux international* (Paris, Presses Universitaires de France, 1990), p. 264.

<sup>19</sup> Reprinted in L. B. Sohn and R. R. Baxter, "Responsibility of States for injuries to the economic interests of aliens", *American Journal of International Law* (Washington, D.C.), vol. 55 (July 1961), p. 548.

<sup>20</sup> F. Orrego Vicuña, "The changing law of nationality of claims", final report submitted to the ILA Committee on Diplomatic Protection, 1999 (unpublished).

<sup>21</sup> See *Yearbook . . . 1995*, vol. II (Part One), document A/CN.4/467, para. 113.

<sup>22</sup> *Ibid.*, vol. II (Part Two), annex, paras. 31–32.

<sup>23</sup> See ILM, vol. 35, No. 2 (March 1996), p. 359.

human rights of the injured person, but diplomatic protection was not a human rights institution per se. The best way of protecting human rights and helping an individual to gain remedies for injury suffered by a wrongful act of a State was to give the individual the right to bring suit against a State, even the State of its nationality, in an international judicial body. Thousands of such cases reached the European Court of Human Rights. The codification of restrictive rules of jurisdictional immunity also contributed to the promotion of human rights. On the other hand, very few cases of diplomatic protection could be expected to end up in international judicial bodies.

10. Article 9 presented a very interesting aspect of diplomatic protection and deserved full consideration. The Special Rapporteur concluded in his report that the traditional “rule” of continuous nationality had outlived its usefulness and had no place in a world in which individual rights were recognized by international law and in which nationality was not easily changed. He respected that conclusion as a policy statement, but found it to be too broad as a reflection of current customary law. He believed that prevailing practice in the field of diplomatic protection was still based on the principle of continuous nationality and that, while nationality was not easily changed in individual cases, far more nationality changes occurred at the current time than in the past. He agreed with the Special Rapporteur, however, that it was necessary to deviate from the principle of continuity in order to resolve certain cases. The question was which were the appropriate cases.

11. Article 9, paragraph 1, referred to a *bona fide* change of nationality and that presented problems, as it had in article 5, on naturalization, which had been submitted to the Commission, but which the Special Rapporteur had been asked to redraft. The Commission could consider article 9, paragraph 1, in conjunction with new article 5. As the Special Rapporteur had pointed out, a change of nationality as a result of succession of States qualified as an appropriate case for deviating from the principle of continuous nationality, but *bona fide* naturalization was a problem and must be considered separately from change of nationality as a result of State succession. In his report, the Special Rapporteur acknowledged that although the doctrine of continuous nationality created particular hardships in the case of involuntary change of nationality, as in the case of State succession, it would be wrong to reject it in that case only, and that marriage, for instance, could involve a change of nationality that was involuntary. He himself thought that it was not the denial of diplomatic protection, but rather an involuntary change of nationality as a result of marriage, that was a violation of human rights.

12. Article 9, paragraph 2, referred to *bona fide* transfer of claims. A distinction must be made between a transfer of claims between legal persons and a transfer of claims between natural persons. At the fifty-second session of the Commission, the informal consultations on articles 1, 3 and 6 had agreed that “the draft articles would—at this stage—endeavour to cover the protection of both natural and legal persons”, had acknowledged that “The protection of legal persons does, however, raise special problems” and that “the Commission might at a later stage

wish to reconsider the question whether to include the protection of legal persons”.<sup>24</sup> He thought that the time had come to reconsider that question and that diplomatic protection should also cover legal persons, since mergers or buy-outs by companies often raised the issue of the *bona fide* transfer of claims between legal persons. The issue was a difficult one, but it was necessary to avoid protection shopping.

13. Having made those preliminary observations, he reserved the right to speak on the topic at a later stage in plenary.

14. Mr. KUSUMA-ATMADJA pointed out that the question of continuous nationality was fraught with difficulty. The topic should cover natural persons, giving them the right of option, and should exclude legal persons. He referred in that connection to a statement he had made during the consideration by the Commission at its forty-seventh session of the topic of “State succession and its impact on the nationality of natural and legal persons”, the title of which had been changed to “Nationality in relation to the succession of States”, in which he described the measures relating to nationality taken by the Government of Indonesia in which the interests of the persons concerned had been respected.<sup>25</sup>

15. He reserved the right to speak again on that very important matter at a later stage.

16. Mr. KATEKA congratulated the Special Rapporteur on his powerful arguments and his careful drafting of article 9 in such a way as to avoid protection shopping.

17. In his view, there were very few cases of the violation of diplomatic protection that would be dealt with at the international level: most would be handled at the national level. The proposed distinction between cases of involuntary and voluntary change of nationality was very likely to create more problems than it solved. The same was true for the extension of the scope of the topic to legal persons, which had been discussed at the fifty-second session of the Commission, and of which he was not in favour.

18. He agreed with the Special Rapporteur that the topic became more complex the more one worked on it and he wondered whether, before going any further, it would not be advisable to demarcate the scope of the topic by carefully indicating the elements of progressive development that would be incorporated, with particular regard for the protection of the human rights of the individual.

19. Lastly, responding to the Special Rapporteur’s appeal, he said that his preference was for the maintenance of the traditional rule of continuous nationality, which he thought was well established in State practice.

20. The CHAIRMAN said that the Commission would resume its consideration of the topic during the second part of its session.

<sup>24</sup> *Yearbook* . . . 2000, vol. II (Part Two), para. 495.

<sup>25</sup> See *Yearbook* . . . 1995, vol. I, 2390th meeting, para. 45.

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

[Agenda item 1]

21. Mr. TOMKA (Chairman of the Drafting Committee) announced that Mr. Rodríguez Cedeño would take part in the work of the Drafting Committee on reservations to treaties.

*The meeting rose at 11.10 a.m.*

## 2681st MEETING

*Tuesday, 29 May 2001, at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

## State responsibility<sup>1</sup> (*continued*)\* (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,<sup>2</sup> A/CN.4/517 and Add.1,<sup>3</sup> A/CN.4/L.602 and Corr.1 and Rev.1)

[Agenda item 2]

### 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 Committee containing the titles and texts of the draft articles on responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading (A/CN.4/L.602 and Corr.1).\*\*

\* Resumed from the 2677th meeting.

\*\* Subsequently, A/CN.4/L.602/Rev.1 was issued. For an account of the changes made, see 2701st meeting, paras. 62–67.

<sup>1</sup> For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

<sup>2</sup> Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

<sup>3</sup> *Ibid.*

2. Mr. TOMKA (Chairman of the Drafting Committee) said that the Drafting Committee had held 19 meetings from 3 to 23 May and had been able to complete the second reading of the draft articles. There was only one small issue still pending, on which the Committee would report to the Commission in plenary at the second part of the session.

3. The topic of State responsibility was unquestionably one of the most important the Commission had ever undertaken. Successive well-qualified and experienced special rapporteurs had put much of their energy and their intellectual talent into developing the relevant regime. The importance of the contribution of the late Roberto Ago, who had defined the overall approach and structure, could not be overemphasized. While Roberto Ago had created a solid foundation for the topic, it was the current Special Rapporteur, Mr. Crawford, who was largely responsible for its completion. He expressed deep appreciation to the Special Rapporteur for his full cooperation and efficient response to the need to revise the articles. The Special Rapporteur's mastery of the subject and perseverance in finding a solution to difficult and divisive issues had greatly facilitated the task of the Drafting Committee. He also wished to thank the members of the Committee for their cooperation and the constructive manner in which they had discussed the articles.

4. The Drafting Committee had provisionally adopted the draft articles on second reading at the fifty-second session, but had not had sufficient time to undertake a complete review. In addition, given the substantial time lapse between the completion of different parts of the topic, the breadth and the importance of the topic and developments in international law, the Commission had considered it prudent to allow Governments to reflect on the articles once more before finalizing them.

5. The Drafting Committee had reviewed all the draft articles taking carefully into account the comments made by Governments in the Sixth Committee, the comments and observations received from Governments (A/CN.4/515 and Add.1–3) and the views expressed by members of the Commission. It had also worked on the basis of understandings reached by the Commission on the settlement of disputes, serious breaches and counter-measures.

6. In discussing the articles, the Drafting Committee had avoided where possible reopening substantive issues that had already been resolved. For both practical reasons—reopening any major issues at the current late stage would risk delaying the completion of the draft—and for reasons of principle—the Committee had provisionally adopted an entire set of draft articles at the fifty-second session—the current review had therefore to be limited to the consideration of comments made on particular articles. Where justified by comments of Governments or of members of the Commission, however, particular issues had been carefully reconsidered and a number of important changes made. The resulting text was a balanced one that responded fairly and fully to the comments made and reflected reasonably the balance of opinion in the Committee and, he hoped, the Commission. The Committee had considered matters of translation into all the language versions in order to align the vari-

ous linguistic texts with the English original. Although he would refer to linguistic issues only when a particular formulation had been adopted for ease of translation, he invited members who noticed discrepancies in language versions other than English to inform him or the secretariat. At the current session, in contrast to the previous three sessions, the Committee was submitting its report with the recommendation that the Commission should adopt the articles.

7. As to the title, the Drafting Committee had been concerned about the possibility that “State responsibility” was not sufficiently clear to distinguish the topic from the responsibility of the State under internal law. It had considered different variants, such as “State responsibility under international law”, “International responsibility of States” and “International responsibility of States for internationally wrongful acts”. One of the advantages of the last formulation was that it facilitated translation into other languages by clearly differentiating the concept from that of international “liability” for acts not prohibited by international law.

8. The Drafting Committee had subsequently settled on the title “Responsibility of States for internationally wrongful acts”, without the qualifier “international” before “responsibility”, so as to avoid repeating the word “international” twice in the title. However, it would be explained in the commentary that the word “responsibility” was deemed to refer exclusively to “international responsibility”. Since the draft articles covered only internationally wrongful acts and not any other wrongful acts, it had been deemed preferable to retain the reference to acts that were internationally wrongful. In terms of structure, the order of the articles adopted at the fifty-second session had been maintained, with a few exceptions.

9. The Drafting Committee had examined the possibility of modifying the title of Part One because it was thought to be too close to the new title of the entire topic. In particular, it had considered a proposal by France, in the comments and observations received from Governments, to adopt the title *Fait générateur de la responsabilité des États*, but it had been found difficult to translate into English. One possibility had been to revert to the title of Part One as adopted on first reading,<sup>4</sup> namely “Origin of international responsibility”, but the Committee had decided that the implications of “historical origin” militated against such an approach. Another possibility had been to adopt a more generic title such as “International responsibility of States”.

10. On balance, the existing title, “The internationally wrongful act of a State”, had been considered to be the best rendering. As to the French version, while the Drafting Committee had considered the possibility of making an exception and using the proposal by France, it had decided that, in view of the change to the title of the draft as a whole, the concern underlying that proposal no longer existed. It had therefore been decided to use as the French title *Le fait internationalement illicite de l'État*.

11. For Part One, chapter I, the Drafting Committee had decided to retain the title “General principles”, which was uncontroversial. In considering articles 1, 2 [3]\*\*\* and 3 [4], the Committee had noted that they were structural in nature, that they had been widely endorsed and that no criticism had been raised by Governments or in the Commission.

12. With regard to article 2 [3] (Elements of an internationally wrongful act of a State), subparagraph (b), the Drafting Committee had considered the possibility of rendering the term “obligation” as “legal obligation”. That was particularly relevant to some of the language versions, such as Russian, where a distinction was made between “legal” and other commitments, such as political commitments. The Committee had decided that the English original would remain unchanged, since the context made it clear that the article dealt with an obligation under international law and that was explained in the commentary. Furthermore, the addition of the term “legal” would result in numerous amendments throughout the draft. The Committee had also been concerned that stressing the legal nature of the obligation would have the effect of implying that there were other obligations of a non-legal nature that could give rise to responsibility. Such a possibility was not envisaged under the draft articles.

13. Regarding article 3 [4] (Characterization of an act of a State as internationally wrongful), the Drafting Committee had considered a comment by one Government about duplication with article 32 [42] (Irrelevance of internal law), since both dealt with the irrelevance of internal law. The Committee had noted that some duplication was inevitable and that there seemed to be no inconsistency between the two articles. Article 3 [4] dealt with the characterization of an act, while article 32 [42] concerned reparation as a legal consequence of a wrongful act.

14. The Drafting Committee had also examined a proposal made in the Sixth Committee to change the title of article 3 [4] to “Law applicable for characterization of an act of a State as internationally wrongful” or “The applicable law”. In rejecting such alternative wording as insufficient, the Committee had noted that article 3 [4] did not consider internal law to be irrelevant to the question of whether conduct was internationally wrongful; rather it provided that international law governed the question of characterization, taking into account internal law to the extent that it was relevant. In other words, there could be situations when internal law was relevant to the question of international responsibility, and that was reflected in the wording of article 3. The Committee had thus decided to adopt all three draft articles in chapter I in their existing form.

15. In the case of Part One, chapter II (Attribution of conduct to a State), the Drafting Committee had made small structural, as well as drafting, changes to the draft articles provisionally adopted at the fifty-second session. It had decided to reorder two of the articles to achieve a more logical grouping and to clarify the relationship between article 9 [8] (Conduct carried out in the absence or

<sup>4</sup> See 2665th meeting, footnote 5.

\*\*\* The numbers in square brackets correspond to the numbers of the articles adopted on first reading.

default of the official authorities) and a number of other articles. The articles were to be reordered in the following manner: articles 4 [5] (Conduct of organs of a State) and 5 [7] (Conduct of persons or entities exercising elements of governmental authority) retained the same numbering; new article 6 (Conduct of organs placed at the disposal of a State by another State), which had been article 8 [9]; new article 7 (Excess of authority or contravention of instructions), containing the substance of what had been article 9 [10]; new article 8 (Conduct directed or controlled by a State), which had been article 6 [8]; new article 9, which had been article 7 [8]; and articles 10 [14, 15] (Conduct of an insurrectional or other movement) and 11 (Conduct acknowledged and adopted by the State as its own), which retained the same numbering as at the fifty-second session. An additional benefit of the reordering had been the grouping together of the first four articles dealing with conduct of organs, persons or entities and the last four articles that dealt with other types of conduct.

16. The Drafting Committee had decided to standardize the various references to persons, entities and organs in chapter II. While it had first considered the formulation “person or body”, it had settled for “person or entity” in article 4, paragraph 2, and articles 5 and 7, conforming to the language of the draft articles on jurisdictional immunities of States and their property.<sup>5</sup> Article 4, paragraph 1, and article 6 retained the reference to “organ”, and the words “person or group of persons” had been kept in articles 8 and 9. The possibility of using a standard formula for all the articles had been rejected. The reference to “person or entity” had been retained to cover the situation of natural and legal persons in the relevant articles. Conversely, the phrase “person or group of persons” appeared in those articles dealing with aggregates of individuals or groups that did not have or did not need to have legal personality, but were nonetheless acting as a collective.

17. Regarding the title of chapter II, the Drafting Committee had been concerned about the possible implications of the phrase “act of the State” in relation to the Act of State doctrine, a legal term within some legal systems dealing with a completely different issue. The Committee had considered alternative formulations that more closely described the scope of chapter II, namely, attribution of conduct to the State. They had included “Conduct attributable to the State”, “Attribution to the State”, “Attribution of an act to the State” and “Attribution of conduct to the State under international law”. The Committee had decided to adopt “Attribution of conduct to a State”, a shorter version of the last-mentioned formulation that left out the reference to “under international law”, which was clear from the context and which flowed from the application of article 3 [4]. As a consequence of the new title, the Committee had adopted shorter versions of the titles for each of the draft articles reflecting the particular conduct in question, it being understood that the entire chapter dealt with attribution to the State of such conduct.

18. Article 4 [5] contained a balance, worked out at the fiftieth session,<sup>6</sup> between the role of the internal law of the

State and of international law in terms of the qualification of an entity as an “organ”. Generally speaking, that balance had been maintained and the Drafting Committee had decided not to reopen the substance of the article.

19. The Drafting Committee had considered a proposal to delete the opening phrase to paragraph 1, “For the purposes of the present articles”. It had been pointed out that because of the structure of the draft, including the absence of a provision on use of terms, a number of definitions appeared as, or within, separate articles, and that it would be inelegant to start those articles every time with the phrase “for the purposes of the present articles”. In the view of the Committee, any definition in a legal instrument was intended for the purpose of application of that instrument. That understanding need not be reiterated at the beginning of every article defining a term, and the commentary to chapter II or to article 4 [5] would make a general reference to it. The Committee had therefore deleted the phrase in question in paragraph 1 and the corresponding phrase at the beginning of paragraph 2.

20. The Drafting Committee had also considered a proposal to amend “shall be considered an act” to “is an act” or “constitutes an act”, but the view had emerged that “constitutes” might be too absolute and that it lost the sense of the process or intellectual operation implicit in the phrase “shall be considered”. On balance, the Committee had decided to retain the phrase “shall be considered”. As a consequence of its debate on article 7 [10], the Committee had decided to delete the reference to “acting in that capacity”. The deletion should be seen, not as a change to the scope of article 4 [5], but as a means of reducing the overlap between articles 4 [5] and 7 [10]. The Committee had shortened the title of the article to “Conduct of organs of a State”.

21. Article 5 [7] had a specific function, to cover situations where, under internal law, parastatal entities were given particular governmental functions, such as the exercise of immigration authority by an airline or certain licensing functions. The Drafting Committee had considered the suggestion by a Government that the phrase “elements of the governmental authority” be further clarified. It had taken the view that it was a commonly used phrase, that no additional language in the article itself was likely to clarify it further and that any such addition might in fact cause more confusion. Further clarification should be left to the commentary.

22. The Drafting Committee had agreed that the terminology used in article 4 [5], paragraph 2, and article 5 [7] had to be consistent. It had recognized that elements of governmental authority could be exercised by a large variety of entities, not all of which had legal personality, for example, militias and associations. The use of the broader phrase “person or entity” had been deemed preferable, to encompass all the possibilities that could arise in practice.

23. The Drafting Committee had also considered the use of the word “case” at the end of the article and had decided that the possible confusion with “case” in the sense of judicial proceedings called for an alternative formulation. Various suggestions had been made, such

<sup>5</sup> *Yearbook* . . . 1991, vol. II (Part Two), para. 28.

<sup>6</sup> For the draft articles adopted by the Drafting Committee at the fiftieth session, see *Yearbook* . . . 1998, vol. I, 2562nd meeting, para. 72.

as “matter”, “issue” or “circumstances”. The Committee had eventually decided to replace the last phrase, “in the case in question” with “in the particular instance”. A new formulation had been decided for the title: “Conduct of persons or entities exercising elements of governmental authority”, in line with the new formula for all titles in chapter II.

24. The Drafting Committee had considered a suggestion by a Government to include a proviso in article 6 [9], to cover a situation of the joint responsibility of a State, an organ of which had been put at the disposal of another State, and of that other State. It had decided that such a reference was not necessary since the articles in chapter II operated cumulatively. In addition, it was not entirely clear whether, when one State lent one of its organs to another State, the question of joint State responsibility necessarily arose. In certain circumstances there might be a joint organ of two States, an organ of State A acting also as an organ of State B—the Swiss authorities exercising immigration authority on behalf of Liechtenstein as well as on behalf of Switzerland, for example. In such situations the conduct would be attributable to both States by virtue of the general structure of chapter II. In other circumstances an organ of State A actually became an organ of State B. To attempt to cover all situations would make for a lengthy article. It was better to discuss the meaning of the phrase “placed at the disposal of” in the commentary, which could also address the issue of joint responsibility. The Committee had accordingly retained the text adopted at the fifty-second session, with a minor editing change, and had adopted a revised title, “Conduct of organs placed at the disposal of a State by another State”.

25. The Drafting Committee had held a lengthy discussion on the scope of article 7 [10]. The purpose of the article was to cover negligent acts, acts *ultra vires* or abuse of authority in situations where individuals were acting within the scope of their authority, i.e. “in that capacity”. The Committee had considered the term “exceeded”, which some had felt was too emphatic. That had raised a question as to the limits of article 7 [10]. It had been deemed unnecessary to cover expressly in the draft articles a situation in which an organ of State A was corrupted and acted on the instructions of State B. That would be a special situation, and the corrupting State would be responsible under article 8 [8]. The question of the responsibility of State A towards State B could not arise, but there could be issues of the responsibility of State A towards a third party that would be properly resolved under article 7 [10]. A much more common case was conduct under the cover of official capacity, or “colour of authority”. That concept was intended to be conveyed by the words “acting in that capacity”. Indeed, the key aspect of the provision was not so much the fact that such persons or entities acted in excess of their authority, but rather that they had been acting in a certain capacity when they had committed such acts: they had been acting with apparent authority.

26. In the version adopted at the fifty-second session, article 7 [10] had been numbered 9 [10] and it had applied, without expressly saying so, to what had then been articles 4 [5], 5 [7] and 8 [9]. Without a proper indica-

tion in the text, however, the Drafting Committee had felt that the reader would not necessarily arrive at the correct conclusion. Various forms of clarification had been considered, including making an explicit cross-reference in the article to those articles to which it applied, something which would depart from the policy by the Committee of limiting cross-references to the extent possible. In the end, the Committee had decided to change the order of the articles, so that what was currently article 7 [10], previously article 9 [10], would follow all the articles to which it applied.

27. A further proposal had been made to replace the phrase “concerning its exercise” by a formulation such as “required by its exercise”. The Committee had thought such a reference was unnecessary and had deleted the last phrase entirely, leaving the last part of the article to read simply: “exceeds its authority or contravenes instructions”. It had revised the title to read: “Excess of authority or contravention of instructions”, which focused more closely on the function of the article.

28. Governments had generally endorsed the language of article 8 [8]. In response to a proposal to merge articles 8 [8] and 9 [8], the Drafting Committee had noted that, while article 8 [8] dealt with the ordinary case of *de facto* agency, article 9 [8] dealt with more exceptional situations of conduct carried out in the absence or default of the official authorities. As such, the Committee had considered it appropriate to treat the two situations in separate articles. The Committee had also examined several proposed drafting changes, including deletion of the reference to “or control”, but had decided to retain the text substantially as adopted at the fifty-second session. The title had been streamlined to read: “Conduct directed or controlled by a State”.

29. The Drafting Committee had felt that a suggestion by one Government that the exceptional character of article 9 [8] should be stressed would best be reflected in the commentary. The commentary would also clarify the fact that the article might apply in a situation analogous to that of the occupying Allied forces at the end of the Second World War pending the transfer of power back to the legitimate authorities, for example in France and Poland. As to the terms “absence or default”, the first covered a situation where the official authorities did exist but were not physically present at the time, and the second, where they were incapable of taking any action. Indeed, the reference to “default” had been added during the second reading specifically to cover such situations. The combination of “absence or default” had been considered appropriate to cover all possible scenarios.

30. The Drafting Committee had also considered the last phrase, “in circumstances such as to call for the exercise of those elements of authority”. It covered cases where, for instance, a group of individuals not constituted as organs of the State took over the running of an airport and assumed responsibility for immigration during or in the immediate aftermath of a revolution. The emphasis was on the words “such as to call for”. In that example, the situation was such as to call for the exercise of immigration authority, which was done by a *de facto* authority. The Committee, on second reading, had changed the wording “in circumstances which justified the exercise

of elements of authority” to “in circumstances such as to call for the exercise of those elements of authority” because it was not appropriate to refer to something as “justified” which, at least hypothetically, was a breach of international law. The phrase “call for the exercise” was more descriptive and less judgemental of the character of the act.

31. Accordingly, the Drafting Committee had decided to retain the wording of article 9 [8], with a minor editing change. It had also adopted a new title, “Conduct carried out in the absence or default of the official authorities”, which conformed to the new standard formula for the titles in chapter II and also reflected more clearly the requirement of “absence or default”.

32. Article 10 [14, 15] retained the same number as at the fifty-second session. The Drafting Committee had disagreed with the comment made by one Government that the article created an *a contrario* interpretation, implying that all acts of unsuccessful insurrectional movements were attributable to the State: that was not the case, unless under some other article of chapter II, for example article 9 [8]. To allay any concern, the Committee had been of the view that the commentary should make that point very clear.

33. The Drafting Committee had considered the words “under its administration” in paragraph 2 and whether the case of a union between States would be covered. A proposal had been made to delete the second half of the paragraph, leaving the question of administration or union to the development of customary international law. However, it had been decided that a deletion was not advisable at such a late stage, especially since paragraph 2 had not been called into serious question by any comments by Governments. In addition, the Commission had in related contexts used the phrase “in a territory under its administration”. As to the question of union, paragraph 2 did not cover a situation where an insurrectional movement within a territory succeeded in its agitation for union with another State. That was essentially a case of succession and was outside the scope of the articles, whereas article 10 focused on the continuity of the movement concerned and the eventual new government or State, as the case might be.

34. The Drafting Committee had also looked into a suggestion to replace the words “or other” by “national liberation movement”, which would cover more clearly the situation of decolonization. However, it had decided that national liberation movements were included in the term “insurrectional movement” and that it was not necessary, at the current stage, for the Commission to enter into a debate on national liberation movements.

35. The Drafting Committee had further considered the need to retain paragraph 3 in view of a suggestion that it could be dealt with in the commentary. On balance, however, it had decided to keep it, since deleting it could create the impression, for example, that the responsibility of the pre-existing State, which retained only part of its territory under paragraph 2, would somehow also be affected by the conduct of a movement that succeeded in establishing a new State in what used to be its territory. Other than for some minor technical changes, the article

and its title had been adopted in the same form as at the fifty-second session.

36. As to article 11, the Drafting Committee had examined the proposal by a Government to delete the reference to an act of the State “under international law”, but had decided to retain the phrase, as it was used throughout the draft. It had also decided to replace the existing reference to specific articles by the more general, “the preceding articles”, i.e. those in chapter II. While at first there had been some question as to the applicability of article 7, it had been felt that there would be no harm in making such a reference. One of the functions of article 11 was to remove doubt where States decided to adopt the conduct as their own. As such, the article was useful in supplementing the other articles in the chapter.

37. The Drafting Committee also had considered a proposal to replace the phrase “acknowledges and adopts” by “acknowledges or adopts”. Similarly, it had been proposed to delete the reference to acknowledgement, since that was implied in the word “adoption”. However, at the fifty-second session the Committee had adopted “acknowledges and adopts” so as to make it clear that what was required was something more than a general acknowledgement of a factual situation. Such a formulation would thus require the State to identify the conduct and make it its own. The conditions were cumulative, and the order indicated the normal sequence of events. Furthermore, the Committee had also found the dual reference to “acknowledges and adopts” useful for translation of the concept into other languages. The commentary would explain that both conditions had to be satisfied together.

38. The Drafting Committee had also examined the question of the degree to which the conduct was attributable to the State, conveyed by the phrase “to the extent that”. It had been felt that that allowed sufficient flexibility to encompass different scenarios where States elected to acknowledge and adopt only some of the conduct in question. That issue would be elaborated further in the commentary. In adopting the article, the Committee had retained the text of the draft at the fifty-second session, the sole change being the reference to the “preceding” articles, as well as some linguistic refinements. The title was a streamlined version of that adopted at the preceding session.

39. In the case of chapter III (Breach of an international obligation), Governments had generally welcomed the simplification carried out by the Commission at the fifty-first session.<sup>7</sup> In particular, there had been no demand for the reintroduction of any deleted provisions. The few comments and suggestions from Governments had been mainly of a drafting nature or called for a clearer explanation of some of the concepts introduced in the chapter.

40. The Drafting Committee had made no changes to the first article of the chapter, article 12 [16, 17, 18] (Existence of a breach of an international obligation), since the article had been found generally acceptable.

<sup>7</sup> For the draft articles adopted by the Drafting Committee at the fifty-first session, see *Yearbook* . . . 1999, vol. I, 2605th meeting, para. 4.

41. Article 13 [18] (International obligation in force for the State), which dealt with the principle of intertemporal law, had also been found acceptable and there had been no suggestions for changes. The Drafting Committee had, however, replaced the words “shall not be considered” by “does not constitute” in order to be consistent with the language of article 2, subparagraph (b). It had made no other changes.

42. As to article 14 [24] (Extension in time of the breach of an international obligation), the Drafting Committee had considered a drafting suggestion by one Government to replace the title of the article by the phrase: “The moment and duration of the breach of an international obligation”, but had decided to retain the existing title, because the word “moment” was inappropriate.

43. Various drafting changes to paragraph 1 had been discussed. One proposal had been to replace the phrase “not having a continuing character” by “not extending in time”, the words used in article 24 as adopted on first reading. Another had been to delete the phrase “having a continuing character” and replace it by the words “whose effects continue”. The Drafting Committee had decided to retain the paragraph as it was. The Commission had discussed that issue at the fifty-first session and deliberately decided to use the words “having a continuing character”. That the question as to when a breach actually occurred was not covered in the article had been intentional. That would depend on the facts and on the content of the primary obligation and could hardly be clarified by a single formulation. Furthermore, the distinction between the continuing character of the breach and the continuing character of the effects of that breach were complicated matters that needed to be explained and elaborated on in the commentary and not in the paragraph itself.

44. In relation to paragraph 2 the Drafting Committee had considered a proposal to add “occurs at the moment when the act is performed” after “continuing character” in order to be consistent with paragraph 1. It had decided not to make the addition, as there might be situations that would then not be covered by the provision. The Commission had earlier decided not to seek to cover all issues in the articles systematically. As a number of Governments had pointed out, such an approach was rigid and over-prescriptive and tended to trespass on the scope of the primary obligations. The various paragraphs of the article dealt with key issues that arose in practice, addressing each in its own terms.

45. One proposal had been made to delete the whole of paragraph 3, and another to delete the words “what is required by” as superfluous. The Drafting Committee had also considered a proposal to include a fourth paragraph covering breach of obligations of result, because paragraph 3 covered obligations of prevention. It had noted the extensive debate at the fifty-first session on the distinction between the obligation of conduct and the obligation of result; and had reached the conclusion that that was a classification of certain primary rules that had no specific context within the framework of the draft articles. The Committee had observed that the commentary would elaborate on the discussion of obligations of conduct and obligations of result.

46. One Government had suggested that the phrase “defined in aggregate as wrongful”, in article 15 [25] (Breach consisting of a composite act), should be replaced by “capable of being regarded in aggregate as wrongful”. The Drafting Committee had decided to retain the existing text, as the proposed language would involve various contingencies, whereas the article was concerned with a narrower case. The point would be explained in the commentary.

47. As for paragraph 2, the Drafting Committee had noted that the word “such”, at the beginning of the paragraph, carried a heavy burden. It had considered replacing the words “In such a case” by “Such a breach”, but decided to retain the paragraph as it was and to explain the reference to “such” in the commentary. It had also looked at a proposal to delete the words “of the series” in paragraph 2 as being unnecessary, but decided to leave them in for the sake of clarity.

48. As for chapter IV (Responsibility of a State in connection with the act of another State) of Part One, one Government had proposed the deletion of the chapter because it reflected primary rules, but others had indicated their support, and that had also been the general view in the Commission. Accordingly, the Drafting Committee had made only certain drafting suggestions. It had first considered the title of the chapter and decided to replace the words “in respect of” by “in connection with”, to reflect the content of the chapter more accurately and also make it clear that responsibility was for the act of another State.

49. The Drafting Committee had considered a proposal to delete the reference to “internationally wrongful” in the title of article 16 [27] (Aid or assistance in the commission of an internationally wrongful act), which was repeated at various places in the body of the provision. It had decided that the words “internationally wrongful” must be repeated in the title of the article because they had been deliberately omitted from the title of the chapter.

50. Concerning the requirement in subparagraph (a) that the assisting State should have “knowledge of the circumstances”, the Drafting Committee had considered a suggestion by some Governments to delete it and a proposal by one Government to redraft the subparagraph to include the words “or should have known”. It had decided that the article should be retained in its entirety and as currently drafted. In particular, it had noted that the knowledge requirement was essential, as a narrow formulation of the chapter was the only approach acceptable to many States. The commentary would clarify the threshold at which aid and assistance became participation in the commission of the act.

51. The Drafting Committee had also examined a suggestion to qualify the aid or assistance by a “materiality” requirement, noting that that issue had been taken up at the fifty-first session, when it had been considered more appropriate to discuss such a qualification in the commentary. The Committee had followed the same view.

52. The Drafting Committee had considered a suggestion by a Government to broaden the scope of article 17



[28] (Direction and control exercised over the commission of an internationally wrongful act) by saying “or control” instead of “and control”. It had concurred with the opinion of the Committee that had looked at that issue at the fifty-first session. At that time, the Committee had decided that to use the conjunction “or” would broaden the scope of the article too much. The two words were complementary and should be read together with the conjunction “and”, which would provide more certainty and clarity regarding the narrow and specific intention behind the article. The position with article 8 [8] had been considered to be different, for in the case of article 17 [28] two States were involved, whereas in the context of article 8 [8], in practice only the directing State could be internationally responsible.

53. The Drafting Committee had considered the suggestion, also made in respect of articles 16 and 18, by Governments to delete the knowledge of the circumstances requirement in subparagraph (a) because it was implicit in the notion of directing and controlling. It had decided to retain the text as formulated for reasons already explained in connection with article 16.

54. Article 18 [28] (Coercion of another State) had been supported in general and thus the Drafting Committee had introduced no changes. It had agreed that the commentary should point out that, where the coercion was itself unlawful, the coercing State was responsible vis-à-vis the coerced State for its conduct, whereas article 18 [28] was essentially concerned with the position vis-à-vis a third party.

55. Article 19 (Effect of this Chapter) was a saving clause that had also commended the support of Governments, and the Drafting Committee had made no changes.

56. With reference to chapter V (Circumstances precluding wrongfulness), the Drafting Committee had had a lengthy debate on a proposal by a Government that the title should instead be rendered as “Circumstances precluding responsibility”, repeating largely the debate the Committee had had at the fifty-first session, when chapter V had been adopted. While it had been recognized in the Committee, as it had been at the fifty-first session, that the proposal did have some merit in relation to some of the draft articles, it had been its view that changing the title would have significant substantive implications for the provisions of chapter V. In particular, the Committee had been concerned about the lack of consistency in the approach to justification and excuses in domestic legal systems. In view of that experience, no one terminological solution would be satisfactory. The Committee had eventually decided that, at the current advanced stage of the work, it was prudent to retain the title and deal with the matter in the commentary.

57. No Government had opposed the inclusion of article 20 [29] (Consent) in chapter V. It might be recalled that a proposal had been made in plenary to include an express provision restricting consent in the case of peremptory norms. The Drafting Committee had considered that “valid” consent was a reference to the rules of international law that might affect the validity of the consent of the State. Such rules included, by definition, peremptory

norms. In fact, that had been the understanding of the Committee at the fifty-first session in adopting the text of that article, one that had been clearly stated by the then Chairman of the Committee when introducing the article. In that respect, the adoption of article 26 bis (Compliance with peremptory norms) made the matter clearer but made no substantive difference to the position. The title remained unchanged.

58. As to former article 21, the Drafting Committee had adopted a new formulation and decided to move the provision to later on in the chapter as article 26 bis. The decision had arisen out of a proposal made in the Commission in plenary to have a general exclusion clause in chapter V to the effect that no State could rely upon a circumstance precluding wrongfulness in respect of conduct which breached a peremptory norm. The alternative was to retain the existing case-by-case approach, whereby the issue was expressly provided for in some, but not all, of the provisions in chapter V as adopted at the fifty-second session, for example, in article 26 [33], paragraph 2 (a), prohibiting reliance on necessity in the context of a breach of an obligation under a peremptory norm. Likewise, article 23 [30] (Countermeasures in respect of an internationally wrongful act) incorporated by reference the provisions on countermeasures in what was Part Three, including the restriction on the effect of countermeasures on peremptory norms, and which was currently included in article 51 [50] (Obligations not subject to countermeasures), paragraph 1 (d).

59. The Drafting Committee had proceeded on the basis of a written proposal containing a draft text of the provision, initially in the form of a second paragraph in former article 21. After a lengthy debate on the merits of including it, the Committee had decided instead to replace the text of the article by the following, “[N]othing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.” While there had been some support in the Committee for keeping the text of former article 21 as paragraph 1 and placing the new text as paragraph 2, it had been decided that the new, more general, formula was to be preferred. Adopting the new wording avoided the slight infelicity of suggesting, as the former text had, that the peremptory norm in question required an act, where in most cases it merely prohibited certain acts. Since the new text was construed in general terms so as to apply to all the various circumstances in the chapter, the Committee had decided to place it towards the end, after article 26 [33] (Necessity). It had also decided, as a consequence of the adoption of the new formula, to delete paragraph 2 (a) of article 26 [33]. The title remained unchanged.

60. As to article 22 [34] (Self-defence), the Drafting Committee had been of the view that the phrase “lawful measure of self-defence” was intended to incorporate by reference the legal regime applicable to self-defence under international law. Likewise, it had examined whether to retain the concluding phrase “taken in conformity with the Charter of the United Nations”, which was viewed by some Governments as unnecessary in view of article 59 [39] (Charter of the United Nations). In considering the article on its merits, the Committee had preferred to retain the reference since it was essentially a *renvoi* to the

general international law position on self-defence, as effected by the Charter.

61. The Drafting Committee had further decided to keep the word “lawful”. It had been noted that in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ had been of the view that even States acting in self-defence had to comply with certain basic rules such as rules of international humanitarian law. Similarly, lawfulness implied compliance with the requirements of proportionality and necessity.

62. The Drafting Committee had also recognized that all the provisions in chapter V were formulated as general provisions, which in turn incorporated by reference the respective legal regimes. The Committee had, as a general policy, refrained from entering into the details of each circumstance, which in most cases would constitute topics of their own. That was the case with article 22 [34], where the current drafting was meant to reflect the basic principle, while at the same time making a reference to the existing law on self-defence. The Committee had thus retained the text of the article and its title as they stood.

63. Whereas the Drafting Committee had not sought to elaborate the legal regime of self-defence or consent, the position with countermeasures was different, since they were specific responses to internationally wrongful conduct and fell within the scope of the articles. He would take up article 23 [30], which addressed the specific issue of countermeasures as a circumstance precluding wrongfulness, when he came to chapter II of Part Three, dealing with the whole question of countermeasures.

64. The Drafting Committee had noted that there had been no objection to including article 24 [31] (*Force majeure*) and had made no changes to paragraph 1. Regarding paragraph 2 (a), it had considered a drafting proposal from a Government that would emphasize the causal link between the wrongful conduct of the State invoking *force majeure* and the occurrence of *force majeure*. The issue had been whether to add “internationally wrongful” before “conduct” to clarify the point that the contributory conduct must itself have been wrongful. The Committee had decided against such an addition because, in principle, the provisions on circumstances precluding wrongfulness should be construed narrowly. Furthermore, including a reference to “internationally wrongful” would give rise to a new set of difficulties. Instead, the Committee had decided to consider the possibility of amending paragraph 2 (a) as an attempt to accommodate that concern. At the fifty-first session, the Committee had adopted the phrase “results, either alone or in combination with other factors” to establish a direct nexus with the conduct of the State, but it had considered different possibilities for further emphasizing such a link. They had included deleting “either alone or in combination with other factors”; explaining in the commentary that “results” did not mean that it was the only, but rather the dominant, causal factor; and replacing “results” by “is caused . . . by the conduct”; “is a consequence of” or “is due . . . to”. The Committee had decided to adopt the last of these suggestions, replacing “results . . . from” by “is due . . . to”, and to replace the term “occurrence” by “situation”, since it was the situation of *force majeure*, having arisen, that was emphasized.

65. The Drafting Committee had considered a suggestion to add a reference in paragraph 2 (b) to “validly”, “definitely” or “expressly” assuming the risk. However, it had felt that the matter was not one of validity but one of interpretation. The commentary would consider the question of the assumption of risk further. The Committee had nonetheless replaced the reference to “occurrence” by “situation occurring” so as to bring the language into line with that adopted in paragraph 2 (a). The title of the article remained unchanged.

66. As to article 25 [32] (Distress), the Drafting Committee brought the text of paragraph 2 (a) into line with that adopted in article 24 [31], i.e. it had changed the words “results . . . from” to “is due . . . to”. Apart from minor technical changes relating primarily to tenses, no other changes had been made.

67. The Drafting Committee had examined the appropriateness of the title of article 26 [33], “State of necessity”, considering a suggestion by a Government that the title should be shortened to “Necessity”, since the reference to “state” was confusing. In addition, paragraph 1 only made reference to “necessity”. Although it had been recognized that the term “state of necessity” had been widely used, particularly in civil law systems, the Committee had decided to adopt the shorter version in English, namely “necessity”, so as to conform with the short form of titles adopted for the other articles in chapter V, but to retain *État de nécessité* in the French version, in both the title and the text of the article.

68. As to paragraph 1, the Drafting Committee had considered the difference between “essential interest” and “fundamental interests” in article 41, as adopted at the fifty-second session, and “collective interests” in article 49, paragraph 1 (a), as well as whether a distinction between “essential interests” and “fundamental interests” should be retained or whether the same expression should be used in articles 26 [33] and 41. In the context of necessity, the emphasis had normally been on essential—as distinct from non-essential—interests. Yet “fundamental interests” could not, by definition, be divided into “essential” and “non-essential”. As such, the Committee had decided to retain the reference to “essential interests” as in the draft at the fifty-second session and also to delete the reference to “fundamental interests” in article 41.

69. Concerning paragraph 1 (b), the Drafting Committee had first looked at the question of the phrase “international community as a whole”. Several Governments had proposed that “international community of States as a whole” should be used instead. The Committee had noted that the term “international community” was commonly used in numerous international instruments, that the phrase “international community as a whole” had been used in the preamble to the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly in 1999, and that the Commission had never used the phrase “international community of States as a whole”. Likewise, ICJ had used “international community as a whole” in the *Barcelona Traction* case. There was only one international community, which States belonged to *ipso facto*. Moreover, States retained paramountcy in the making of international law, i.e. the establishment of international obligations, and

especially those of a peremptory character. Article 53 of the 1969 Vienna Convention was intended to stress that paramountcy and not to assert the existence of an international community consisting solely and exclusively of States. Everyone accepted that there were other entities besides States towards which obligations could exist. That issue would be explained in the commentary. Therefore, the Committee had eventually decided to retain the phrase “international community as a whole”. It should be noted that paragraph 1 (b) was formulated disjunctively, in that necessity was disqualified as a defence if any of the conditions was met. That disjunctive nature of the provision was conveyed by the use of the word “or”.

70. The Drafting Committee had considered deleting the opening phrase “in any case”, in the *chapeau* of paragraph 2. That phrase had been adopted on first reading, by way of emphasizing that, irrespective of the balance in paragraph 1, necessity could not be raised as a defence in certain circumstances. The Committee, however, had decided to retain the phrase, primarily because article 26 was drafted in a negative form to stress the exceptional and limited nature of necessity.

71. As a consequence of the decision to include a general provision on peremptory norms as article 26 bis, the Drafting Committee had decided to delete paragraph 2 (a) of article 26 [33] adopted at the previous session and to renumber the remaining subparagraphs accordingly.

72. On new paragraph 2 (a), the Drafting Committee had also considered proposals to delete it and make it applicable to chapter V as a whole or to deal with it in the commentary. However, the Committee had decided to retain it both because of its expository value and also because certain obligations existed that expressly excluded the possibility of relying on necessity, for example in the field of international humanitarian law. Those were the examples the Committee had had in mind in previously adopting what was currently paragraph 2 (a). As to the argument that paragraph 2 (a) was equally applicable to the other circumstances in chapter V, the Committee had taken the view that the substance of paragraph 2 (a) might already be included in the individual regimes of each circumstance in chapter V, and would probably be covered by the *lex specialis* provision. On balance, as a matter of policy, the Committee had felt that, since necessity was the most marginal of the circumstances in chapter V, it was justified to have an express reference to the primary norm itself. The Committee had therefore decided not to make paragraph 2 (a) applicable to the entire chapter, but to retain it in article 26. That issue would be clarified further in the commentary.

73. Still with reference to paragraph 2 (a), he wished to reiterate the view of the Drafting Committee when it had adopted the article as article 33 at the fifty-first session, namely, that the basic assumption of the draft articles was that they applied both to conventional and to customary international law. While most examples of the type of international obligation contemplated in article 26 [33], paragraph 2 (a), were found in treaties, it was possible to envisage such obligation arising as a matter of customary international law or a unilateral undertaking which expressly or implicitly excluded the possibility of the invocation of necessity.

74. The Drafting Committee had decided to retain paragraph 2 (b) without any change. The Committee had considered a proposal to adopt the same basic formulation as in articles 24, paragraph 2 (a), and 25, paragraph 2 (a), for the sake of consistency, but had decided against doing so. The provision was phrased in broader and more categorical terms than the equivalent provisions in articles 24, paragraph 2 (a), and 25, paragraph 2 (a), again because of the general policy that necessity should be narrowly construed and changing the formulation as proposed would have the effect of broadening the scope of necessity. The commentary would explain further the question of contribution in the context of article 26 [33].

75. As explained earlier, in the context of former article 21, the Drafting Committee had adopted a new formulation for the article, and had decided to place it after current article 26, as article 26 bis.

76. The last article in chapter V, article 27 [35] (Consequences of invoking a circumstance precluding wrongfulness), dealt with two issues, namely, that circumstances precluding wrongfulness did not as such affect the underlying obligation so that, if the circumstance no longer existed, the obligation resumed its operation; and also the question of compensation. The text was framed as a without prejudice clause because the effect of the facts which gave rise to a circumstance precluding wrongfulness might independently give rise to the termination of the obligation, especially if it was a treaty obligation.

77. With regard to the opening clause of the article, the Drafting Committee had considered the words “invocation of” and proposals either to delete them or to replace them with “existence of”. A further alternative had been to return to the original formulation of article 35 as adopted on first reading, namely “preclusion of the wrongfulness . . .”. Yet, the inference was that, if a State found itself in a situation where it wished to rely on one of the circumstances precluding wrongfulness, it should invoke it, and not wait until later on. The Committee had thus felt that there was some value in referring to “invocation”. Furthermore, the existing text retained an element of flexibility whereby the State might decide not to invoke, for example, necessity, even though it might be entitled to do so. To clarify the matter further, the Committee had decided to retain “invocation” and replace the term “under” with the phrase “in accordance with”, to reiterate that what was being referred to was invocation of a circumstance contemplated in chapter V.

78. As to subparagraph (a), in response to a proposal by a Government to delete the provision as being unnecessary, the Drafting Committee had thought it would be worthwhile to retain it so as to clarify the situation, and also because the principle had been confirmed by ICJ in the *Gabčíkovo-Nagymaros Project* case.

79. The Drafting Committee had next considered the possibility of reformulating subparagraph (a) so as to provide more detail, for example, by stating “if the obligation may still be performed” or “if execution is possible”. However, doing so would run the risk of either developing a very complex text, or of not being sufficiently thorough. At the fifty-first session, the Committee had decided against providing a substantive statement on sub-

paragraph (a), for example on questions of termination of the underlying obligation, and against entering into a discussion as to the effects of circumstances precluding wrongfulness on the obligation in question, which related to other areas of law such as that covered by the 1969 Vienna Convention in the treaty context. Instead, it had preferred to leave such discussion to the commentary. The Committee had decided to follow that approach again at the current session, and had adopted subparagraph (a) without change.

80. The Drafting Committee had noted the proposal that, since no regime on compensation was fully established, subparagraph (b) should be deleted. It had also considered an alternative proposal going the opposite way, namely, to provide more detail on the regime relating to compensation. That there might be situations where compensation was required was clear. However, the Committee had been of the view that the elaboration of such a regime would require more particularization, which would be difficult, and that there was no justification for doing so in that subparagraph. In fact, at the fifty-first session the Committee had adopted a middle road between those proposals, by making the version adopted on first reading (which had been limited to some circumstances only) generally applicable. At the current session, the Committee had again decided to retain that basic balance, so as to ensure that the State invoking the circumstance would bear the costs, as a matter of equity, but not to go into more detail. The Committee had replaced the reference to “material harm or loss” by “material loss” in order to avoid any reference to the term “harm”, which had been used in the draft articles on the prevention of transboundary harm from hazardous activities. The reference to “material loss” was purposely construed as narrower than the concept of damage elsewhere in the draft articles because what the Commission was concerned with in the current context was the adjustment of losses that occurred when a party relied on, for example, *force majeure*. Those matters were to be explained further in the commentary as well.

81. The Drafting Committee had therefore decided to retain article 27 and the title substantially as adopted at the fifty-second session, for it was useful in clarifying the law, even if its provisions were largely expository in nature.

82. The CHAIRMAN invited members to request clarifications or comments on individual titles and articles in Part One of the draft.

83. Mr. KATEKA asked for clarification as to whether national liberation movements constituted “insurrectional” or “other” movements within the meaning of article 10.

84. Mr. PELLET said that the Special Rapporteur’s patience, diplomatic skills and sense of humour, and the firmness and scholarship of the Chairman of the Drafting Committee, had resulted in a very satisfactory, generally well balanced and sometimes remarkable set of draft articles. Although he was unable to endorse all the provisions contained therein, he would be able to join a consensus in favour of their adoption, on the understanding that no further amendments were made to the draft. However,

he wished to seize what would be the last opportunity to state his position on certain important problems of principle that had not been resolved to his satisfaction.

85. Article 10, in chapter II of Part One, posed problems for him for two reasons. First, unlike article 14 adopted on first reading, it did not refer to the principle of the responsibility of the insurrectional movement itself. Secondly, he found it quite unacceptable that national liberation movements engaged in a legitimate struggle for self-determination should be summarily consigned to the dumping ground of the catch-all expression “insurrectional or other movement”.

86. On chapter III of Part One, he continued to regret the disappearance of draft articles 20 to 23 adopted on first reading, which had contained useful additional detail on the influence of the nature and character of the obligations breached on the regime of State responsibility. He had never approved of the simplification of those provisions, which had involved reducing them to a mere skeleton. The same was true of the truncation of article 18 adopted on first reading, on the condition that the international obligation must be in force for the State, and, in particular, of its paragraph 2, the oversimplification of which had left it devoid of content—a criticism that applied to much of chapter III. In seeking to oversimplify the complex issues of international life and the law it encompassed, the new draft was less satisfactory than the version adopted on first reading.

87. Again, with reference to chapter III, articles 12 and 13 would have gained greatly from being merged. Once the subtle but useful distinctions of the earlier draft had been abandoned, it would have been sufficient to indicate in a single article 12 that the international obligation must be in force. There, in contrast to its practice elsewhere in the draft, the Drafting Committee had complicated matters.

88. As for chapter IV, article 16 was obscurely drafted and comprehensible only after several readings, perhaps also requiring recourse to the future commentaries. Chapter V, however, called for four brief remarks. First, it could be criticized for mixing two different categories of circumstances, namely, circumstances precluding wrongfulness and those precluding consequences arising out of responsibility. Some of the former were in fact circumstances attenuating responsibility, and it was regrettable that the Drafting Committee had not seized the opportunity to draw that distinction. Secondly, it had been unwise to include article 22 in the draft, since it simply referred to the Charter of the United Nations. That irrational muddling of the law of State responsibility and Charter law was regrettable. Thirdly, it was also regrettable that the idea of the consequences of invoking a circumstance precluding wrongfulness had been retained in article 27. In his view, the chapter as a whole, and the article in question, dealt with the consequences, not of invoking such a circumstance, but of the circumstance itself. The retention of the word “invoking” sent a wrong signal to States concerning the interpretation of chapter IV as a whole.

89. Fourthly, he welcomed the new drafting of article 21 as article 26 *bis*, which gave concrete form to the idea of the existence of an international community whose

minimum principles could never be transgressed. With those provisos, he could endorse the text of Part One as a satisfactory compromise.

90. Mr. LUKASHUK said that the new draft, while not irreproachable, was the best that could be achieved in the circumstances and an important contribution to the development of international law. Many of the provisions were substantially improved, not least the title, which had become legally precise. One point, however, had provoked his serious misgivings—as well as those of some Governments—from the outset, namely, article 17, subparagraph (a). Arguing *a contrario*, it was entirely unclear to him how a State that directed and controlled another State in the commission of an internationally wrongful act could possibly do so without the knowledge of the circumstances of the internationally wrongful act required by subparagraph (a). That matter should be clarified, at least in the commentaries.

91. Mr. PELLET said that article 17 posed a serious problem in the French version. However, he had refrained from commenting on that article, it being his understanding that the French text of the provision was not yet finalized.

92. Mr. CRAWFORD (Special Rapporteur) confirmed that Mr. Pellet's understanding was correct. The final texts in all languages would fully reflect the underlying intention of the draft. That was true even of the English language version: the continuing process of *toilettage* might necessitate the issuing of corrigenda. Needless to say, any corrections that the Commission might have to adopt would not affect the substance of the draft.

93. Mr. HAFNER said that the new version of Part One was a considerable improvement on the previous text. It should be made clear, however, that article 10, paragraph 1, did not exclude the possibility that one or more members of the new government referred to might not belong to the insurrectional movement in question. In such circumstances, article 10 would continue to be applicable. He also noted that the Russian and English texts of article 17 appeared not to correspond.

94. Mr. SIMMA said that, while he was all for introducing elements of community interest into the draft, he doubted whether article 26 *bis* was an appropriate way of achieving that aim. In cases of *force majeure* or distress, for instance, it must be possible to imagine situations in which wrongfulness would be precluded even if the rule breached was a peremptory norm of *jus cogens*.

95. Mr. LUKASHUK said he did not agree with Mr. Hafner. The Russian version of article 17 was a faithful rendering of the English original. However, perhaps it would be useful to establish a small unofficial drafting group to edit the Russian text, because that version would be used for the purpose of additional translations into other Slavonic languages and the languages of the Commonwealth of Independent States.

96. Mr. MOMTAZ expressed his appreciation of the work of the Drafting Committee and its Chairman. As to article 8 [8], he expressed the reservation that the three criteria mentioned—instructions, direction and control—were not cumulative. Moreover, “instructions” was a third element added to the “effective control” of

the case law of ICJ and to “direction” as identified by the International Tribunal for the Former Yugoslavia. The result was confusing and did not help to clarify the prevailing situation in the international community. He had the same concern as Mr. Kateka about article 10 [14, 15] and would welcome an explanation from the Chairman of the Committee.

97. Mr. KAMTO said he experienced difficulty with the term “territorial unit” in article 4. The Commission had not established a proper link with the 1978 Vienna Convention, which established that acts by such units in the context of State succession did not engage the responsibility of the State. There was no *renvoi* to explain the link, not even in the “without prejudice” clauses at the end of the draft. He hoped the commentary would explain the link between State responsibility and State succession. Secondly, he was alarmed at the implications of the words “even if it exceeds its authority or contravenes instructions” in article 7[10]. Acts by a person or entity exercising governmental authority but acting contrary to instructions could of course be treated as a matter of internal law, but it should be made clear in the commentary, that international responsibility would only be engaged in such a case if the other State was unaware that the person or entity was exceeding its authority. There was also the problem of coercion, dealt with in article 18: what would the situation be if the person or entity acting as the agent of a State and exceeding authority was doing so as a result of coercion? It was a situation that was not envisaged in the Convention. The commentary should clarify that the responsibility of the State was not engaged in such a case if the other State demonstrably knew that the agent was acting in excess of its powers. As for insurrectional movements, they should not be treated as equivalent to national liberation movements for the purpose of article 8, since the status of the latter was already recognized in international law.

98. Mr. ROSENSTOCK said he agreed with the comment already made about article 26 *bis*. The validity of the provision was beyond doubt, but it was unclear why it had been thought necessary to include it. If it was an accurate reflection of the law, it was unnecessary; if not, it was unhelpful. It was also uncertain to what extent a rule was expected to emerge from the article.

99. Mr. TOMKA (Chairman of the Drafting Committee), replying to the points raised, explained that the Committee had discussed whether the phrase “a movement, insurrectional or other” in article 10 [14, 15] was intended to encompass national liberation movements, and had decided by a majority that it was. It should be borne in mind that the rules in the draft articles related only to State responsibility, not to international legal personality and recognition.

100. As for the points raised by Mr. Pellet, many of them related to the text adopted on first reading, and no Government had argued for restoring that text. Accordingly, there had been no proposal to reintroduce the original draft articles 20 to 23, the disappearance of which was regretted by Mr. Pellet. In any case, their content was largely covered by primary rules. The Drafting Committee had not supported Mr. Pellet's proposal to amalgamate articles 12 and 13. With regard to chapter IV and the

difficulties of comprehension, he expected those difficulties to be eased by the commentary. The title of chapter V had been thoroughly discussed in the 1970s, when work had begun on circumstances precluding wrongfulness, and it was too late at the current time to alter or subdivide it into two chapters, or indeed to include a reference to mitigating circumstances. Concerning article 22 [34], Mr. Pellet was expressing a personal view on the law of the Charter of the United Nations; the draft dealt with general international law, which could apply even if the law of the Charter did not.

101. The Drafting Committee had discussed and rejected a proposal to delete the term “invocation” in article 27 [35]. Article 26 bis represented a compromise among divergent views, and had been adopted after lengthy debate and an indicative vote. The intention of the Commission had been to enlarge the scope of peremptory norms, so that no deviation from the obligations imposed would be possible, even for *force majeure* or distress. Article 17, subparagraph (a), would be further explained in the commentary. Article 8 [8] represented the majority view within the Committee, which favoured amalgamating the jurisprudence of ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua* with that of the International Tribunal for the Former Yugoslavia in the *Tadić* case. Concerning Mr. Kamto’s remark about article 4 [5], paragraph 1, the article was intended to establish the responsibility of a State for acts of a territorial unit or other subdivision that might have international repercussions. The rule would be relevant in the case of a federal State, such as Austria. The Committee had not taken any position on State succession. Mr. Kamto’s comment on article 7 [10] seemed to draw a parallel with article 46 of the 1969 Vienna Convention. It had not, however, been the intention of the Special Rapporteur or the Committee to impose a requirement that the other party should be aware there had been an abuse of authority.

102. Proceeding with the report of the Drafting Committee on Part Two of the draft articles (Content of the international responsibility of a State), he explained that its title had been considered by the Committee in the light of the amendment made to the title of the draft articles as a whole. The Committee felt that the existing title accurately reflected the content of Part Two. It had made a small grammatical change by adding the word “the” before “international”. The title of chapter I (General principles) had not presented any problems. Article 28 [36] (Legal consequences of an internationally wrongful act) was a link between Parts One and Two, and was essentially expository in nature. It had been extensively debated at the fifty-second session and was generally accepted by Governments. The Committee had decided to make only drafting changes, replacing “arises from” by “is entailed by”, to bring the language closer to article 1. It had also replaced the words “entails legal consequences” by “involves legal consequences”, in order to avoid repeating the word “entail”.

103. The Drafting Committee had retained the text of article 29 [36] (Duty of continued performance) without change, since no objections or comments had been made by Governments. With regard to article 30 [41, 46] (Cessation and non-repetition), there had been general

agreement to retain the *chapeau* and subparagraph (a), which presented no problems. The Committee had noted comments by some Governments questioning the legal basis for the provision in subparagraph (b), as well as comments by other Governments stating that they had no objections to the text. However, taking into account that the provision was *sub judice*, the Committee had decided to place it in square brackets and reconsider it during the second part of the session.

104. As to article 31 [42] (Reparation), while in principle there were no objections, comments by Governments had focused on two aspects of the article. The first set of comments related to the use of the notion of injury, which appeared for the first time in that article and in which it was defined. The second set of comments related to the notion of proportionality and its application to the article.

105. The Drafting Committee had not accepted a suggestion to merge paragraphs 1 and 2 in order to avoid the definition of “injury”, nor had it agreed to a suggestion to replace the notion of “injury” by “damage”. Taking into account the relationship between article 31 and articles 38 [45] (Satisfaction) and 43 [40] (Invocation of responsibility by an injured State) the Committee had thought it useful to use the two notions, “injury” and “damage”, the former being broader than the latter. In addition, in view of the different and sometimes conflicting uses of the notions of “injury” and “damage” in different legal traditions, the Committee was convinced that there should be a definition of “injury” for the purposes of the draft articles, and that the definition should be broadly construed so as to take account of various forms of reparation provided for under the articles in Part Two. The Committee had agreed, however, that the definition of injury as contained in paragraph 2 of the article could cause confusion. In paragraph 2, injury was defined as consisting of any damage, whether material or moral. The word “consists” limited the notion of injury. The Committee had therefore replaced the word “consists” by “includes”, which broadened the definition. Accordingly, injury was more than damage, whether material or moral. It included the so-called “legal injury” or moral damage to a State that might be entitled only to satisfaction. The Committee had also replaced the words “arising in consequence of” in paragraph 2 by the words “caused by”, which seemed more descriptive.

106. As for the inclusion of the notion of proportionality in the general provision on reparation, the Drafting Committee was of the view that “proportionality” applied differently to different forms of reparation. The notion of proportionality was addressed in individual articles describing various forms of reparation and could not therefore be attached, in addition, as a general condition to reparation. That issue could, however, be addressed in the commentary to the article.

107. The Drafting Committee had considered a proposal by some Governments to place article 32 in Part Four. It had noted that the article was especially relevant to the issue of reparation and should be retained in its current place. It had further noted that, if it were moved to Part Four, among other difficulties there might be some confusion as to how the article would relate to counter-

measures. Moreover, Part Four contained mainly saving clauses or articles explaining the scope of the text, which did not actually apply in the field of responsibility, unlike article 32. The Committee had not, therefore, made any changes to the article and had retained it in its original place.

108. Article 33 [38] had been moved to Part Four and would be introduced in that context. As for article 34 (Scope of international obligations set out in this Part), the Drafting Committee had first considered whether to move it to the beginning of the chapter, on the basis that an article on “scope” might be more appropriate at the beginning. It had nonetheless decided that the article could stay at the end of chapter I, because the whole chapter contained general principles applicable to Part Two as a whole. It had also noted that, with respect to the title of the article, the French term *portée* reflected the aim of the article better than “scope”, but no alternative had been found for the English text. The Committee had, however, decided to change the expression “covered by” in the title to “set out in”, in order to make it more consistent with the terminology used in the article itself.

109. The Drafting Committee had found that Governments had made only a few drafting suggestions for article 34. One suggestion, relating to the formulation of the expression “international community as a whole”, had already been discussed by the Committee in the context of article 26 [33]. Another proposal by a Government had been to delete the last phrase in paragraph 1: “and irrespective of whether a State is the ultimate beneficiary of the obligation”. The Committee had noted that the phrase was not strictly necessary and did not add much to the text. The words “content of the international obligation” in fact covered what was intended by the last phrase. It had therefore decided to delete the phrase in order to shorten the text, and to explain its intention in the commentary.

110. The Drafting Committee had also considered a proposal to delete the phrase “depending on the character and content of the international obligation and on the circumstances of the breach” as being superfluous. It had nevertheless considered that there was value in retaining the phrase, and had decided to add the words “in particular” after “depending”, to make it clear that the series of factors was not exhaustive and could operate cumulatively or alternatively, as well as to retain flexibility within the provision.

111. The Drafting Committee had considered a proposal by a Government to delete paragraph 2 of article 34. It had noted that the provision concerned the invocation of the rules on State responsibility by a non-State entity and was important for it dealt with the discrepancy between the scope of Parts One and Two. It was therefore necessary to retain the paragraph. In response to a proposal to delete the word “directly”, the Committee had decided to soften the wording of the paragraph to read: “which may accrue directly to any person . . .”.

*The meeting rose at 1.05 p.m.*

## 2682nd MEETING

*Wednesday, 30 May 2001, at 10 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

**State responsibility<sup>1</sup> (continued) (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,<sup>2</sup> A/CN.4/517 and Add.1,<sup>3</sup> A/CN.4/L.602 and Corr.1 and Rev.1)**

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE  
ON SECOND READING (*continued*)

1. The CHAIRMAN invited the members to continue their consideration of the report of the Drafting Committee containing the titles and texts of the draft articles on responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading (A/CN.4/L.602 and Corr.1). He invited the Chairman of the Drafting Committee to complete his introduction of Part Two of the draft articles.

2. Mr. TOMKA (Chairman of the Drafting Committee), introducing Part Two, chapter II, began by indicating that the title had been modified, since the Drafting Committee had found it inelegant to have the same title for the chapter and for article 35 [42] (Forms of reparation). After considering various alternatives, it had settled on “Reparation for injury” for the title of the chapter and had decided to retain the title of the article as adopted at the fifty-second session.

3. In considering article 35 [42], and indeed all of the articles in chapter II, the Drafting Committee had kept in mind its drafting changes to article 31 [42] (Reparation). For example, a Government had proposed to replace the term “injury” by “damage”, but, as the Committee had already decided to retain “injury” in paragraph 1 of article 31 [42], it had to be retained in article 35 [42] as well.

<sup>1</sup> For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

<sup>2</sup> Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

<sup>3</sup> *Ibid.*

4. The Drafting Committee had also considered a proposal by a Government to add a second paragraph that would indicate that the determination of reparation would take account of the nature and gravity of the internationally wrongful act. In the view of the Committee, that article was introductory in nature and served the function of pointing out all of the forms of reparation which, when combined, amounted to full reparation as required by article 31 [42]. In addition, the issue of proportionality was already addressed in the context of the individual forms of reparation, taking into account their specific character. For example, in relation to satisfaction, the article dealing with it explicitly referred to “appropriate modality” (art. 38 [45], para. 2). The Committee had therefore concluded that the substance of the proposal was already covered in the draft articles or that, in some cases, the inclusion of such a provision would amount to an overstatement of the principle of proportionality, since it would not always be a determining factor. It would therefore be better explained in the commentary. The Committee had subsequently adopted article 35 [42] in the form finalized at the fifty-second session.

5. Turning to article 36 [43] (Restitution), he said the Drafting Committee had considered a proposal by a Government to reformulate the opening clause to read: “... to re-establish the situation which would have existed if the internationally wrongful act would have not been committed”. That had already been discussed at the previous session, however, and it had been decided to adopt the current shorter formulation, which stated the general policy that applied to full reparation rather than to restitution as one form of reparation. The Committee had seen no reason to reverse that decision. It had also considered a suggestion made by a Government concerning the application of article 36 to the expropriation of foreign property but had decided that that was a matter for the commentary, as appropriate, especially in the light of the fact that expropriation was a controversial area that was not strictly within the scope of the draft articles. The Committee had also decided not to follow a proposal to reinsert language from subparagraph (d) of article 43 as adopted on first reading,<sup>4</sup> concerning serious impairment of the economic stability of the responsible State. The issue was largely covered by subparagraph (b) and, in the opinion of the Committee, there was no reason to reopen the debate. In addition, those issues would be elaborated on in the commentary. Finally, the Committee had considered a proposal by a Government to include a new subparagraph (c) to limit the provision of reparation where it would entail the violation by the State of some other international obligation. The Committee had already considered that issue at the fifty-second session and had decided not to change the text, for the same reason as at that session: “material” impossibility was intended to address legal impossibility as well. The issue of priority between conflicting obligations depended on the context and on a number of other factors that could not be expressed in a single paragraph, not to mention that it was outside the scope of the articles. The Committee had decided that the issue should be dealt with in the commentary, which would make it clear, *inter alia*, that the situation envisaged was covered by the reference to

material impossibility. The Committee had subsequently decided to adopt article 36 in the form finalized at the fifty-second session.

6. Concerning article 37 [44] (Compensation), paragraph 1 limited compensation to cases when damage was not made good by restitution. The notion of “damage” referred back to article 31, paragraph 2, which spoke of any damage, whether material or moral. The Drafting Committee had considered the meaning of moral damage. It had concluded that, for the purposes of compensation, moral damage meant pain and suffering and did not include moral damage to the State, which some referred to as “legal injury”: that was covered under the broad notion of injury and was primarily catered for by satisfaction. The Committee had considered a proposal to clarify the matter further by inserting in paragraph 2 a reference to compensation for “moral damage for pain and suffering”, but had decided against it, since it raised additional difficulties relating to the definition of moral damage suffered by individuals. It had decided that those issues should be elaborated on in the commentary. The Committee had also considered a proposal by a Government to extend the proposition in article 36 [43], subparagraph (b), to article 37 [44], but had not adopted that proposal, since it could contradict the principle of full reparation in article 31.

7. As to paragraph 2, the Drafting Committee had agreed that the qualification “financially assessable” was also intended to exclude any possibility of granting compensation for moral damage to a State. In addition, the Committee had agreed with the observation by a Government that what was “financially assessable” was to be determined by international law. That would be stressed in the commentary and, in any case, it flowed from article 3 [4] on the predominance of international law. The Committee had also discussed a proposal to replace the words “insofar as” with “if and to the extent that”, but had elected to retain the existing formulation, since “insofar as” carried with it the connotation that loss of profits might not be recoverable, depending on the context. The Committee had therefore decided to retain the title and text of article 37 [44] as formulated at the fifty-second session.

8. Regarding article 38 [45] (Satisfaction), the Drafting Committee had first considered a proposal that, in paragraph 1, the word “injury” should be replaced by the word “damage”. In view of the modified definition of injury in article 31, paragraph 2, the Committee had decided to retain the word “injury” in that article, where it meant moral damage to the State itself. The reference was to circumstances in which there might be nothing to restore or compensate for, yet there had been a breach that was exceptional and amounted to an affront to the State. It was in those circumstances that satisfaction could be offered, even if it was nominal. The commentary would make that clear and, in particular, indicate that satisfaction was not intended to be punitive in character and did not include punitive damages. The Committee had next considered the concluding phrase, “insofar as it cannot be made good by restitution or compensation”. Article 38 [45] was subject to the phrase “either singly or in combination” in article 35 [42]. Satisfaction was therefore not required “in addition” to restitution or compensation, although the concluding phrase reaffirmed the point that

<sup>4</sup> See 2665th meeting, footnote 5.



restitution and compensation were more common forms of reparation and enjoyed a certain priority. It was only in cases when they had not provided full reparation that satisfaction might be required. The matter would be explained in the commentary.

9. As to paragraph 2, the Drafting Committee had had before it a proposal by several Governments that the list of modes of satisfaction should be extended to include nominal damages or that the words “of a similar character” should be added, as well as another proposal made in the Commission in plenary that the words “formal regrets” should be included. As to nominal damages, the Committee had decided at the fifty-second session not to include such a reference, particularly because it was a concept that was difficult to translate into other languages. At any rate, paragraph 2 was intended only to indicate some of the sorts of satisfaction that were available and its non-exhaustive nature was confirmed by the words “or another appropriate modality”. As to the inclusion of the words “of a similar character”, insofar as they were intended to limit satisfaction, the word “appropriate” covered the idea. Its inclusion would have the effect of limiting the concluding phrase “or another appropriate modality”, which the Committee had adopted at the previous session as a compromise, having regard to the views of those members who wanted to see references to other modes of satisfaction, such as taking disciplinary or penal action against individuals whose conduct had caused the internationally wrongful act. The Committee had also considered the order of the modalities of satisfaction and had discussed the possibility of placing formal apology before expression of regret. In the end, it had felt that there was no hierarchy between the modalities. The commentary would state that they were simply examples and that it was the context that should determine the most appropriate form of satisfaction. Lastly, the Committee had considered the use of the word “may”, which indicated that the list was not exhaustive and that it was not up to the responsible State to choose the form of satisfaction, which was left to the individual circumstances.

10. The Drafting Committee had noted that there was strong support for paragraph 3 in the Sixth Committee, even though some had spoken against it. As to the comment made by a Government that the term “humiliating” was imprecise, the Committee considered that historical examples of “humiliating” forms of reparation could certainly be cited and some of the speakers in the Sixth Committee had had such examples in mind. The Committee had considered another proposal to replace the concluding phrase by “impairing the dignity of the responsible State”, but had felt that the new wording was neither clearer nor more readily understood than the existing text.

11. The Drafting Committee had therefore adopted the article and its title in the form finalized at the fifty-second session, with some minor drafting amendments.

12. Turning to article 39 (Interest), he said the Drafting Committee had considered a proposal by some Governments to reinsert it into article 37 [44]. The matter had been considered extensively at the previous session and it had been decided to maintain a separate article because of the importance of the issue of interest. The Committee

had felt that there was no reason to reverse that decision. It was of the view that the provision, as currently drafted, struck a suitable compromise between those who wanted more details on the issue of interest and those who wanted to reduce the provision to a mere reference in the context of compensation, as had been done in the draft articles adopted on first reading. The Committee had decided to retain article 39 and its title in the same form as at the fifty-second session.

13. With regard to article 40 [42] (Contribution to the injury), which concerned, in a generalized form, what in some systems was termed contributory negligence, the Drafting Committee had noted that that was one of the balancing factors in the context of reparation. It had first considered two proposals to replace the opening phrase, “[i]n the determination of reparation”, by “[i]n the determination of the amount of reparation” or by “[f]or the purpose of the contribution to damage and in relation to the question of the determination of reparation”. The Committee had decided not to adopt either proposal. In the first, the reference to “amount” was unnecessarily restrictive, since the provision applied both to amount and to form; in other words, the individual or the injured State might have waived the right to restitution and opted for compensation alone. In addition, the Committee had considered possible alternatives to the words “in relation to whom”, a formula which was phrased generally in order not to prejudice the approach to be taken under the item on diplomatic protection, on which the Commission had not yet taken a decision, and could apply to a variety of different situations, not all of them covered by diplomatic protection. The Committee had decided to retain the phrase “in relation to whom”, but to adopt *au titre de laquelle* instead of *par rapport à laquelle* in the French text. The Committee had also brought the text into line with the preceding article by substituting the word “injury” for “damage”, which could be read as limiting the applicability of article 40 [42] in the case of satisfaction, which was not the intention. It was clear that the behaviour of the injured person or entity was relevant to satisfaction as well as to other forms of reparation. The Committee had also considered a proposal made by some Governments to place the article in chapter I, possibly as a third paragraph to article 31 [42], as an aspect of the principle of full reparation. The principle in article 40 [42] had initially been expressed in the predecessor to article 31, namely, article 42 as adopted on first reading, but, at the fifty-second session, the Committee had decided to place it in a separate article so as to simplify what was at the current time article 31 [42] containing the general principle of reparation. In addition, in practice, the primary function of article 40 [42] was the determination as between the forms or the amount of reparation. It therefore belonged in chapter II and it had accordingly been decided to keep it in its current place. The Committee had thus adopted article 40 with the single drafting amendment to the French text and with the title “Contribution to the injury”.

14. Introducing Part Two, chapter III (Serious breaches of obligations under peremptory norms of general international law), he pointed out that at the fifty-second session it had been the subject of lengthy discussions in the Commission and by Governments. In the end, the Com-

mission had agreed to proceed with a compromise involving the retention of the chapter, with the deletion of article 42, paragraph 1, concerning damages reflecting the gravity of the breach. As part of the compromise, the previous references to a serious breach of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests, which dealt primarily with the question of the invocation of responsibility, as expressed by ICJ in the *Barcelona Traction* case, would be replaced by a reference to peremptory norms. The notion of peremptory norms was well established in the 1969 Vienna Convention and had been referred to by the Court. In certain circumstances, there might be minor breaches of peremptory norms that would not be the concern of chapter III, but serious breaches would be covered. The Drafting Committee had been asked to give further consideration to the consequences of serious breaches as contained in article 42, in order to simplify it, avoid excessively vague formulas and narrow the scope of its application to cases falling under chapter III. It was on that basis that the Committee had considered chapter III. The new title of chapter III reflected the understanding reached in the Commission in plenary.

15. The Drafting Committee had further considered the reference to “peremptory norms of general international law” in the context of its decision to maintain the phrase “international community as a whole” in various articles. In the light of that decision, the reference to peremptory norms in the draft articles might well be broader than that found in article 53 of the 1969 Vienna Convention, which used the more limited expression “international community of States as a whole”. The Committee was of the view that article 53 related primarily to the definition of peremptory norms for the purposes of the Convention, something that was done by the international community of States as a whole, a subset—albeit the most important one—of the international community as a whole. It should be stressed that the draft articles on the responsibility of States were not concerned with the definition of peremptory norms and, as such, did not conflict with the relevant provisions of the Convention.

16. The Drafting Committee had reformulated article 41 (Application of this chapter) in the light of the compromise just mentioned. The language of paragraph 1 was limited, referring to a “serious breach by a State” to avoid the implication that States could be responsible for serious breaches of peremptory norms committed by other States in situations not specified in the text. Paragraph 2 defined the word “serious”. It was the same as the previous text with the deletion of the final phrase, “risking substantial harm to the fundamental interests protected thereby”. By definition, if peremptory norms were involved and a serious breach was committed, there was a risk of substantial harm to such fundamental interests and the phrase was accordingly superfluous. The Committee had found the new text of paragraph 2 preferable to that of the previous session because it was shorter and avoided yet another reference to interest. The word “serious” signified that the violation must be of a certain order of magnitude. It was not intended to designate some types of violations as more serious than others or to attribute a punitive character to the violation or reparation, which might ensue.

The commentary would elaborate on that issue. The title remained unchanged.

17. Consistent with the understanding reached in the Commission, article 42 (Particular consequences of a serious breach of an obligation under this chapter) began with a reference to the obligation to bring to an end through lawful means any serious breach within the meaning of article 41. That applied, in effect, in the context of the cessation of a wrongful act, which was the subject of paragraph 1. That paragraph corresponded to paragraph 1 and paragraph 2 (c) of the previous text, but no longer used the words “as far as possible”, referring instead to “lawful means”. In addition, the modalities of “cooperation” were not specified. They could include coordinated actions by a group of States or all States, although unilateral actions by States were not excluded. The commentary would elaborate on those issues.

18. Paragraph 2 corresponded to paragraphs 2 (a) and 2 (b) of the previous text. It addressed unlawful situations arising by virtue of a serious breach and expressed the obligation of non-recognition or rendering of aid or assistance in relation to such situations. That paragraph, of course, did not apply when the breach under article 41 was not continuing and when no unlawful situation was created thereby, something that was conceivable, although unlikely, in respect of the types of wrongful acts covered by the article. It was intended to apply in *Namibia*-type situations and reflected the findings of ICJ in the *Namibia* case on the obligation of non-member States of the United Nations. The redrafted paragraph no longer spoke of “other States”, a phrase that, in the previous text had been intended to refer to States other than the responsible State. Under the new formulation, “[n]o State” could recognize the situation created by a serious breach as lawful. Accordingly, even the responsible State was under an obligation not to sustain the unlawful situation, an obligation consistent with article 30 (Cessation and non-repetition). The Drafting Committee had considered the question whether an injured State could waive its right to invoke the responsibility of another State for breaches referred to in article 41. It had been noted that, while an injured State clearly could not waive the right of another State that was entitled to invoke responsibility, there was nothing to prevent it from waiving its own right to invoke responsibility. In any event, that issue was not relevant to the paragraph under consideration and therefore did not need to be addressed.

19. Paragraph 3, which corresponded to paragraph 3 of the text adopted at the previous session, provided that the article was without prejudice to the other consequences referred to in Part Two, which included reparation, and to such further consequences that a breach to which chapter III applied might entail under international law. Of course, that did not exclude the applicability of the provisions of Part Four. The commentary would elaborate on the meaning of the paragraph. The title of the article was not the same as in the previous text.

20. Mr. KATEKA expressed his dismay at the further weakening of chapter III of Part Two, which was apparently due to an attempt to exorcize the ghost of international crimes. The Drafting Committee had changed the title of chapter III from “Serious breaches of essential

obligations to the international community” to “Serious breaches of obligations under peremptory norms of general international law”. Equally, in article 41, paragraph 1, the phrase “international community as a whole and essential for the protection of its fundamental interests” had been deleted. The deletion by the Committee might have been made in response to criticism by some States that article 41 was full of ambiguous terms such as “essential”, but the expression “peremptory norms” was also not without ambiguity. One member of the Committee had suggested introducing a definition of the concept of a peremptory norm. It seemed that the Committee had avoided that pitfall, since, according to article 53 of the 1969 Vienna Convention, “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole . . .”.

21. The Drafting Committee had studiously avoided referring to the “international community of States”, but, if there was only one international community, why had there been a retreat from the notion of the “international community as a whole” to the vaguer and, whatever the Chairman of the Committee might say, more controversial concept of peremptory norms? The Republic of Korea, for example, had suggested that the relationship of obligations covered by article 41 to obligations *erga omnes* and peremptory norms should be clarified. In paragraph 49 of his fourth report (A/CN.4/517 and Add.1), the Special Rapporteur had stated that there was no necessity for the Commission to take a general view as to the relations between peremptory norms and obligations to the international community as a whole. He had gone on to say that the two concepts substantially overlapped but that, whereas, in the context of peremptory norms, the emphasis was on the primary rule itself and its non-derogable or overriding status, the emphasis with obligations to the international community was on the universality of the obligation and the persons or entities to whom it was owed. It should therefore be asked whether, by choosing to refer to peremptory norms, the Committee had not decided to emphasize the primary rules, even though the Commission had decided that State responsibility should be dealt with under secondary rules. The Special Rapporteur had already provided an answer to that question by saying, in his report, that, since chapter III related to the consequences of a breach, the appropriate notion was obligations to the international community as a whole. The Committee should have heeded his remarks, particularly since the phrase was widely used throughout the draft articles, including the section on countermeasures. Its exclusion from chapter III of Part Two could therefore not be because it was vague, but because it was inconvenient for some members.

22. The changes made by the Drafting Committee to article 42 had further weakened the “middle ground” which could have produced consensus. For example, the reference in paragraph 1 to “damages reflecting the gravity of the breach” had been deleted. The Special Rapporteur had previously referred to “penal or other consequences”, but the Committee had decided to delete the expression at the previous session in order to remove any possible implication of punitive damages. In doing so, it had put paid to the Special Rapporteur’s attempt to give the draft articles some real substance concerning serious breaches.

And as if that retrograde step were not enough, there had been a call that the draft articles should state—presumably in the commentary—that punitive damages were not recognized under international law, thus accentuating the tendency for the commentary to be the last refuge of the disaffected. The advocates of the concept of international crimes had been pilloried by their opponents, but the spirit of article 19 as adopted on first reading lingered on and might haunt the Commission in the future. The Committee had done a disservice to the international community as a whole by its drastic overhaul of chapter III of Part Two. He was left wondering whether it had not exceeded its mandate.

23. Mr. PELLET said that, apart from chapter III, the text of Part Two of the draft submitted by the Drafting Committee was overall far superior, in both form and content, to that adopted on first reading. Chapters I and II, however, contained some elements that gave him pause. First, although the Commission should take account of the jurisprudence of ICJ, it should not simply echo the views of the Court. It was therefore inappropriate for it to await a decision by the Court before taking a decision on article 30, subparagraph (b). Secondly, article 34 (Scope of international obligations set out in this Part) harked back oddly to the character and content of a breach of an international obligation, even though the provisions of Part One on that point had been largely, and regrettably, deprived of any substance. Thirdly, the provision that was open to the strongest objections, apart from chapter III, was article 36: given that the object of restitution, as of any other form of reparation, was full reparation for damage, the situation to be re-established was not that which had existed before the wrongful act had been committed, but that which would have existed if the wrongful act had not been committed; that was the only way of fully restoring the consequences of an internationally wrongful act. As it stood, article 36 was not compatible with article 31, paragraph 1. Moreover, the Committee had unfortunately rejected the French proposal for the addition of a subparagraph (c), which would have supplied an easy and logical solution to the problems raised by the conjunction of incompatible obligations. As for the text of article 40, it might be asked whether, when a State gave diplomatic protection to one of its nationals, it could properly be said to be acting on that person’s behalf. The Commission had perhaps not taken sufficient care with regard to the relationship between the topic under consideration and the topic of diplomatic protection.

24. The new title of chapter III was, all things considered, satisfactory, if only because it had the dual virtue of both removing the ambiguity concerning the allegedly penal nature of such breaches and then of linking the concept—which the Commission had not invented, but had established—with that of *jus cogens*, which was well established. The link, however, posed a problem: since the draft articles gave no definition of *jus cogens*, they implicitly endorsed the generally accepted definition, contained in article 53 of the 1969 Vienna Convention, which was that it was a norm recognized by the international community of States as a whole. Yet the rest of the draft articles referred to a wider international community not limited to that constituted by States. That wider concept of the international community was intellectually

admissible and indeed it was even possible to accept that the two concepts, with their distinct aims, could coexist. The problem lay in the fact that the coexistence was not explained, but implicit in the draft articles. It would have been preferable to make them clearer by sticking throughout to the concept of the international community of States as a whole. Also, article 42 was undoubtedly extremely cautious. Its content was unexceptionable and the deletion of paragraph 1, which had contained rather strange provisions on damages, was no loss. It might have been useful to establish the concept of punitive damages in cases of serious breaches under chapter III, but, given the opposition aroused, it was better to say nothing on the subject than to retain such a vague provision. The problem with article 42 lay in its nearly complete silence on the real consequences of such serious breaches of obligations arising from peremptory norms of general international law. Paragraphs 1 and 2 of the new text of the article set out some of the real consequences, but there were many other more important and fundamental points that ought to have been made, for example, with regard to State transparency, the *actio popularis* that could, when a jurisdictional link existed, ensue from the commission of such acts and the effects of circumstances precluding the wrongfulness of such serious breaches, a matter which the Commission persisted in refusing to consider. Such serious breaches were undoubtedly governed by a different regime from that governing circumstances precluding wrongfulness; and article 26 *bis* was not adequate to solve the problem. Moreover, given the fact that article 42, and the draft articles as a whole, said nothing about the effect of serious breaches in the context of possible countermeasures, the loss of article 54 (Countermeasures by States other than the injured State) adopted at the fifty-second session, constituted an extremely serious problem and deprived the concept of serious breaches of a very large measure of its substance. However, the “without prejudice” clause in paragraph 3 would allow the future to take its natural course, putting in place the possibility of development or even of acknowledging the existence of other consequences of positive law. That said, the decision not to advance beyond the minimum was undoubtedly regrettable and, together with the deletion of article 54, constituted the greatest weakness in the draft articles. That should not, however, prevent the Commission from reaching a final consensus.

25. Mr. ECONOMIDES said that he still had reservations about some elements of the draft articles. In Part Two, he was particularly concerned about the deletion of paragraph 1 of article 42, which he considered most regrettable. In that it had provided that the responsible State should pay damages corresponding to the gravity of the breach, the article had had considerable dissuasive force and had therefore been one of the most useful and progressive of all the draft articles.

26. Mr. MOMTAZ said he also regretted that chapter III had been deprived of some of its provisions, but was particularly concerned about the question of punitive damages. In the Sixth Committee, many States had made much of the fact that article 37 made no provision for punitive damages. It would therefore be appropriate to state, at least in the commentary, that articles 37 and 39 did not provide for any such damages, despite the deletion

of paragraph 1 of article 42, which was a commendable change.

27. Mr. HAFNER said that, according to his understanding of some of the provisions in Part Two of the draft, the change to article 29 [36] (Duty of continued performance) was satisfactory, since the duty provided for reflected what was ultimately the binding nature of international law. Its effects were therefore not the result of State responsibility alone. As for the group of provisions made up of articles 31, 37 and 38, the existing text made possible an understanding of damage and injury and the relationship between them in the following way: according to article 31, paragraph 2, injury seemed to go beyond damage, whether material or moral, whereas article 38 left open the question whether the article covered moral damage or a further element of injury which was neither moral nor material damage. Either way, it should be quite clear that injury and/or damage was linked exclusively with the States referred to in article 43 [40] (Invocation of responsibility by an injured State) and not with those under article 49 (Invocation of responsibility by a State other than an injured State).

28. As for the effects of article 19 adopted on first reading, it was necessary to state that article 26 *bis* of the current draft, if read in conjunction with article 41, could not be interpreted as implying that, in cases of distress or *force majeure*, a State would run the risk of a breach of article 41, if the other conditions concerning the circumstances precluding wrongfulness were met. As for article 42, paragraph 1, the duty to cooperate was limited by the legal constraints imposed on the State. Such constraints should, however, result only from international law and not from national law, otherwise the word “shall” would make no sense. A State could not set off the duty of cooperation by a unilateral act. The paragraph also reflected a basic shift in the paradigm of current international law from individualism to a certain collectivism with regard to the guarantee and assurance of international law. For that reason, the limits on the duty to cooperate should be interpreted in a very strict sense, otherwise the objective of the provision would be seriously impaired.

29. Mr. LUKASHUK noted with regret that the category of serious breaches, which was widely recognized and established by doctrine, had been whittled down to the point where even the concept of “international community as a whole” had disappeared. Yet the facts must be faced and the text proposed by the Drafting Committee represented the most on which it had been possible to reach agreement. One point remained unclear, however, with regard to article 38, which gave the impression that the obligation to give satisfaction applied only in cases where no restitution or compensation was made. Yet satisfaction could stand on its own: in virtually every case it was right for a State to acknowledge the breach, express regret or issue a formal apology, for example. That should be stated in the commentary. He added that the statement in article 38, paragraph 3, that satisfaction should not be out of proportion to the injury amounted to the enunciation of a general principle—that of proportionality—and should therefore not be contained in a specific provision.

30. Mr. KAMTO said that he considered the new version of chapter III more acceptable than its predecessor

because the controversial concepts, little used in international law, that had appeared in the earlier version had been replaced by terminology that was more familiar and widely accepted in positive law. The concept of “peremptory norms”, for example, offered a way out of the choice between “international community” or “international community of States”. Nevertheless, a more precise formulation could have been useful in order to avoid the use of two different terms in the same text to designate the same thing. Admittedly, article 53 of the 1969 Vienna Convention defined a “peremptory norm” for its own purposes, but, by borrowing the expression, the Commission was also necessarily borrowing the definition. Recourse to the terminology used in the *Barcelona Traction* case did not solve the problem, in that there was no question in that case, by contrast with the Convention, of defining *jus cogens*.

31. The deletion of paragraph 1 of article 42 could not be regretted, given the extreme practical difficulty of obtaining punitive damages. The general reparations regime could, in any case, provide sufficiently for reparation—especially in financial terms—for serious breaches.

32. Mr. ROSENSTOCK said that nothing in chapter II or chapter III implied support for the notion that punitive damages could be imposed. He hoped that the commentary would say as much, thus leaving the way open for the withdrawal of any objections to chapter III, which, although it lacked clarity, introduced a qualitative distinction between wrongful acts that was founded in neither practice nor logic. Other aspects of article 42 should also be treated with great care in the commentary, so that there could be no possibility of inferring that the consequences in question applied only to the vague and anecdotal category of serious breaches, whereas in fact many such consequences applied in a far larger range of categories and should not be used in an argument *a contrario*. Taken as a whole, chapter III seemed simply to add further confusion, but its lack of clarity was such that it would probably cause no harm.

33. Mr. TOMKA (Chairman of the Drafting Committee) said that the Drafting Committee had worked on chapter III on the basis of a compromise reached following informal discussions and approved in the Commission. The deletion of the paragraph that dealt with damages reflecting the gravity of a breach had resulted from a decision by the Commission in plenary and not the Committee.

34. Turning to Part Three of the draft (The implementation of the international responsibility of a State), he said that it corresponded to Part Two *bis* (The implementation of State responsibility) proposed by the Special Rapporteur in his third report.<sup>5</sup> Its title had been aligned more closely with the new title of the draft articles as a whole and with that of Part Two (Content of the international responsibility of a State).

35. The Drafting Committee had shortened the title of chapter I (Invocation of the responsibility of a State), at any rate in the English version. On the concept of “invocation”, the Committee had considered a general com-

ment regarding the need to be clear about the meaning. It had noted that invocation should be understood as taking measures of a relatively formal nature, which, without necessarily involving the commencement of legal proceedings, included it. A State did not invoke the responsibility of another State by simply reminding it of a breach or even by protesting. For the purposes of the articles, protest as such was not an invocation of responsibility; it had a variety of forms and motivations, for example, the reservation of rights, and was not limited to cases involving State responsibility. On the other hand, certain diplomatic exchanges, such as the lodging of a formal claim, would amount to invocation. The Committee had decided to retain that concept and to leave the explanation of its meaning and parameters for the commentary.

36. The Drafting Committee had noted that Governments had expressed two concerns as to the substance of article 43 [40]: the first related to the need for a more direct link with article 31 and the second to the concept of integral obligations found in subparagraph (b) (ii) of the previous draft. Having ascertained that the *chapeau* of the article was clear and provided a sufficient link with article 31 and that no Government had proposed any drafting amendments to that clause or to subparagraph (a), the Committee had decided to leave the text unchanged, save for a drafting amendment in the French version. As for subparagraph (b), the Committee had examined a comment by one Government that the expression “group of States” implied some form of entity with legal personality. It had considered the possibility of replacing it by the words “several States”, but had concluded that the first expression conveyed most accurately the sense of the provision, which referred to a community of States. The commentary would make it clear that that provision did not purport to attribute legal personality to a group of States. The category of States referred to in subparagraph (b) (i) had not given rise to any objections and the Committee had therefore retained it as well. However, the Committee had found that subparagraph (b) (ii) had created some confusion among Governments. It had noted that the notion of integral obligations originated in article 60, paragraph 2 (c), of the 1969 Vienna Convention. That category of obligations was more familiar and more frequently encountered in the context of obligations resulting from international treaties than in other contexts. In addition, the provision in question, in the field of State responsibility, dealt with collective interest, a matter already covered by article 49, paragraph 1 (a). For those reasons and in view of criticism by Governments that that provision was too vague, the Committee had considered deleting it. On balance, however, it had felt that there was merit in retaining a provision on integral obligations for such a category of obligations, although narrow, did exist and some parallelism with article 60, paragraph 2 (c), of the Convention must be preserved. In its opinion, any misunderstanding on the part of Governments could be attributed to the poor drafting of the provision and, in particular, to its excessive breadth, which was likely to foster confusion with article 49, paragraph 1 (a). It had therefore decided to keep the provision, but to narrow the definition of integral obligations by aligning it more closely with the wording of article 60, paragraph 2 (c), of the Convention. Hence the text of article 43, subparagraph (b) (ii), read: “Is of such a character as radically to

<sup>5</sup> See 2672nd meeting, footnote 4.

change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.”

37. The Drafting Committee had amended the title of the article in order to reflect its content more faithfully. It had taken the view that the definition of the injured State, although not expressly defined in the text, was inferred from the content of the article. The new title “Invocation of responsibility by an injured State”, which was that of former article 44, was more fitting for article 43.

38. Bearing in mind the new title of article 43, the Drafting Committee had amended that of article 44 to read: “Notice of claim by an injured State”, which also reflected more closely the content of the provision and would be more in line with article 45 [22] (Admissibility of claims). It had maintained paragraph 1 as it stood, since it had not prompted any objections or proposed amendments by Governments, other than one comment on the meaning of “invocation”, which had already been answered. The Committee had studied the suggestion by a Government that all the remedies available to an injured State should be listed in paragraph 2. It had added the words “in accordance with the provisions of Part Two” at the end of subparagraph (b) to make it quite clear that an injured State had all the remedies provided for in Part Two. The Committee had also considered a proposal to expand paragraph 2 by adding another subparagraph on the nature and characteristics of the claim. Nevertheless, in the light of the view expressed during previous discussions that the article should be as flexible as possible, it had believed that it would be unnecessary to elaborate on the characteristics of the claim in the body of the text, but that that could be done in the commentary.

39. As for article 45 [22], the Drafting Committee had studied a proposal by a Government that the words “by an injured State” should be inserted in the *chapeau* after the words “it may not be invoked”. It had decided not to do so, for those words would be inconsistent with the scope of the article, which applied to both injured States and States other than the injured State which were entitled to invoke responsibility. With regard to subparagraph (a), it had first examined a proposal by a Government to return to the rule on nationality of claims contained in article 22 adopted on first reading. It had also taken note of the fact that the issue of nationality essentially related to the admissibility of claims and had decided that, as the new subparagraph (a) introduced some flexibility, it would not be appropriate to revert to the previous text. It had then considered the comment of one Government that the “nationality of claims” was an unfamiliar concept in French legal terminology and that the expression should be redrafted to refer to an applicable rule relating to nationality in the context of the exercise of diplomatic protection. The Committee had decided to retain the text as it stood, even in the French version. It had recalled that the term “nationality of claims” had been used in 1949 by ICJ in the advisory opinion that it had delivered in French and English in the *Reparation for Injuries* case, with the French text being the official text. The Committee had also noted that the nationality of claims rule did not apply only in the field of diplomatic protection. The Committee had made no amendments to subparagraph (b), since Governments had generally endorsed it.

40. The title of article 46 (Loss of the right to invoke responsibility) had presented problems for some Drafting Committee members who would have preferred the word “renunciation” to the word “loss” (of a right) in English. The Committee had made that change in the French version, but had retained the English title as it stood, since it considered the word “loss” better than the word “renunciation”.

41. With regard to subparagraph (a), the Drafting Committee had examined the proposals by some Governments to exclude the ability to waive a claim arising from a breach of a peremptory norm or an *erga omnes* obligation. It had felt that, in the context of chapter V of Part One (Circumstances precluding wrongfulness), the word “validly” referred to both the procedural and the substantive validity of the waiver of the claim. In that article, the Committee had been unable to settle the question of the circumstances in which a claim relating to a breach of an obligation under a peremptory norm could be waived, for the reasons already explained when introducing article 42, paragraph 2. The Committee had likewise considered a suggestion by one Government that the word “validly” should be deleted, since it was redundant. It had thought it essential to uphold the principle that a claim had been validly renounced, in order to take account of situations in which an injured State might waive its claim under duress or coercion, because such renunciation should not be regarded as a sufficient waiver. The Committee had also studied the proposal from one Government to delete the words “in an unequivocal manner”, which might hamper the application of the article. It had noted that the expression was not strictly necessary and that the adverb “validly” rendered the idea adequately. It had therefore deleted the expression and agreed to explain the point in the commentary. The Committee had maintained subparagraph (b) without any changes, since no Government had submitted any comments on it.

42. Taking its cue from a proposal by the French Government, the Drafting Committee had amended the title of article 47 to read: “Plurality of injured States”, which was, in its opinion, more consistent with the content of the article itself. The article had been generally accepted by Governments. The Committee had wondered whether the article should specify that States could invoke responsibility collectively and separately. It had, however, found that the word “separately” had been expressly included in the text to show that States could invoke responsibility individually and that it went without saying that injured States could act together. In such circumstances, however, each State would be acting in its own right and not on behalf of any group or community. The provision did not deal with the issue of joint actions, which was governed by a separate body of law. That point could be explained in the commentary.

43. The Drafting Committee had amended the title of article 48 to read: “Plurality of responsible States”. In paragraph 1, it had first looked into the question raised by a Government whether the article recognized the principle of joint and several responsibility. It had noted that the general rule in international law was that a State bore responsibility for the wrongful acts it had committed and that article 48 reflected the rule well. The commentary would clearly explain that that provision must not be

construed as recognizing the rule of joint and several responsibility. If States wished to establish such a regime, they could do so. The Committee had further considered a Government's proposal to include the concept of attribution by changing the last part of paragraph 1 to read "the responsibility of each State may only be invoked to the extent that injuries are properly attributable to that State's conduct". It had noted that introducing the notion of attribution would create confusion with Part One and that the words "in relation to that act", which appeared in the text, would achieve the same objective. That point would be explained in the commentary.

44. The Drafting Committee had retained paragraph 2 as it stood, apart from some editorial modifications.

45. The Drafting Committee had noted that only one Government had proposed the deletion of article 49. It had considered a proposal to delete the expression "subject to paragraph 2" from the opening clause of paragraph 1, but had concluded that it would be better to replace it by "in accordance with paragraph 2". The Committee had examined the comment of a Government, which thought it necessary to clarify the concept of collective interest in paragraph 1 (a). It had decided to narrow the provision by adding the words "of the group" after the words "collective interest". That wording did not, however, rule out the possibility of a group of States entering into an obligation in the common interest of a larger community. For example, a group of States with rainforests in their territory might undertake to protect and preserve those forests, not only in their own interest, but also for the benefit of the international community as a whole. In the view of the Committee, that situation was also covered by the subparagraph. The commentary would elaborate on that issue. The Committee had made no changes to paragraph 1 (b) because Governments had found it generally acceptable.

46. In paragraph 2, the Drafting Committee had replaced the words "a State" by "any State" so as to be consistent with paragraph 1. Similarly, in the English version, it had replaced "may seek" by "may claim". The Committee had then examined a suggestion by a Government that a saving clause should be included to indicate that non-State entities might also be entitled to invoke State responsibility, but had considered that it was pointless to do so, since that matter was already dealt with in article 34, paragraph 2. The Committee had then noted that the inclusion of the reference to "assurances and guarantees of non-repetition" in paragraph 2 (a) depended on the decision taken on article 30, subparagraph (b), and had therefore decided to place those words in square brackets in the intervening period. The reference to the cessation of the internationally wrongful act did not give rise to any problems. A number of Governments had queried the substance of paragraph 2 (b). In particular, they had wondered whether the States in question in that article were entitled to ask for more than the cessation of the wrongful act and whether their right to demand reparation was recognized by international law. The Committee had further noted that some Governments were unsure how the invocation of responsibility by several States under that provision could be reconciled with conflicting or divergent demands. The Committee had found that that provision was a clear example of the progressive development of in-

ternational law and its utility should be evaluated from a policy perspective. It had noted that the right of the States referred to in article 49 to adopt countermeasures for the sake of the collective interest in the event of breaches of obligations, which had been embodied in article 54 of the previous draft, was highly controversial. The general view of the Commission had been that that article should be replaced by a saving clause, even if that might have the effect of weakening the protection of the collective interest. Under those circumstances and on balance, the Committee had reached the conclusion that, while that provision represented the progressive development of international law, it established a wise and useful principle worth retaining. It had nevertheless replaced the words "under chapter II of Part Two" by the words "in accordance with the preceding articles" in order to emphasize that the States referred to in article 49 could not demand reparation on behalf of an injured State that had chosen to waive its right to do so in accordance with article 46. The commentary would elaborate on the question of the procedure to be followed in the event of conflicting or divergent demands by the States referred to in article 49. At the beginning of paragraph 2 (b), the Committee had replaced the words "[c]ompliance with" by the words "[p]erformance of" in the English version in order to bring it into line with the French text.

47. Finally, with regard to paragraph 3, the Drafting Committee had discussed the proposal of one Government to add "*mutatis mutandis*" after "under articles 44, 45 [22] and 46 apply", but it had concluded that the intent of the provision was clear and that there was no need to amend its wording. Since the paragraph had been generally deemed acceptable by Governments, the Committee had retained it without any changes.

48. Turning to Part Three, chapter II (Countermeasures), he said that that part of the text had attracted much criticism from Governments and Commission members. Taking into account the compromise reached in the Commission, it had been found undesirable to overload article 23 (Countermeasures in respect of an internationally wrongful act) by incorporating in it most of the articles on countermeasures. Article 23 would therefore remain in chapter V of Part One. The chapter on countermeasures would remain in Part Three, but article 54 of the draft at the previous session, which had been highly controversial, would be deleted and replaced by a saving clause which took account of all the positions on that issue. Article 53 [48] (Conditions relating to resort to countermeasures) of the previous draft would also be reconsidered and the distinction between countermeasures and provisional countermeasures would be removed. That article should also be simplified and brought into line with the decisions of the arbitral tribunal in the *Air Service Agreement* case and the decision of ICJ in the *Gabčíkovo-Nagymaros Project* case. Articles 51 [50] (Obligations not affected by countermeasures) and 52 [49] (Proportionality) should also be reconsidered, as necessary, in the light of the various comments made. On that basis, the Drafting Committee had considered chapter III and article 23 [30] as it was related to that chapter.

49. With regard to article 50 [47] (Object and limits of countermeasures), the Drafting Committee had taken note of the fact that, while Governments had not objected

to it, they had questioned its balance and that was the issue it was trying to resolve.

50. According to paragraph 1, the purpose of countermeasures was to induce the wrongdoing State to comply with its obligations to cease the breach and provide reparation. Countermeasures were not punishment. One Government had suggested that the sole aim should be to bring about the cessation of the wrongful act, but, in the view of the Drafting Committee, reparation was necessary in situations where damage had already been done. That conception of countermeasures was therefore too restrictive and not supported by State practice. The Committee had felt that the restriction implied by the word “only” in the English version applied to both the target of countermeasures, i.e. the responsible State, and the purpose of those countermeasures, which was to persuade the responsible State to comply with its obligations.

51. The Drafting Committee had likewise considered a suggestion that countermeasures to guarantee satisfaction should be ruled out, since satisfaction played only a minor, symbolic and supplementary role in the entire range of forms of reparation and could not alone justify the imposition of countermeasures. It was inconceivable that a State that had met its obligation to cease the wrongful act and had provided compensation could be made the target of countermeasures. The Committee had felt that the notion of proportionality addressed that concern and that it was unnecessary to make arbitrary distinctions in that paragraph.

52. In paragraph 2, the Drafting Committee had considered the use of the expression “suspension of performance of one or more international obligations”, which some considered too close to the language used in the context of treaty obligations and which might convey the impression that the paragraph was confined to that kind of obligation. The words “one or more international obligations” had also been criticized, but the Committee had noted that a countermeasure could well result in the breach of several different obligations coexisting under a variety of arrangements and that the more exact wording “or more” was therefore justified. The Committee had thus done no more than make purely drafting changes to the previous text by replacing the words “suspension of performance of one or more international obligations” by the words “the non-performance for the time being of international obligations” because the term “for the time being” accurately reflected the temporary nature of the countermeasure. Lastly, the Committee had examined the suggestion by a Government that the text did not sufficiently protect third States’ rights, which might be infringed by countermeasures in some situations, but it had considered that, in view of State practice, it was impossible to introduce a provision which would restrict the right of the injured State to adopt countermeasures for that reason.

53. In paragraph 3, the Drafting Committee had turned its attention to a point raised by some Governments concerning the irreversible consequences of countermeasures. In its opinion, it would be impossible to prevent irreversible effects in all cases, but States could at least be required “as far as possible” to take countermeasures with reversible effects. For the sake of greater clarity,

the Committee had made some drafting changes to the paragraph by replacing the words “not to prevent” by the words “to permit” and by deleting the words “obligation or” in order to achieve consistency with paragraph 2, which referred only to “obligations”. The title of the article remained unchanged.

54. As to article 51 [50], although one Government had proposed its deletion on the grounds that it dealt with issues covered by the Charter of the United Nations or by the article on proportionality, whereas others had wished to supplement it, the Drafting Committee had taken the view that it usefully clarified certain issues and had largely reproduced the text of the previous version with a few amendments; for example, it had slightly altered the wording of paragraph 1 by replacing the words “involve any derogation” by the word “affect” in the opening clause because some Governments had rightly been of the opinion that the use of the term “derogation” created confusion with human rights derogation clauses. As far as substance was concerned, in paragraph 1 (c), it had deleted the reference to any form of reprisals against persons protected by obligations because it believed that there was no need to be more specific, since the text relied on *lex specialis*. As at the fifty-second session, it was the understanding of the Committee that paragraph 1 (d) did not qualify the obligations referred to in the previous subparagraphs, especially those in paragraph 1, subparagraphs (b) and (c), which might or might not be peremptory. The subparagraph on diplomatic and consular inviolability had not prompted any criticism by Governments. According to one Government, however, the obligation in question should be considered peremptory. The Committee did not share that viewpoint because a State might waive the inviolability of its own personnel, premises and documents. The purpose of that subparagraph was directly linked with that of paragraph 2, for, in order to settle a dispute successfully, it was essential to keep diplomatic channels open between the States concerned. That was why the Committee had transferred that subparagraph to paragraph 2.

55. When considering paragraph 1, the Drafting Committee had wondered whether it would be useful to keep it general, with no listing of specific obligations. The advantage of such a formula was that the scope of the paragraph would remain within the realm of secondary rules and would avoid the possibility of excluding any of the obligations against which countermeasures might not be taken. On the other hand, the fact of listing some of the “prohibited countermeasures” had the advantage of removing uncertainty, at least about those for which there should be no ambiguity. On balance, the Committee had considered that the second approach was preferable, even though the provision would have to draw on primary rules.

56. Paragraph 2 was a merger of paragraph 2 and paragraph 1 (e) (on diplomatic and consular inviolability) of the article at the previous session. In the context of its consideration of that paragraph, the Drafting Committee had looked into the question of the meaning of the expression “applicable dispute settlement procedure in force” between the injured State and the responsible State and had confirmed its understanding that it was intended to be construed narrowly and to refer only to dispute settlement procedures that were applicable to the dispute in



question. For that reason, the Committee had considered it useful to change “applicable” to “relevant”. In any event, the issue would be made clear in the commentary. Also, the title of the article had been modified.

57. The need for article 52 [49] had not been questioned by Governments, but a number of suggestions had been made affecting both the drafting and the substance of the article. With regard to the drafting, some Governments had proposed adopting the phrase “not disproportionate” or, in the English version, replacing the word “commensurate”, which seemed to suggest a more restrictive meaning, by the word “proportional”. The Drafting Committee, consistent with its general approach of avoiding double negatives, had not found the first proposal acceptable. Considering that the words “proportional” and “commensurate” were interchangeable, it had opted for the latter because it was the word ICJ had used in the *Gabčíkovo-Nagymaros Project* case. The Committee had also considered a proposal by some Governments that countermeasures should be considered justified to the extent that they were necessary to induce compliance with the obligation that had been breached. Therefore, proportionality should be linked to the purpose of countermeasures. Along the same line, other Governments had proposed replacing the words “the rights in question” by the words “the effects of the internationally wrongful act on the injured State”. In the view of the Committee, the purpose of countermeasures having been already described in article 50, it was unnecessary to repeat it. As for the words “the rights in question” adopted by the Committee at the previous session, they came from the decision of the Court in the *Gabčíkovo-Nagymaros Project* case and had a broad meaning, which included the effect of a wrongful act on the injured State. On that issue, he referred to the statement made by Mr. Gaja. Article 52 [49] was intended to identify the factors that had to be taken into account in deciding on the type of countermeasures to adopt and their intensity. It captured the necessary and relevant elements identified by the arbitral tribunal in the *Air Service Agreement* case. Those issues would be explained in the commentary. The title of the article remained unchanged.

58. Article 53 [48] was central to the compromise by the Commission. The most delicate aspect of the provision was the relationship between countermeasures and dispute settlement. To address that difficulty, the Drafting Committee had deleted paragraph 4 of the previous text, essentially prohibiting countermeasures while negotiations were being pursued in good faith, but had retained paragraph 5 dealing with the suspension of countermeasures where the dispute was before a tribunal with the power to make decisions binding on the parties.

59. Paragraph 1 was a merger of paragraphs 1 and 2 of the previous text. Subparagraph (a) required the injured State to request the responsible State to comply with its obligations under Part Two, namely, the cessation of the wrongful act and the reparation of injuries caused. Subparagraph (b), which corresponded to paragraph 2 of the previous text, required the injured State to notify the responsible State of any decision to take countermeasures and to offer to negotiate with that State. Under the new formulation, the notification should be given before the taking of countermeasures.

60. Paragraph 2 was essentially the same as paragraph 3 of the previous text. It permitted the taking of urgent countermeasures without prior notification to the responsible State. The Drafting Committee had deleted the reference to “provisional” countermeasures, since the notion of reversibility of countermeasures was already covered by article 50, paragraph 3. Therefore, by definition, all countermeasures were provisional and the term “provisional” therefore lacked specific meaning. The Committee had also changed the words “countermeasures as may be necessary to preserve its rights” to “countermeasures as are necessary to preserve its rights” in order to establish a link with the purpose of countermeasures as set out in article 50.

61. Paragraph 3 was identical to paragraph 5 of the previous text with only one drafting change in the opening clause; the words “within a reasonable time” had been replaced by the words “without undue delay”, which merely drew attention to the importance of suspending countermeasures when they were no longer necessary. As Mr. Gaja had said at the previous session, for the Drafting Committee, tribunal or court meant any third party dispute settlement mechanism. The court or tribunal in question should also be established and operating and should have the competence to make decisions binding on the parties, including decisions regarding provisional measures. The rationale behind the paragraph was that the injured State could request such a court or tribunal to order provisional measures to protect its rights that would have the same effect as countermeasures and therefore make countermeasures unnecessary.

62. Paragraph 4 was identical to paragraph 6 of the previous text. It stated that, if the responsible State failed to implement the dispute settlement procedure in good faith, paragraph 3 relating to the requirement of the suspension of countermeasures would not apply. The title of the article remained unchanged.

63. Article 55 [48] (Termination of countermeasures), was identical to the previous text and simply provided for when the countermeasures should be terminated. Governments had generally supported the article and the Drafting Committee had made no changes to its text or title.

64. The last article in the chapter, article 55 *bis* (Measures taken by States other than an injured State), replaced article 54 (Countermeasures by States other than the injured State) of the previous draft. That article, which had been much criticized, had been deleted as part of the compromise in the Commission and replaced by a saving clause reserving the position of all those who believed that the right to take countermeasures should be granted to States other than the injured State with regard to the breaches of obligations established to preserve collective interests and those who believed that only injured States should have the right to take countermeasures. That saving clause was the subject of article 55 *bis*, which stated that the chapter on countermeasures did not prejudice the right of any State, entitled under article 49, paragraph 1, to invoke the responsibility of another State to take lawful measures against the responsible State to ensure the cessation of the breach and reparation in the interests of the injured State or the beneficiaries of the obligation

breached. It should be noted that the expression used was “lawful measures” and not “countermeasures” so as to respect all points of view. With that saving clause, the Commission was not taking a position on the issue and had left the matter to the development of international law.

65. He then introduced article 23 [30] (Countermeasures in respect of an internationally wrongful act) of chapter V of Part One, which dealt with countermeasures as circumstances precluding wrongfulness. It corresponded to the text of the same article in the previous draft with a minor drafting change in that the reference to “conditions set out” in the articles of the chapter on countermeasures was replaced by the general reference “in accordance with chapter II of Part Three”. That redrafting had been made necessary by the insertion of article 55 *bis*, which did not deal in so many words with countermeasures and did not set out any conditions for taking countermeasures, since it was a saving clause. Article 23 did not intend to include the measures referred to in article 55 *bis*, since they were not countermeasures, but it would not rule out the possibility of those measures precluding wrongfulness either. It contained an implied without prejudice clause with regard to article 55 *bis* measures. The commentary would elaborate further upon those issues.

66. Mr. PELLET said that, in general terms, if chapters I and II of Part Three represented a slightly improved version in terms of form compared with the version that had resulted from the work of the previous session, the way countermeasures were dealt with was, in his view, quite a big step backwards.

67. As for chapter I, he considered article 44, paragraph 2, to be useless and misleading. It was in fact always regrettable in a codification exercise when examples were given of what might be done. That meant introducing elements in the draft itself that belonged or should belong in the commentary. He deplored the fact that, in the current case, what had been done was to follow the approach adopted, and criticized, in respect of article 19 adopted on first reading. Likewise, article 45 posed a real problem for him and it was also a problem of general principle. It made the admissibility of a claim subject to two conditions and it was clear that, if one of them was not met, the claim was not admissible. As currently worded, the text did not include the word “or”, whereas the Drafting Committee seemed to be agreeable to the Special Rapporteur, with the help of the secretariat, giving systematic and case-by-case consideration to that kind of problem and adding “or” or “and” as needed. That did not appear to have been done and he wished to remind the Commission that it should have been. Furthermore, he maintained his firm opposition to the expression “nationality of claims”, which meant nothing in French legal language, as the French Government had pointed out. It was a matter of concern that an English-speaking majority was imposing its views on the French-speaking minority; notwithstanding the authority argument invoked by the Chairman of the Committee and regardless of what ICJ might have thought in 1949 (see para. 39 above).

68. More fundamentally, he once again welcomed the new orientation the Special Rapporteur had given to Part Three—which the Commission had endorsed and the

Drafting Committee had not altered—which involved looking at things from the point of view of invoking responsibility and avoiding the very artificial construction of the first draft, which had consisted of very artificially extending the notion of “injured State” to States which had in fact suffered no injury in the real sense of the term. The distinction made in articles 43 and 49 between injured States and those that were not injured, but which had a right to act, a legal interest in acting, consequently seemed apposite, even if it should perhaps be regarded as an element of the progressive development of international law. It was nevertheless a step forward, although he had some doubts about the wording of article 43, subparagraph (b) (ii).

69. It would be an understatement to say that chapter II left him less than enthusiastic. He remained very sceptical about the idea that a countermeasure might, intellectually speaking, be a circumstance precluding wrongfulness. It was the consequence of a circumstance which precluded wrongfulness and that circumstance which precluded the wrongfulness of the countermeasure was the initial internationally wrongful act. He regretted that, on that point, the Commission had never managed to call into question the analysis by the former Special Rapporteur, Roberto Ago, which, to his own way of thinking, had been erroneous. The problem was one of intellectual consistency. Those who supported the power politics which such private justice necessarily implied had once again, as at the previous session, obtained far too much satisfaction, particularly with the very flabby wording of article 50, paragraph 3, from which the expression “as far as possible” should have been deleted. Likewise, he particularly noted with concern that article 53, paragraph 2, opened the way to many potential abuses and deplored the use in paragraph 3 of the expression “without undue delay”.

70. He found article 51 intellectually appalling. The relegation of diplomatic inviolability to paragraph 2 (b) was a useful rationalization, but that was not the case with the implausible listing in paragraph 1, where it would have been so simple to make a general reference to the peremptory norms of general international law. Nothing in the article as it was drafted enabled one to say whether paragraph 1, subparagraphs (a), (b) and (c), related to breaches which were breaches of a *jus cogens* obligation. It seemed to him that much too much importance was attached to human rights and humanitarian law, whereas the principle of the right of peoples to self-determination, which the Drafting Committee had refused to include, was just as deserving of attention. He would not have been in favour of the inclusion of the right of peoples to self-determination if other examples had not been included. It was always the excesses of “human rightism” that led to the adoption of technical procedures that he found unacceptable. He regretted that ideological considerations and concern for current fashions had prevailed. Lastly and above all, he was one who deplored the deletion of former article 54 and particularly its paragraph 2. For example, the draft gave no guidelines about what should be done in cases of genocide or apartheid. Non-law prevailed, whereas former article 54 had the great merit of giving indications as to where the juridical framework began. It was a serious step backwards from the previous text and created a considerable imbalance in the draft.

On that point, the Commission was not engaging in the progressive development of international law, but in its regressive or recessive development, under the threat of a handful of, frequently conservative, States. He found that deeply regrettable.

71. He admitted that he had hesitated to support chapter III and had seriously considered requesting a vote on the issue. But he had not done so because article 55 *bis* adequately safeguarded the future, and even the current time, even though it provided States with no guidelines on how to proceed in the hypothetical cases in question. In his opinion, it was a non-law clause rather than a saving clause. It dealt with the unknown. In that respect, he recalled that saving clauses led in the end to non-codification and the non-progressive development of international law. By shying at serious obstacles, the Commission was neglecting the task entrusted to it, which was to make law and to tell States either what rules were in force or what tack should be taken in the context of the progressive development of international law. It had missed an opportunity, but at least had not compromised the future, and that was very important. In conclusion, he considered the draft taken as a whole to be acceptable.

72. Mr. LUKASHUK said that he welcomed the notable improvement that the Drafting Committee had made to the text, and particularly to article 51 [50] on obligations for the protection of fundamental human rights.

73. The question raised by Mr. Pellet in connection with the meaning of the expression “nationality of claims” in French was also a problem in Russian, but it would be dealt with without resorting to the Commission.

74. He had two difficulties with chapter II of Part Three. First, in article 52 [49], no mention was made of an important aspect, namely, that countermeasures must be sufficient not only to constitute reparation, but also to guarantee the fulfilment of obligations. The point could be made in the commentary. Also, the urgent countermeasures referred to in article 53 [48], paragraph 2, did not correspond to the definition of countermeasures given in article 50 [47]. That article stated that an injured State might take countermeasures only in order to induce the State responsible for an internationally wrongful act to comply with its obligations, whereas according to article 53 [48], paragraph 2, it could take them “to preserve its rights”. Paragraph 3 implied that provisional measures were not involved. If account was taken, for example, of cases where assets were frozen, it was clear that the effects of the measure were not provisional. It therefore seemed improper to speak of countermeasures in that case and such matters should be clarified.

75. Mr. KATEKA said that he remained opposed to the principle of countermeasures despite the changes made to chapter II of Part Three because they continued to be a threat to small and weak States and gave the more powerful States another weapon. The Drafting Committee had certainly taken a step in the right direction by deleting article 54, but had reintroduced the notion through the back door by the saving clause in article 55 *bis*, which he found difficult to accept.

76. With regard to article 51 [50], he noted that the provision relating to the obligation to respect the inviolability of diplomatic or consular agents, premises, archives and documents currently appeared in paragraph 2. He considered that on that point the Drafting Committee should have followed the comment made by Mexico that obligations in the field of diplomatic and consular relations had acquired a peremptory character. He noted that the Committee had not taken account of the wishes of certain members of the Commission and certain Member States of the United Nations, which wanted to reintroduce the prohibition of extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which had committed the internationally wrongful act. Some States favoured a simple reference to the prohibition of any conduct that could undermine the sovereignty, independence or territorial integrity of States. The Committee had told them that the point was covered by article 52 [49], but that argument had not been invoked in respect of obligations under the Charter of the United Nations or fundamental human rights. It was to be hoped that the commentary would elaborate on the scope of article 51 [50], paragraph 1 (d), on other obligations under peremptory norms of general international law, for economic and political coercion undermined the right to self-determination, which was a principle of the Charter.

77. As for article 53 [48], he was of the view that countermeasures of any kind should not be taken while negotiations were being pursued in good faith and had not been unduly delayed. Taking account of observations made by members of the Commission, the Drafting Committee had deleted the reference to “provisional” countermeasures while retaining the reference to “urgent” countermeasures. He recalled that, in paragraph 69 of his fourth report, the Special Rapporteur acknowledged that the distinction between urgent and definitive countermeasures did not correspond with existing international law. He shared the concern expressed on that matter by Mr. Lukashuk.

*The meeting rose at 1 p.m.*

## 2683rd MEETING

*Thursday, 31 May 2001, at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr.

Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

**State responsibility<sup>1</sup> (*continued*) (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,<sup>2</sup> A/CN.4/517 and Add.1,<sup>3</sup> A/CN.4/L.602 and Corr.1 and Rev.1)**

[Agenda item 2]

**DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE  
ON SECOND READING (*continued*)**

1. The CHAIRMAN invited the members to continue their consideration of the report of the Drafting Committee containing the titles and texts of the draft articles on responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading (A/CN.4/L.602 and Corr.1).

2. Mr. KAMTO said that, from his point of view, Part Three of the draft raised the most difficulties. He particularly regretted the retention of the phrase “as far as possible” in article 50 [47] (Object and limits of countermeasures), paragraph 3, because of the risk of contradicting paragraph 2. The implicit admission that in certain cases countermeasures might be taken in such a way as not to permit the resumption of performance of the obligations in question could conflict with the idea in paragraph 2 that countermeasures were limited to non-performance “for the time being”. As currently worded, paragraph 3 was illogical and an example of faulty legal drafting. The Chairman of the Drafting Committee had stated, at the previous meeting, that it was impossible to guarantee the irreversibility of certain countermeasures. He did not agree: States must be able to give such a guarantee, and were not free to take whatever action they chose in the guise of countermeasures. In that sense, countermeasures differed from other measures.

3. As to article 53 [48] (Conditions relating to resort to countermeasures), he regretted the omission of paragraph 4 in the form in which it had been provisionally adopted at the previous session. The former paragraph 4 had been drafted to balance out former paragraph 3. Urgent countermeasures might indeed be necessary in some cases, but the new wording of article 53 was unacceptable. It meant that countermeasures could be taken even while negotiations were being pursued in good faith, thus providing a legal basis for unlawful or excessive acts by States and creating inequality among States. The former paragraph 4 should be reinstated.

4. He approved of the deletion of article 54 adopted at the previous session, which was not in line with State practice, and its replacement by a safeguard clause. The

progressive development of international law should not be treated as synonymous with the creation of prospective law.

5. Mr. ECONOMIDES, commenting on article 50, said it involved an even more serious contradiction than the one mentioned by Mr. Kamto, namely with article 29 [36] (Duty of continued performance). The phrase “as far as possible” in article 50, paragraph 3, exempted a State taking countermeasures from the requirement to permit continued performance at all times. Generally speaking, it was easier for a State taking countermeasures than for the responsible State to monitor its own conduct and to decide whether its actions complied with international law. It would be preferable either to delete the words “as far as possible” from article 50, paragraph 3, or to add them to article 29.

6. He interpreted the word “validly” in article 46 (Loss of the right to invoke responsibility), to mean that an injured State could not, either explicitly or implicitly, waive its claim arising from a serious breach as defined in article 41 (Application of this chapter) until the case had been finally resolved in accordance with the rules of international law. According to the Special Rapporteur, that principle was to be spelt out in the commentary, but he would have preferred it to be incorporated into article 46.

7. Paragraphs 2, 3 and 4 of article 53 were currently seriously unbalanced. The obligation of dispute settlement was among the most fundamental obligations of the international legal order and it must not be made to give way before the unilateral act of a State in the form of countermeasures. Under paragraph 2 an injured State could, without notification, take urgent countermeasures to preserve its rights and it might reasonably be supposed that, in such a case, the State would itself decide what measures to take. What was worse, as a result of the deletion of the former paragraph 4, an injured State could take fresh countermeasures, urgent or otherwise, after notifying the responsible State and even if negotiations had begun in good faith. That opened the door wide to arbitrary action by States and breached the obligation of peaceful settlement of disputes. Moreover, it placed unlimited confidence in a State that might merely be alleging an injury and condemned in advance a State that was allegedly responsible but might not in fact be so, or not entirely. Those three paragraphs were unacceptable and he hoped the General Assembly or a conference of plenipotentiaries would redress the balance. As for the deleted article 54, he had been in favour of retaining it as expressing the primacy to be given to the organized international community, but could accept the compromise solution adopted. Lastly, he emphasized that the draft as a whole, and especially the provisions on countermeasures, still stood in great need of an appropriate system of dispute settlement.

8. Mr. SIMMA said the draft was a great improvement over the one adopted on first reading at the forty-eighth session.<sup>4</sup> He particularly approved of the replacement of former article 40 [42] by articles 43 [40] (Invocation of

<sup>1</sup> For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

<sup>2</sup> Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

<sup>3</sup> Ibid.

<sup>4</sup> See 2665th meeting, footnote 5.

responsibility by an injured State) and 49 (Invocation of responsibility by a State other than an injured State), and also the express treatment of “integral” obligations in article 43. He welcomed the provision for what might be termed “article 49 States” to claim not only cessation and assurances and guarantees of non-repetition but also reparation in the interest of non-State victims. The provision represented progressive development of the law inasmuch as it clarified existing law. As for the relevance of non-State actors in the context of State responsibility, and especially in Part Three of the draft, the notion of the “international community” must vary depending on the context in which the term was used. The context of article 53 of the 1969 Vienna Convention was that of law-making, which in a formal sense was still the prerogative of States and of States cooperating in the framework of international organizations, whereby *jus cogens* could emerge. That had justified using the term “the international community of States as a whole”. However, States also bore a responsibility towards non-State entities, including individuals, and that broader concept of the international community was also relevant in the context of the draft articles.

9. With regard to Part Two, chapter III (Serious breaches of obligations under peremptory norms of general international law), from a systematic viewpoint the criticism of the replacement of obligations *erga omnes* by peremptory norms was justified. However, in the process of codification the two kinds of rules became two sides of the same coin, having the effects in the case of *jus cogens* of invalidating consent to the contrary and creating an interest for every State in their observance. In the context of State responsibility, it was clearly the latter aspect that was relevant and it had rightly retained its place in article 51 [50] (Obligations not affected by countermeasures). The new article 41 was narrower than the former one, because the range of peremptory norms was narrower than that of obligations *erga omnes*. However, the serious breaches singled out in article 41 would, for all practical purposes, always involve obligations *erga omnes*.

10. He welcomed the retention of chapter II (Countermeasures). On its own, the solution in article 23 [30] (Countermeasures in respect of an internationally wrongful act) would have given too much leeway to countermeasures and to States inclined to use them. He was also pleased with the drafting of article 51, because the obligations expressly mentioned were those that, in the past, had been most often violated through countermeasures. The deletion of article 54, especially paragraph 2, was regrettable. However, he was willing to sacrifice article 54 in exchange for a saving clause, rather than jeopardize the chances of the draft being accepted.

11. Mr. HAFNER said he saw the draft as a major achievement, although there might be some problems of interpretation. For example, the definition of the injured State in article 43, subparagraph (b) (ii), could result in a plurality of injured States from the same breach, with resulting complexities such as incompatible claims by those States. Article 47 (Plurality of injured States) attempted to address that issue, but identified only one aspect, namely, the right of each injured State separately to invoke responsibility. That in turn raised the possibility of incompatible claims. He therefore regretted that it had

not been possible to draft articles dealing with a plurality of injured States. Notwithstanding article 47, there remained a need to cooperate with the injured State; otherwise, one breach could become the seed of further conflict. Cooperation with the injured State must, however, be clearly distinguished from joint invocation of State responsibility, which, as already explained, was subject to specific regimes.

12. Article 49, paragraph 2 (b), referring both to the injured State and to the beneficiary of the obligation breached, could cause difficulty. For instance, in the event of a breach of a norm in the legal regime on foreigners, the interests of the State of which the foreigner was a national, possibly itself the injured State, and the foreigner himself could diverge. Furthermore, if the word “or” was intended to provide for an alternative, it seemed that the State would have to decide which interests should prevail. He recognized, however, that it was not always feasible to provide through a rule for the settlement of all conceivable conflicts, and could accept the text as it stood.

13. Article 51, paragraph 1 (d), should not be interpreted as meaning that all other norms referred to in the preceding subparagraphs were necessarily peremptory norms. The question was left open. He welcomed article 55 bis (Measures taken by States other than an injured State), but queried the discrepancy between “cessation of the breach and reparation in the interests of the beneficiaries of the obligation breached” and the reference in article 49, paragraph 2 (b), to “the interest of the injured State or of the beneficiaries of the obligation breached”. He asked whether it was intentional.

14. Mr. MOMTAZ said it was inconceivable that countermeasures could be instigated merely on the basis of a subjective evaluation of the situation by the State claiming to be injured. Before countermeasures could be taken, it must be certain that the allegations advanced to justify them were well founded. He had consistently argued for the inclusion in the draft of a dispute settlement mechanism to which both the putative injured State and the State allegedly responsible could have recourse to establish the facts. He therefore regretted the absence from the draft of any clear prior condition of recourse by both States to dispute settlement mechanisms, although article 51, paragraph 2 (a), went some way to filling the gap. It was also to be regretted that countermeasures could be taken while negotiations were in progress.

15. Mr. CRAWFORD (Special Rapporteur) commented, in reply to Mr. Kamto, that the formulation of article 53 had been the subject of an explicit understanding in the informal consultations reported to the Drafting Committee.

16. Mr. ROSENSTOCK said that when the Commission had considered the report of the Drafting Committee on the draft articles relating to countermeasures on first reading,<sup>5</sup> wreckage had occurred and a great deal of effort had been required to put the pieces back together. He was beginning to believe that certain Governments had been right in suggesting that all circumstances preclud-

<sup>5</sup> See *Yearbook ... 1996*, vol. I, 2452nd and 2454th to 2459th meetings.

ing wrongfulness should be listed as in article 23 and that it was not prudent to disturb the balance by elaborating the content of self-defence, countermeasures or any of the other circumstances precluding wrongfulness. A logical argument could certainly be made for not trying to go into any details beyond what was in article 23.

17. So far as article 50, paragraph 2, was concerned, the term “non-performance” did not refer to a non-event: it meant not doing what one was obligated to do, which in some cases meant doing nothing when one should do something, and in others, the reverse. Given the language of the draft articles, it should come as no surprise that a State did not have at its command countermeasures that were fully reversible and resorted to some that were not. One could not always restore things in their entirety.

18. The phrase “as far as possible [...] in such a way as to permit”, in article 50, paragraph 3, struck the right note with regard to the effort that should be made by an injured State when responding to an injury. The contention that countermeasures might be taken when no injury had occurred was tantamount to impugning the right of self-defence because all States invoked it when going to war. Countermeasures were no worse than self-defence. Both were necessary but had been claimed abusively.

19. In terms of the attempt to balance differing views on countermeasures, article 51 had no basis in State practice, doctrine or anything else. Was it really such a bad thing for a State to have at its command fairly extreme measures when dealing with genocide or apartheid? As long as proportionality was maintained, a case could be made for not otherwise restraining countermeasures in sufficiently heinous situations. In that sense, article 51, paragraph 1, was an effort to reach a middle course between the law as it stood at the current time and some of the concerns that had been expressed.

20. Article 51, paragraph 2, was a further example of the draft articles going far to meet concerns and going beyond law or logic. If a dispute settlement process was capable of ordering the cessation of conduct, it was almost presumptuous to require the injured party to cease engaging in a certain conduct automatically. The existing text on countermeasures was more restrictive than the established law as reflected, *inter alia*, in the *Air Service Agreement* case.

21. Mr. DUGARD said he supported Part Three and was pleased to see that articles 45 [22] (Admissibility of claims) and 46 did not prejudge issues that would have to be addressed in the draft articles on diplomatic protection. Article 45, subparagraph (b), in particular, adopted neutral terminology in relation to the rule on the exhaustion of local remedies, to be considered in some depth in the context of diplomatic protection. Article 49 was an historic step forward that, once and for all, did away with the philosophy advanced by ICJ in the *South West Africa* cases and as such, he thought it would be widely welcomed.

22. The Commission had achieved the proper balance on countermeasures. Most of the provisions were in the nature of codification, although some could be described as progressive development. For that reason, he thought

they would be accepted. He supported Mr. Hafner’s views on the interpretation of article 51, paragraph 1 (d), namely that the reference to “other obligations under peremptory norms of international law” did not mean that the obligations referred to in paragraph 1, subparagraphs (b) and (c), were necessarily peremptory in character.

23. Like Mr. Simma, he had favoured the retention of article 54, paragraph 2, but could go along with article 55 *bis*, which was an important saving clause.

24. Mr. TOMKA (Chairman of the Drafting Committee), responding to comments on Part Three, said the highest priority of the Drafting Committee had been to complete the work on the draft articles. After 45 years, it had certainly seemed to be time to do so. The Committee had proceeded on the basis of understandings reached in the Commission in plenary or during the informal consultations whose results had been reported to the Commission.

25. There had been a danger, it must be recalled, that the draft would contain no provisions on countermeasures and there would be only a basic reference to them in article 23. The majority in the Commission had clearly not wanted that to be the case, however. Accordingly, based on a decision taken in plenary, the Drafting Committee had elaborated a separate chapter on countermeasures.

26. Article 51 had been drafted with a view to State practice, and accordingly it contained specific provisions, not general principles that could be subjected to different interpretations by practitioners or academics. The Drafting Committee had adopted it without taking a position as to whether or not obligations for the protection of fundamental human rights and obligations of a humanitarian character prohibiting reprisals were peremptory norms. No one disputed the fact that the obligation to refrain from the threat or use of force was a peremptory norm, however.

27. Article 53 had been redrafted along the lines of the *Air Service Agreement* case and other case law, based on an understanding which the Special Rapporteur had reported to the Commission in plenary. The major criticism had been that, when a case was the subject of judicial proceedings or negotiations, that did not have the effect of preventing a State from taking countermeasures. That position was not supported by case law, however. ICJ had considered the question of whether a certain measure undertaken by a State was or was not a countermeasure. The measure had continued to be taken during judicial proceedings, and at the same time, negotiations between the parties to settle the matter out of court had been ongoing. The Court had not rejected the notion that the measure might be a countermeasure on the grounds that judicial proceedings were in progress and there was no possibility of the parties negotiating in good faith. One might dream of a better world, but article 53 had been drafted to reflect customary international law.

28. The difference in the wording used at the end of article 55 *bis* and in article 49 was unintentional, probably due to pressures of time and it could be corrected, although no amendment would be made.

29. Mr. KATEKA said that it had been unfair of the Chairman of the Drafting Committee to use his response to comments on Part Three to go beyond points of clarification to question the position of members of the Commission. It was not his role and he hoped the Chairman of the Committee would confine his remarks henceforth to clarification alone.

30. Mr. TOMKA (Chairman of the Drafting Committee), introducing Part Four of the draft articles, said the Drafting Committee had decided to retain the title, "General provisions", since there had been no objection to it.

31. The Drafting Committee had considered several proposals for the inclusion of additional issues. The first had involved a suggestion that the reflexive nature of the draft articles be made clear, and that would be done in the commentary. Next, the Committee had considered a proposal to move paragraph 2 of article 34 (Scope of international obligations set out in this Part), dealing with the position of non-State entities, into Part Four, but had decided that it was not necessary. It had also considered a proposal to move the provisions on internal law, in articles 3 [4] (Characterization of an act of a State as internationally wrongful) and 32 [42] (Irrelevance of internal law), into Part Four, but had decided against it for reasons explained during his discussion of article 32.

32. With regard to article 56 [37] (*Lex specialis*), the Drafting Committee had noted that there was strong support both for its content and for its placement in Part Four. One Government, however, had made a proposal to move the article back to Part Two. Such a move would be undesirable, particularly because many of the issues in Part One and Part Three could also be subject to the *lex specialis* principle.

33. In addition, the Drafting Committee had noted the concern that the article applied only to Parts One and Two and not to Part Three because of the inclusion of the phrase "existence of an internationally wrongful act or its legal consequences" in the text adopted at the fifty-second session. There was no intention that the article should not apply to Part Three. Indeed, the issues dealt with in Part Three were often, although not necessarily exclusively, covered by special regimes. The Committee had decided to make the point clearer by incorporating abbreviated versions of the titles of the Parts of the draft. It should be noted that it was not the mere coexistence of specific rules that was sufficient to trigger the provision, but rather the coexistence of specific rules to the exclusion of general rules. The more detailed version made that aspect clearer. In addition, the provision was designed to cover both "strong" forms of *lex specialis*, such as self-contained regimes, and "weaker" forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution.

34. As a consequence of the new formulation, the Drafting Committee had considered that there was some difficulty in saying that the implementation of responsibility could be "determined" by special rules. One possibility had been to say that the "conditions for implementation... are determined", but that would have resulted in a double

reference to "conditions". Instead, the Committee had opted to replace the word "determined" by "governed".

35. Article 56 *bis* (Questions of State responsibility not regulated by these articles) had been adopted at the fifty-second session as article 33 [38] (Other consequences of an internationally wrongful act). Governments had made two types of suggestions. The first related to whether there was a need for the article at all, and if so what form it should take, and the second related to its placement. The Drafting Committee had deemed the article necessary, in particular because the draft did not, and could not, state all the consequences of an internationally wrongful act, and because there was no intention of precluding the further development of the law on State responsibility. The article was intended to include customary international law as well as the application of treaties. The concerns of some Governments as to what else in customary international law was not addressed in the draft articles were covered in the commentary to the article.

36. As regards the placement of the provision, the Drafting Committee had noted that there was a direct link between article 33 and article 56, which had in previous drafts been in Part Two, preceding article 33. The Committee had agreed with the views expressed by some Governments that there was no reason to limit the application of the article to the legal consequences of wrongful acts and that the article should apply to the whole regime of State responsibility set out in the articles. It had therefore decided to move the article to Part Four and had considered that the most logical place was after article 56. Once placed in Part Four, the article would need to be drafted more broadly so as to be applicable to the entire text. The Committee had agreed on the current form of language, which drew on a preambular paragraph of the 1969 Vienna Convention. While the article was certainly applicable to the entire draft, it was most relevant to Part Two and the commentary would explain that point. The title of the article had been changed to reflect the new text.

37. Article 57 (Responsibility of an international organization) was a without prejudice clause dealing with two issues. It excluded any question of the responsibility of an international organization under international law and of the responsibility of a State for the conduct of an international organization, in other words, when the international organization was the actor and the State was said to be responsible by virtue of its involvement in the conduct of the organization. It had been proposed that the wording should be broadened so as not to prejudice the position of the law on the matter, but the Drafting Committee had been reluctant to introduce any language that could potentially expand the second part of the article. Any expansion of the article would introduce a significant escape clause whereby a State could exempt itself from the scope of the draft articles by arguing that it would not have done the act had it not been acting at the behest of an international organization. If a State had done the act, it was responsible for it. In certain circumstances, the State could also be responsible for acts of international organizations, but that was excluded as falling within the realm of the law of international organizations.

38. The Drafting Committee had considered the phrase “that may arise in regard to” in comparison with other suggested versions, including “relating to” and “concerning”, and had settled on the even shorter phrase “any question of the responsibility . . .”, which conformed to the formula used in article 58 (Individual responsibility). As to the title of the article, the Committee had considered the formulations “Conduct of an international organization” and “Questions relating to the responsibility of an international organization” but had settled for “Responsibility of an international organization”.

39. With regard to article 58, the Drafting Committee had considered a proposal to render the phrase “individual responsibility” as “responsibility of individuals” under international law, since the term “individual responsibility” could imply the individual responsibility of States. Other suggested formulations had included “personal responsibility” and “the responsibility of a person”. The Committee had decided to retain the phrase “individual responsibility”, however, as it had acquired an accepted meaning in the light of the Rome Statute of the International Criminal Court and various Security Council resolutions and had thus become a term of art.

40. As to the formulation “agent of a State”, which had appeared in the version provisionally adopted at the fifty-second session, the Drafting Committee had been concerned with its potential inconsistency with some of the formulations currently used in Part One, chapter III. Another concern had been the difficulties that could arise in referring to “agency” at that point in the draft, which hitherto had not analysed the issue of attribution in terms of “agency”. Suggestions had included “acting as an organ or otherwise on behalf of the State”, “the acts of which are attributable to a State” and simply ending the sentence after “of any person”. The Committee had eventually settled on “acting on behalf of a State”. To the extent that an individual was responsible under international law, for example under international criminal law, the fact that the act had been undertaken on behalf of a State did not serve to exonerate the individual from responsibility. The title remained unchanged.

41. Drawing attention to the last article of the draft, article 59 [39] (Charter of the United Nations), he said the Drafting Committee had considered a proposal to delete it as unnecessary, for two reasons: first, because the General Assembly might take note of the draft, and secondly, and perhaps more fundamentally, because the article was redundant in the light of Article 103 of the Charter and that its inclusion might give rise to an *a contrario* interpretation with regard to other agreements where such a clause did not exist. The Committee, while agreeing that the provision was not strictly necessary, had decided to retain it so as to confirm that the draft articles were to be interpreted in conformity with the Charter: the provision was expository and just a useful reminder.

42. As to the drafting, the Drafting Committee had considered that the opening phrase, “The legal consequences of an internationally wrongful act of a State under”, as adopted at the previous session, had to be consistent with the new, longer formula currently in article 56 [37], or alternatively that it could be deleted, leaving the text to

read only: “These articles are without prejudice to the Charter of the United Nations”. In adopting the shorter alternative, the Committee had been of the view that article 59 played a slightly different role than did article 56 in relation to the text and that the shorter form was therefore acceptable.

43. The Drafting Committee had also considered the observation made by several Governments that the phrase “without prejudice to the Charter of the United Nations” could be made more precise, although how that could be done was not clear. It had not accepted a suggestion to include a reference to peremptory norms and had decided to adopt a shorter version for the title.

44. In concluding his introduction of the report of the Drafting Committee, he recalled that the Committee was recommending that the Commission should adopt the draft. He expressed appreciation to the members of the Committee for their active participation in its work and to the members of the secretariat, in particular Ms. Arsanjani, Ms. Khalastchi and Mr. Pronto, who had assisted it in its task.

45. He apologized for the length of his statement, but due to the importance of the subject, he had felt it necessary to have a written record of the way in which the Drafting Committee had addressed the many comments by Governments and members of the Commission, including the reasons for accepting or rejecting them.

46. Mr. AL-BAHARNA said that he joined other members in paying tribute to the Special Rapporteur and the Chairman of the Drafting Committee for their completion of the topic of State responsibility, which constituted one of the greatest achievements in the history of the Commission. But like Mr. Kateka, he found that the drastic changes made in respect of articles 41 and 42 of the text of the draft articles provisionally adopted by the Committee on second reading were regrettable. Replacing the title of chapter III “Serious breaches of essential obligations to the international community as a whole” by “Serious breaches of obligations under peremptory norms of general international law” weakened the text and did not entail the same damages as envisaged in article 42. The phrase “a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests” in article 41 had been deliberately taken from article 19 adopted on first reading as the price for its deletion. The Commission appeared to be going back on its agreement to substitute the words “serious breaches” for “crimes” or “State criminal responsibility”.

47. In view of the divisive issues in Part Two, chapter III, and the wide range of positions of States, which were set out in paragraphs 43 and 44 of the fourth report (A/CN.4/517 and Add.1), and bearing in mind the Special Rapporteur’s own view in paragraph 49 of his report, it might be asked why the Commission should adopt the stricter and much weaker rule of peremptory norms in preference to the much more widely accepted principle of the international community as a whole, given that the Drafting Committee had already adopted current articles



41 and 42 as an essential compromise in exchange for dropping article 19 adopted on first reading.

48. In particular, the deletion from former paragraph 1 of article 42 of “damages reflecting the gravity of the breach” could not in any sense be replaced by article 42 proposed by the Drafting Committee, a provision devoid of any substantive remedies for reflecting the gravity of the breach. In fact, none of the principles of cooperation, non-recognition and others contained in the three paragraphs of article 42 as currently proposed, controversial as they were, provided proper and equitable remedies commensurate with the seriousness of the breaches of obligations contemplated in the version proposed by the Drafting Committee.

49. He was convinced that those States that, in principle, were hostile to Part Two, chapter III, could hardly be persuaded to accept articles 41 and 42 even in its current milder form relating to serious breaches of obligations under peremptory norms of international law.

50. On the whole, he was prepared to join other members in approving the proposed draft articles adopted by the Drafting Committee, but reserved his position with regard to articles 41 and 42 for the reasons he had mentioned. On the question of dispute settlement, he would like to see the current draft contain a form of optional settlement of disputes, perhaps along the lines of the suggestion by the Government of China.

51. Lastly, in order to ensure their stability, conformity and continuity, he was in favour of the draft articles taking the form of a convention.

52. Mr. PELLET said that he had no serious objections to the draft articles in Part Four, but had three comments to make. Referring first to Mr. Kamto’s expression of concern (2681st meeting) during the discussion on Part One, about the absence of any reference to State succession, in his own opinion the lacuna was more general, and the draft lacked a provision similar to that of article 73 of the 1969 Vienna Convention. The members of the Commission would have done well to follow the cautious example of their predecessors. Mr. Kamto’s point on the problem that State responsibility could pose with regard to State succession, regardless of whether others shared that view, showed that something was missing.

53. Secondly, he had already expressed his regret on several occasions at the failure to include in the draft a saving clause concerning diplomatic protection.

54. Thirdly, he was in favour of the broad wording of article 59, but the draft was not very consistent on the relationship between the law of State responsibility and the law of the Charter of the United Nations. Admittedly, it was said that the draft was without prejudice to the Charter, which was only as it should be. Yet the law of State responsibility and Charter law or, more broadly, the law on the maintenance of international peace and security, were two distinct branches of international law, even if not unrelated. Article 59 rightly stated that fact that the draft had nothing to do with the Charter, which was the source of primary obligations that could give rise to the

application of the rules of States responsibility. But in that case, why mention the Charter, as had been done in, for example, article 22 [34] (Self-defence) or article 51, paragraph 1 (a)? His was not a major criticism, but such a reference to the Charter was not logical and such confusion might cause practical difficulties on what were very important points.

55. In drafting matters, the French version of the text, and apparently the Spanish version as well, still had a number of weaknesses. He asked what the procedure for correcting them was.

56. Wishing to close on a positive and even enthusiastic note, he said that, although he did not like some of the provisions of the draft, which reflected excessive timidity not only *de lege ferenda*, but also *de lege lata*, and although the draft did not go far enough in some areas, it had the great merit of not prejudicing the future. It left the door open to later consolidations and developments and even the possibility of refutation by practice, and that was why he was not in favour of its being immediately transformed into a convention, because that might “freeze” it. The draft was an extraordinary starting point and would be an excellent guideline for State practice. It was important to allow time for such practice to emerge.

57. Expressing gratitude to the Special Rapporteur for his work, he said that he was proud to have been a member of the Commission at a time when it completed its work on the topic.

58. Mr. HAFNER said that he, too, commended the Special Rapporteur and the Chairman of the Drafting Committee for their efforts. He supported the draft articles, but was concerned about a possible interpretation of article 59, the wording of which must in no way be construed as excluding the applicability of the draft articles from activities carried out by States on the basis of an act of a United Nations body, such as a resolution of the Security Council or the General Assembly. Insofar as there were no obligations under the Charter of the United Nations requiring of a State conduct which differed from that required by the draft articles, there was no reason why, in such a situation, the draft articles should not be applied. Hence, the draft articles must be interpreted as not going beyond the substance of Article 103 of the Charter.

59. Mr. LUKASHUK said that he wholeheartedly endorsed Part Four of the draft articles and the draft as a whole and joined other members in commending the Special Rapporteur for his efforts.

60. He had two comments of a purely juridical nature. First, he had doubts about the phrase “to the extent that they are not regulated by these articles” in article 56 *bis*, which suggested that the draft articles, whose initial form would be that of a General Assembly resolution, would change or replace the generally accepted norms of customary law on responsibility. That was not quite right from a legal point of view. Perhaps a juridically more accurate and flexible phrase could be found, such as “the applicable rules of international law which are not reflected in this article ...”.

61. Secondly, a problem had arisen with regard to article 59. He raised the question of how a General Assembly resolution could possibly cause any prejudice to the Charter of the United Nations. Some other kind of wording needed to be found, something to the effect that “these articles shall be applied in accordance with the purposes and principles of the Charter”.

62. Mr. KAMTO said that he endorsed Mr. Pellet’s remarks. It might, indeed, be useful to envisage a saving clause regarding the case of State succession. He was not certain that article 56 *bis* covered that situation, but if it did, then his comment was superfluous. He strongly supported the wording of article 59. The Commission must not convey the impression that the law of State responsibility was in any way subject to Charter law. They were two different matters.

63. Despite his reservations about article 53, the draft was a major piece of work by the Commission and he was particularly pleased to have made his own modest contribution to its completion. When adopting the draft articles, he asked whether the Commission might adopt a motion of congratulations for the Special Rapporteur and the secretariat.

64. The CHAIRMAN said that the Commission would have the opportunity to pay formal tribute to Mr. Crawford, as well as to Mr. Sreenivasa Rao and the previous special rapporteurs, when, all being well, the Commission completed their topics at the time of the adoption of the report.

65. Mr. TOMKA (Chairman of the Drafting Committee), replying to a question by Mr. Pellet, said that members who had corrections to make to any of the other language versions should submit a note to that effect in writing to the secretariat.

66. Mr. KATEKA said that, before the draft articles were adopted, he wished to express his strong reservations about Part Two, chapter III and about Part Three, chapter II. He would not stand in the way of the Commission by calling for a vote, but wanted to have it placed on record that he did not support the draft articles in their current form.

67. The CHAIRMAN said he took it that the Commission wished to adopt the titles and texts of the draft articles on responsibility of States for internationally wrongful acts proposed by the Drafting Committee, subject to statements made by Mr. Kateka and others.

*It was so agreed.*

68. Mr. CRAWFORD (Special Rapporteur) thanked the past and current chairmen of the Drafting Committee, the secretariat and the members of the Commission and paid tribute to the previous Special Rapporteurs, Mr. Ago, Mr. Riphagen and Mr. Arangio-Ruiz.

69. There should be no misunderstanding about the difficulty of the task, because the draft articles on State responsibility covered the whole field of international obligations, both bilateral and multilateral, and the whole

area, in general terms, of the qualification of conduct as unlawful by reference to the primary obligations of States and the consequences that flowed therefrom. Time would show the relatively comprehensive nature of the task undertaken, as well as the way in which the door had been left open to further development. He accepted the vision of those members who would like to see the draft articles associated with a system of dispute settlement, more especially in the context of countermeasures, as well as those who would like to see it as a convention. He hoped that the international community of States would some day be able to adopt a convention along those lines by general agreement and to attach to it a system of dispute settlement. That would be a real revolution. It would, however, be a pity if a codification conference were held and it tore the text apart.

*The meeting rose at 11.40 a.m.*

## 2684th MEETING

*Friday, 1 June 2001, at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Lukashuk, Mr. Momtaz, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

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

[Agenda item 1]

1. The CHAIRMAN welcomed the successful outcome of the work of the Commission during the first part of the session: the Drafting Committee had completed its work on the draft articles on the prevention of transboundary harm from hazardous activities and on the responsibility of States for internationally wrongful acts. The Commission had adopted the draft articles on those topics on second reading. Progress had also been made on the topic of reservations to treaties. The Commission would later consider new reports on reservations to treaties, diplomatic protection and unilateral acts of States.

\* Resumed from the 2680th meeting.

2. In accordance with the cost-saving measures provided for in paragraph 11 of General Assembly resolution 54/111 of 9 December 1999 and reiterated in paragraph 13 of its resolution 55/152 of 12 December 2000, the first week of the second part of the session would be devoted to meetings of the Working Group on the commentaries to the draft articles on State responsibility, and the first plenary meeting would be held on 9 July.

3. In conclusion, he thanked all the members of the Commission for their cooperation and the secretariat staff for their assistance.

*The meeting rose at 10.10 a.m.*

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## SUMMARY RECORDS OF THE SECOND PART OF THE FIFTY-THIRD SESSION

*Held at Geneva from 9 July to 10 August 2001*

### 2685th MEETING

[Agenda item 3]

*Monday, 9 July 2001, at 3.10 p.m.*

FIRST AND SECOND REPORTS OF THE SPECIAL RAPPORTEUR  
(continued)\*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

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

[Agenda item 1]

1. The CHAIRMAN welcomed all the members of the Commission to the second part of the session and said that the Working Group on the commentaries to the draft articles on State responsibility would be making every effort to complete its review of the commentaries in a timely fashion so as to enable the Special Rapporteur to finalize them. Sufficient time must be accorded for the translation of the commentaries, which were voluminous.

#### Diplomatic protection<sup>1</sup> (continued)\* (A/CN.4/506 and Add.1,<sup>2</sup> A/CN.4/513, sect. B, A/CN.4/514)<sup>3</sup>

\* Resumed from the 2680th meeting.

<sup>1</sup> for the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook . . . 2000*, vol. I, 2617th meeting, para. 1.

<sup>2</sup> See *Yearbook . . . 2000*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

2. The CHAIRMAN invited the Commission to continue its consideration of chapter III (Continuous nationality and the transferability of claims) of the first report of the Special Rapporteur (A/CN.4/506 and Add.1).

3. Mr. DUGARD (Special Rapporteur) said that, although chapter III had been introduced at the first part of the session, he wished to make some brief additional comments. In his introductory statement (2680th meeting), he had indicated in respect of the principle of continuous nationality that the Commission had a choice to make between a traditional view and a more modern view. The traditional view was that a State could exercise diplomatic protection only on behalf of a person who had been its national at the time of the injury on which the claim was based and only if that person had continued to be its national up to and including the time of presentation of the claim. The traditional view was supported by some State practice, some attempts at codification, some judicial decisions and some writers. The rationale behind it was that it prevented abuse and “protection shopping”—the changing of nationality until a powerful State willing to espouse the individual’s claim was found.

4. The traditional view had come in for considerable criticism, many writers and judicial decisions taking the position that it was not a clearly established rule of customary international law. Criticism was also levelled on the grounds, *inter alia*, that it was not clear whether the injury began on the date of the actual injury or of a denial of justice and whether the date until which nationality was required was the date of initiation of diplomatic negotiations or of presentation of the claim. It had been argued that the rationale behind the rule had disappeared. At the current time, in the wake of the judgment of ICJ in the *Nottebohm* case, an individual could not engage in “protection shopping” because he or she would lack an effective link with the chosen protector State. The continuity rule had been described as unjust in that it failed to take account of involuntary changes of nationality. In the context of nationality in relation to the succession of States, the Special Rapporteur on that topic had already pointed to the need to adjust the continuity rule in regard to such involuntary changes.

5. For those reasons, the Commission might be wise to adopt a more flexible rule, which was set out in article 9. It allowed a State to bring a claim on behalf of a national who had acquired its nationality in good faith after the date of injury, where the injury was attributable to a State other than the previous State of nationality, provided the original State had not exercised or was not exercising diplomatic protection in respect of the injury. A number of safeguards were built into article 9, the most important being that the new nationality must have been acquired in good faith. It was also important that a claim could not be brought against the previous State of nationality.

6. He looked forward to hearing the debate and to seeing whether the Commission was to follow the traditional approach or a more progressive one that took account of changes in international law since the judgment of ICJ in the *Nottebohm* case.

7. Mr. GAJA said that the Special Rapporteur was making a major effort to reconsider the rules of diplomatic protection to ensure fuller protection of individual rights, especially human rights. In doing so, he was proposing some innovative solutions that enabled the Commission to revisit traditional rules and to discuss their rationale. The proposal in article 9, on continuous nationality, was moderately innovative in that it considered that a State was entitled to exercise diplomatic protection on behalf of a person who had not been its national at the time of the injury only if the person had not had the nationality of the allegedly responsible State. Other conditions stated in article 9 further limited the scope of the innovation. Even so, however, the article appeared to be in conflict with practice, as stated in the first report.

8. The Special Rapporteur conceded that the continuity rule was well established in State practice and, in considering judicial decisions, suggested that the main trend was towards support of the rule. In that context, however, he quoted both the judgment of PCIJ in the *Panevezys-Saldutiskis Railway* case and the dissenting opinion of Judge van Eysinga,<sup>4</sup> to which he gave almost equal weight. Personally, he wished to quote a passage in the judgment that seemed particularly clear in support of the continuity rule:

In the present case no grounds exist for holding that the Parties intended to exclude the application of the rule. The Lithuanian Agent is therefore right in maintaining that Estonia must prove that at the time when the injury occurred which is alleged to involve the international responsibility of Lithuania the company suffering the injury possessed Estonian nationality [pp. 16–17].

In another part of the judgment, PCIJ criticized the attempt of the Government of Estonia to discredit the rule.

9. As the Special Rapporteur stated in his comments on article 9, some doubts had been cast on the existence of the continuity rule by Sir Gerald Fitzmaurice in his separate opinion in the *Barcelona Traction* case. Both Belgium and Spain had reasserted the rule of continuity in reply to a question posed at the last stage of the oral pro-

ceedings by Judge Jessup. In his separate opinion, which the report did not quote, Judge Jessup had said:

Although the phraseology varies, there is general agreement on the principle that the claim must be national in origin, that is to say that the person or persons alleged to have been injured must have had the nationality of the claimant State on the date when the wrongful injury was inflicted. One might well admit that there is a certain artificiality in the whole notion since it rests basically on the Vattelien fiction, but I do not think the Court can change a long established practice on this matter [p. 202, para. 74].

10. Judge Jessup had been right to stress that the main rationale of the continuity rule was not the danger of abuse, but the *Mavrommatis* or Vattelien approach to diplomatic protection: that the State, in resorting to diplomatic action on behalf of an individual, was asserting its own rights, namely to ensure, in the person of its subjects, respect for the rules of international law. That seemed to imply that, at the time of the breach, the individual must have had the nationality of the State that brought the claim.

11. Should the Commission decide to go against existing practice and follow the Special Rapporteur's suggestion with a view to increasing the possibility of protection for the individual, one condition should be added to those currently listed in article 9. At the time of the breach, the obligation ought to have been in force between the allegedly respondent State and the State that brought the claim for an individual who had acquired a new nationality. An example was when a State contended that an individual's right to consular assistance in criminal proceedings under article 36 of the Vienna Convention on Consular Relations had been infringed. Without the suggested addition to article 9, the State of new nationality might bring a claim based on a breach when the allegedly responsible State had had no obligation at the time of the breach towards the State that was bringing the claim. Often, rules of diplomatic protection were considered simply in the context of customary international law and therefore the obligation would exist anyway. The judgment of ICJ in the *LaGrand* case was a useful reminder that diplomatic protection could also relate to breaches of obligations under treaties; hence the need to stipulate that the obligation must already be in existence.

12. Before moving away from nationality of claims concerning individuals, he thought that a number of further issues should be addressed. The first was when an international organization exercised both functional protection and diplomatic protection for an official. It would be useful to state a rule that applied when both an international organization and the State of nationality intended to exercise diplomatic protection on behalf of the same individual.

13. The second issue concerned the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew and possibly the passengers of the ship or aircraft, irrespective of the nationality of the individuals concerned. An example of the assertion of such a right could be found in the judgment by the International Tribunal for the Law of the Sea in the *M/V "Saiga" (No. 2)* case, which stated that Saint Vincent and the Grenadines was "entitled to reparation for damage suffered directly by it as well as for damage or other loss suffered by the

<sup>4</sup> See 2680th meeting, para. 4.

*Saiga*, including all persons involved or interested in its operation” [para. 172]. It would be expedient for the Commission to state what the applicable rule was in such a case and to what extent the entitlement of the State of nationality of the ship or aircraft affected the entitlement of the individual’s State of nationality.

14. The third issue was a case in which one State exercised diplomatic protection for a national of another State because that State had delegated it to do so. It would be useful to set out the conditions under which diplomatic protection could be delegated. The presumed extent of delegation should also be specified, for even after having delegated protection, the State of nationality might wish to take up the case.

15. The fourth issue involved cases when a State or an international organization administered or controlled a territory. For example, was the United Nations entitled to exercise diplomatic protection on behalf of the East Timorese pending the birth of a new State? Could the United Nations bring a claim for the benefit of Yugoslav nationals who were resident in Kosovo?

16. He looked forward to hearing the Special Rapporteur’s views on those questions.

17. Mr. ROSENSTOCK said he wished to comment on the intertemporal issue raised by Mr. Gaja. One might take, for instance, a case in which, at the time the injury occurred, the individual affected was a German national and Germany and the host country were parties to the Vienna Convention on Consular Relations. The individual then changed nationality, becoming, say, a national of Zimbabwe, but Zimbabwe had not been a party to the Convention at the time of the incident. It would be unreasonable to hold Zimbabwe and the host country to obligations to which they had not been committed at the time of the incident. The State of new nationality, although not at that time entitled to claim, became so entitled when the individual changed nationality. Where was the unfairness in the subsequent State of nationality asserting its right, as an inherited right? At the time the obligation had been breached, it had been breached not *vis-à-vis* a non-party, namely Zimbabwe, but *vis-à-vis* a party, namely Germany. Where was the injustice in allowing Zimbabwe to take over the obligation that had been valid at the time? That sort of issue addressed the conception of the Commission of the topic: was it looking for a way of protecting the individual or was the focus to be on State-to-State relations?

18. Mr. GAJA said Mr. Rosenstock had introduced a new element into his own example, in that the State of new nationality had acquired the obligation between the time of the original breach and the time of the submission of the claim. That case, too, had to be considered. The element of unfairness was that, in the suggested example, Zimbabwe would be able to bring a claim for infringement of an obligation that had occurred at a time when Zimbabwe would not have had any obligation.

19. Mr. HAFNER, pursuing the line of questioning raised by Mr. Rosenstock, asked what would happen if a State ceased to exist—for example, because of dismemberment, and persons who had already been injured became nationals of a new State? If the new State was

required to be entitled by law in order to claim a right *vis-à-vis* the injuring State, the individuals would suffer because no State would be entitled to exercise diplomatic protection on their behalf.

20. Mr. HE drew attention to two points in connection with article 9. First, the original State of nationality had priority in exercising diplomatic protection. Only if it did not institute a claim following an injury could the new State of nationality do so. He wondered, however, what the position would be if the injury occurred during the period of transition from one nationality to another and continued to exist after the acquisition of the new nationality. Would priority for making a claim still belong with the original State of nationality or could the injured person call on the new State of nationality to put forward the claim? Since the article was intended to establish a flexible regime, it might be necessary to cover the possibility of such an eventuality and explain in the commentary whether the priority still lay with the original State of nationality.

21. Secondly, the statement that only the new State of nationality may institute a claim and only when it—the State—elects to do so, in the conclusions on article 9 contained in the first report of the Special Rapporteur, seemed to give the new State of nationality wide discretionary powers, taking no account of priorities. In practice, both the original State and the new State of nationality had the discretionary power to institute a claim.

22. Mr. ECONOMIDES said that he could not support the proposal to do away with the traditional, classic rule of continuous nationality and the transferability of claims, which had long been the bedrock of the exercise of diplomatic protection, as borne out by State practice, mixed claims commissions and international jurisprudence. It was an established principle of international law. In that context, the practice of the United States and the United Kingdom, as described in the Special Rapporteur’s comments on article 9, was most revealing. The same practice existed in Greece. The reasons for maintaining the continuous nationality rule and the concern to prevent abuses of all kinds by individuals and States, particularly in view of the enormous power wielded by the multinational corporations, were currently greater than had been the case at the time of the *Barcelona Traction* case. Accordingly, he could not agree with the separate opinion of Sir Gerald Fitzmaurice. That was not to say improvements to the rule could not be made, and some essential exceptions should be admitted. In that context, he agreed with the statement also quoted in the report by his countryman Politis.<sup>5</sup> If an individual or legal person changed nationality involuntarily, there should be a provision that diplomatic protection could be exercised by the new State of nationality but not against the original State of nationality. Such an exception would apply above all in cases of State succession when the successor State automatically granted its nationality to the persons who came under its sovereignty. Exceptions should also be made in other cases, such as a change of nationality by reason of marriage or when a person was stateless. Otherwise, the application of the rule should remain unchanged. Article 9, paragraph 1, did not cover all cases.

<sup>5</sup> *Ibid.*, para. 5 and footnote 14.

23. Article 9, paragraph 4, was acceptable, but its provisions should be broadened to exclude diplomatic protection by the new State of nationality against the original State of nationality. He also had strong doubts about the necessity or the relevance of paragraph 3: it was inappropriate to disassociate the general interest of the requesting State from the interest of the injured individual. Classic diplomatic protection covered only protection of the individual. The transferability of claims, a delicate question not adequately dealt with in the report, should be much more restrictive than was allowed for in paragraph 2. The continuity rule should apply except in the case of the involuntary transfer of claims, more particularly upon the death of the injured person.

24. Mr. MELESCANU said that he was speaking, without preparation, in order to obviate the impression that the dominant trend within the Commission was in opposition to the changes proposed in article 9 by the Special Rapporteur, who had given new life to a particularly important aspect of public international law. State responsibility was, after all, largely expressed through diplomatic protection, whether of individuals, company shareholders, ships or aircraft. At a time of globalization, problems involving property or capital investment took on ever greater importance. Another factor was the high concentration of power in the State, which was the only protector of private interests, whether of individuals or legal entities. It had to be conceded, however, that the exercise of diplomatic protection was, unfortunately, largely subordinate to political considerations. It was a fact of life and must be accepted as the premise for constructing an answer to the question of how individual interests could best be protected.

25. As could be seen from the comments by Mr. Rosenstock and Mr. Hafner, even from a practical point of view, there was some point to positive development of the law. The reservations expressed by Mr. Gaja and Mr. Economides were based on theory and precedent. Even in the theory, however, cracks had appeared in the edifice of diplomatic protection. Umpire Parker had clearly said that the injury was to the State only in the sense that the State was entitled to make sure that the provisions of international law were applied to its citizens.<sup>6</sup> Logically, means should be made available to make good the injury, and the Commission should consider what those means were if, for political reasons, a State decided not to extend diplomatic protection. Article 9, paragraph 1, provided the answer: the protection could be provided by another State. International practice and doctrine thus came together to provide support for the Special Rapporteur's views. Despite the sound arguments for the old rule on continuous nationality, there was a stark choice between staying with that rule or encouraging the progressive development of the law. He would opt for the latter.

26. Mr. GOCO said that diplomatic protection was discretionary not obligatory. Cases existed in which, despite every reason to extend it, a State refrained from doing so. His country had extended diplomatic protection even in cases where the change of nationality had taken place

following an injury, but that practice was by no means universal.

27. The article should address another phenomenon of current international life: that of dual or multiple nationality, which was accepted internationally by virtue of the principles of *jus sanguinis* and *jus soli*, yet had been subjected to attempts to abolish them. Certain conditionalities were set out in paragraph 1 for the exercise of protection in a case of change of nationality in good faith by reason of marriage or naturalization. However, it was important that the rule should not be inflexible and could apply in cases where another State of nationality might also exercise diplomatic protection.

*The meeting rose at 4.20 p.m.*

## 2686th MEETING

*Tuesday, 10 July 2001, at 10.10 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma.

### Diplomatic protection<sup>1</sup> (*continued*) (A/CN.4/506 and Add.1,<sup>2</sup> A/CN.4/513, sect. B, A/CN.4/514<sup>3</sup>)

[Agenda item 3]

#### FIRST AND SECOND REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. HAFNER said that article 9 proposed by the Special Rapporteur in his first report (A/CN.4/506 and Add.1), addressed interesting problems, including that of change of nationality of an injured person who wished to bring claims for injuries suffered under his or her old nationality. According to the well-established basic rule of continuous nationality, the injured person must have the

<sup>1</sup> For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook* . . . 2000, vol. I, 2617th meeting, para. 1.

<sup>2</sup> See *Yearbook* . . . 2000, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 2001, vol. II (Part One).

<sup>6</sup> *Ibid.*, para. 4.

nationality of the State exercising the right of diplomatic protection at the time of the occurrence of the injury, as well as at the time of the presentation of the claim by the State. That rule seemed to follow from the fact that the State that espoused the claim was claiming its own rights; it was to be considered injured in the person of its nationals. A rule that covered the problems that could arise if a State disappeared or an injured person changed nationality due to marriage or similar events was thus justified. But it was one thing to deal with specific issues and another to draw general conclusions therefrom. Draft article 9, paragraph 1, as it stood, seemed to change the whole substance and meaning of the instrument of diplomatic protection: the State was no longer considered to be injured and entitled for that reason to present claims, but, rather, appeared to act only as a representative of the individual, as its agent. It no longer mattered whether the State was considered the victim of the injury in the persons of its nationals, but only whether the person had the nationality of that State. That would undoubtedly give new meaning to the condition of nationality within the framework of the draft articles on State responsibility. The main thrust of the instrument of diplomatic protection would be shifted from the State to the individual.

2. As a consequence, the traditional Vattelien conception of diplomatic protection<sup>4</sup> would be thrown overboard. A new concept seemed to be emerging according to which the State was the agent of the national and more emphasis was placed on the well-being of the individual. In that sense, it was not entirely true that the Commission did not deal with human rights. Its work during the quinquennium reflected a certain tendency towards considering the State mainly as an instrument for raising claims in international law. The issue of injury as the basis for such claims had disappeared.

3. One problem that might result from article 9, paragraph 1, was certainly the time of the injury. During the discussion on State responsibility, he thought the members of the Commission had agreed that the breach occurred not when local remedies had been exhausted, but from the time of the breach itself. In the case of diplomatic protection, that would mean that the breach had occurred at a time when the person had had a different nationality. Referring to an issue raised by Mr. Gaja (2685th meeting), he said it was fully understandable that the new State should likewise be bound by the rule that had been breached in respect of the individual. Otherwise, it would appear to acquire a new right without assuming the reciprocal obligation. That argument reflected a State-oriented approach to diplomatic protection based on the traditional understanding. But the position of the individual also had to be taken into account: to request that such a condition should be applied would mean that the individual ran the risk of losing any possibility of being protected by a State.

4. That should not, however, mean that it was possible to generalize the contrary position, even though globalization and the rapid changes of nationality possible under existing conditions seemed to call for such a rule, which would certainly be an extremely progressive step.

It was doubtful, however, that States would be in a position to accept such a proposal. What it might be possible to do would be to enumerate cases in which such a risk might arise and to state explicitly the exceptional nature of the rule. Such cases could be divided into two categories: cases in which the impossibility of applying the rule of continuity of the claim was based on the disappearance of the State (e.g. by dismemberment); and others which resulted from circumstances relating to the individual, such as succession in the claim as a result of death, subrogation, assignment, marriage, adoption, etc. Those situations must be addressed: the basic idea should be that the Commission should cover any situation in which the individual would have no other possibility of obtaining protection by a State.

5. The wording of paragraph 1 had to be clarified. It spoke of a change of nationality, which he understood to mean that the original nationality was lost. Otherwise, a number of additional problems would arise. It might therefore be useful to refer to that condition in the text in order to avoid queries on possibly competitive claims.

6. With regard to the wording of paragraph 2, it was difficult to understand whether it referred to the claims of the individual or of the State. That it should be those of the State was certainly impossible and, if the paragraph dealt with the claims of an individual, it seemed to cover the possibility of subrogation. That issue should certainly be elaborated on and clarified in the text itself.

7. Paragraph 3 also raised problems. It could easily be omitted, since it had very little to do with diplomatic protection, given that the State was injured in its own right from the outset. The matter covered was direct injury to the State and should accordingly not be included in the text, since it would only confuse matters.

8. Paragraph 4 was similar to the rule on dual nationality. Although it differed from that rule, it seemed justified, since a change of nationality would amount to a new right that benefited the individual. As to the conclusion contained in the last paragraph of the report, it was true that even the European Union had considered that the Helms-Burton Act<sup>5</sup> might be wrongful, but for different reasons than those stated in that paragraph, i.e. because of extra-territorial jurisdiction rather than any inconsistency with the rule expressed in article 9, paragraph 4.

9. In sum, the draft article was a progressive step which reflected a changed conception of the instrument of diplomatic protection. Hence, it should be reformulated and stricter conditions should be incorporated; that could be done by the Drafting Committee.

10. The other questions raised by Mr. Gaja (2685th meeting) must inevitably be answered within the framework of the draft articles. He did not know, however, whether the Commission had already taken a decision to deal with the diplomatic protection of companies, ships or aeroplanes or with that issue in the context of international organizations. If those problems were to be dealt with, it would undoubtedly have to be in the context of the draft articles on nationality and he would be

<sup>4</sup> See 2680th meeting, footnote 4.

<sup>5</sup> *Ibid.*, footnote 23.



grateful for information from the Special Rapporteur in that regard.

11. Mr. DUGARD (Special Rapporteur) said that, on the basis of the informal discussions held on the subject, his understanding was that he had a mandate to deal with the diplomatic protection of corporations and shareholders, but not with the protection extended by international organizations.

12. Mr. ELARABY, referring to the work of UNCC, which authorized those who had been injured during the Iraqi invasion of Kuwait to present their claims through a State, either the State of nationality or of residence, or through an international organization, said that persons of various nationalities residing in Australia, Canada, the United Kingdom or the United States, for example, sent their claims through the State in which they were resident. A great many claims, mainly from persons who did not have clearly defined nationalities (for example, Palestinians), were presented through the United Nations Development Programme (UNDP), the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and sometimes the Office of the United Nations High Commissioner for Refugees (UNHCR). All those claims were accepted as if they had been sent by the proper authorities. The Commission should look at that practice as well and review its decision to consider international organizations outside the scope of its mandate under the topic.

13. Mr. GAJA said that the problem was to see how the ability of an international organization to exercise diplomatic protection affected the ability of the State to exercise diplomatic protection. He continued to believe that the four issues he had raised at the preceding meeting were all very relevant to the exercise of diplomatic protection by the State of nationality.

14. Mr. GOCO pointed out that Mr. Hafner had said that article 9, paragraph 4, applied to a situation of dual nationality. Perhaps he could explain that idea further, since article 9 dealt with a change of nationality, i.e. the loss of a previous nationality, whereas a dual national held two nationalities simultaneously.

15. Mr. HAFNER, replying to Mr. Gaja, said that he had referred only to some of the many problems relating to the question of continuous nationality and nationality itself for the purposes of the diplomatic protection of natural persons. As to Mr. Goco's question, he had said that paragraph 4 reminded him of the dual nationality rule, but that there was a difference between that rule and what was contained in paragraph 4, a difference that was quite justified and could be supported.

16. Mr. SIMMA recalled that, at the fifty-second session of the Commission, open-ended informal consultations had been established. In the report of the informal consultations,<sup>6</sup> it had been agreed that the draft articles should, for the time being, endeavour to cover the protection of both natural and legal persons. The informal consultations had, however, added that the protection of legal persons raised special problems and accepted that

the Commission might at a later stage wish to reconsider the question whether to include the protection of legal persons. In his view, that meant that the Commission should still be dealing with both natural and legal persons. It seemed, however, that the inclusion of legal persons had not been fully taken into consideration in the Special Rapporteur's work on article 9.

17. Mr. HERDOCIA SACASA said he agreed with Mr. Hafner that there were other options that had not been exhausted in the proposed text of article 9. There was nothing at all outdated about the rule of continuous nationality, which alone was able to guarantee the stability of an institution that was at risk from the power games played by States. Mr. Hafner's idea of attempting to regulate, precisely and directly, specific exceptions to the principle of continuous nationality, yet without making the general principle itself an exception, seemed right.

18. Mr. DUGARD (Special Rapporteur), replying to Mr. Elaraby, said that, in the report that he would eventually submit on the protection of companies and shareholders, he would take account of the jurisprudence of UNCC with regard to dual nationality. He would, however, prefer not to have to deal with the principles of the protection provided by international organizations. It was proper to draw a distinction between traditional diplomatic protection and functional diplomatic protection, as the Working Group on diplomatic protection had confirmed on a number of occasions. As Mr. Simma had pointed out, a decision had been taken at the fifty-second session that the draft articles should cover both natural and legal persons, but, given that a draft article on legal persons had not been discussed or approved in principle, the emphasis would obviously be on natural persons. That was clear from both article 1 and article 9, which essentially required the Commission to decide whether it wished to retain the traditional interpretation of the rule of continuous nationality or whether it considered that the traditional rule should be completely revised or else retained, but with a number of exceptions. In his view, that was the principle that should be considered first. Once the question of natural persons had been considered, it might be necessary to include specific articles dealing with continuous nationality and the transferability of claims relating to legal persons. For the time being, he merely requested guidance on the question whether the traditional principle should be retained or not.

19. Mr. MOMTAZ said that, in chapter III of the first report entirely devoted to continuous nationality and the transferability of claims, the Special Rapporteur had shown extraordinary intellectual integrity: while himself being in favour of abandoning the rule of continuous nationality, the transparency of his study was such that both those for maintaining the rule and those against could find arguments to support their view. However, the numerous examples drawn by the Special Rapporteur from State practice, jurisprudence and doctrine showed that the rule of continuous nationality was extremely well established in international law and there could be little doubt of its customary basis. For that reason, the rule should be retained, unless the Commission wished to be innovative and accept the risk of rejection that was inevitable with such an undertaking.

<sup>6</sup> *Ibid.*, footnote 24.

20. The new realities of international life and the problems caused for the international community by State succession, particularly when it occurred in violent circumstances, could not be ignored. There had been situations in which individuals had found a nationality imposed on them by a State which, for various reasons, sometimes ethnic or religious, refused to extend them its protection. In such conditions, inspiration must be drawn from the Latin saying *Hominum causa omne jus constitutum est* (Law is established for the benefit of man) and the rules of international law must be made more flexible so that their application would not have excessively unjust and inequitable consequences for the very individuals that they were meant to protect.

21. It was agreed that there was a growing tendency for the traditional approach of international law based on State sovereignty to be supplanted by a human rights-based approach. Thus, the jurisprudence of the International Tribunal for the Former Yugoslavia, wishing to avoid the harmful consequences of applying nationality links too strictly, simply disregarded them and emphasized other criteria which were more to the advantage of the individual. The Tribunal had called into question the definition of the term “protected person” given in the first paragraph of article 4 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949. According to that definition, a victim must, to qualify as a protected person, have a nationality different from that of his oppressor. That, however, had almost never been the case during the bloody armed conflicts that had engulfed the territory of the former Yugoslavia. In its judgement in the *Celebici* case, the Trial Chamber of the Tribunal had skirted the difficulty by applying the criterion of emotional ties rather than of the actual place of residence—which could in any case often be the same—without there being any legal link in terms of nationality. According to the Trial Chamber, in situations where State succession had occurred violently, as had been the case after the break-up of the former Yugoslavia, the nationality criterion could not be decisive in the definition of the concept of “protected person”, where such a person’s nationality had been imposed on him. That jurisprudence had been confirmed by the Appeals Chamber of the Tribunal in its judgement in the *Tadić* case.

22. That example provided an excellent illustration of how international law was developing in a direction that favoured the individual. He was therefore in favour of including some well-defined exceptions to the rule of continuous nationality of the claimant, such as cases in which nationality had been imposed on an individual or withdrawn from him. In such situations, provision could be made for the exception that a State to which the injured individual had emotional ties, or even ties of allegiance, but whose nationality he had not obtained could take up the cudgels for that individual and extend diplomatic protection to him. The application of that criterion could, in practice, give rise to some problems, sometimes insoluble. Such a solution might, however, provide an answer to Mr. Hafner’s concern, although it could appear revolutionary. In all cases where provision was made for an exception to the rule of continuous nationality of a State other than that of nationality of origin, the State could not exercise diplomatic protection against the State whose nationality

the injured individual had held previously. That was the idea expressed in article 9, paragraph 4.

23. Mr. MELESCANU, referring to Mr. Momtaz’s comments, said that, while it was certainly possible to think of other exceptions to the principle of continuous nationality, such as emotional or actual ties, as Mr. Momtaz had said, thereby solving various categories of problem, no solution would be found for the basic problem, which was that which occurred when a State chose, for reasons of its own, not to exercise its diplomatic protection. That was the main problem and the Commission should give guidance to the Special Rapporteur by adopting a position on the issue. It must decide whether it wished to abandon the traditional rule of continuous nationality or abide by it strictly.

24. Mr. LUKASHUK said that the report under consideration was particularly convincing in that the Special Rapporteur did not conceal the fact that practice ran counter to the position that he had adopted in article 9 with regard to continuous nationality. It could, however, be said that the draft article reflected a general trend in the development of international law, whereby increasingly greater importance was attached to the individual. That was no accident, since it merely followed the development of domestic law. More and more modern constitutions, including that of the Russian Federation, placed a legal obligation on the State to protect its nationals and thus conferred on the latter the right to diplomatic protection. The Commission should attempt to reflect that development in international law.

25. The Special Rapporteur showed the greatest objectivity in setting out the relevant jurisprudence. Diplomatic protection had always been considered a discretionary power of the State and an individual who changed nationality could no longer be protected by the State when he lost its nationality. That way of seeing the issue had been progressively contested, in the literature and elsewhere, and a new concept had gradually emerged in practice, even though it was clear from the discussions in the Commission that by no means were all members in sympathy with the new way of viewing the issue. The fact remained that diplomatic protection was increasingly considered a right of the individual which formed part of human rights and should therefore be extended even to a person who had changed nationality. The Commission could not, in any case, shut its eyes to contemporary reality: diplomatic protection was one of the most basic instruments for the protection of human rights in international relations.

26. It was, however, essential to take account of the specific nature of the machinery for implementing the protection of human rights. Otherwise, their effectiveness might be jeopardized. The fact was that international law was still inter-State law and that human rights were protected through States and the machinery set up by States for that purpose. To ignore their specific nature would run the risk of harming the machinery. The question remained controversial and it was difficult to accept what the Special Rapporteur seemed to be saying in his comments on article 9, namely, that the individual should be considered a subject of international law. In any case, it was a question of principle, to which the Commission

could not provide a casual answer while drawing up articles on diplomatic protection.

27. There was also a danger that article 9 would raise problems not with regard to the protection of the individual, but with regard to property, including intellectual property rights. That raised the question of the protection of legal persons. The Commission should admit that it was unable, in the absence of jurisprudence and established practice, to codify detailed rules in that regard, even though it could no longer leave legal persons without protection. The only solution was therefore that it should restrict itself to stating general principles, without going into detail.

28. The question was entirely different when it came to international organizations, since they were part of the international machinery for the protection of human rights, quite independently of the institution of diplomatic protection.

29. Lastly, he said that article 9 represented an important step in the progressive development of international law, fully in line with contemporary trends.

30. Mr. BROWNLIE said that the Special Rapporteur had set himself the arduous task of attacking a principle which was, as he himself had admitted, very generally supported by State practice in a field where Governments claimed that they encountered no difficulties. The Special Rapporteur's laudable aim became obvious on reading article 9, but it was equally plain that the provision prompted some basic objections.

31. The first of those objections was rooted in the existence of the principle established by PCIJ in the *Mavrommatis* case, which the Special Rapporteur had not ignored, since he had quoted from the judgment of the Court in his first report. That principle was often called stuffy and old-fashioned by the *bien pensants*, despite the fact that nationality and citizenship reflected social realities. It was extremely artificial to suggest that the *Mavrommatis* principle was the invention of some elderly lawyers who were completely out of touch with the real world. For that reason, he did not subscribe to the assumption that that rule was unsound in policy. Moreover, it currently represented the law and the Special Rapporteur himself recognized that State practice confirmed that situation.

32. The second basic objection related specifically to State practice and the lack of evidence that it was changing.

33. Thirdly, he considered that the rationale of the principle of continuous nationality had not been taken sufficiently seriously by the Special Rapporteur. The principle had a dual purpose, namely, that established in the *Mavrommatis* case and the desire to prevent the individual from choosing a powerful protector State by an opportunist shift of nationality—a very real possibility which worried Governments. If the Special Rapporteur had taken the rationale of the continuous nationality principle more seriously, he would have found it easier to segregate cases of involuntary change of nationality, standard examples being State succession, death and marriage, in which the rationale did not apply.

34. A further problem arose from the mandate of the Commission: in order for it to develop the law, there had to be some sign of change, however faint it might be. So far, the Special Rapporteur had failed to show evidence of any emergent practice. Further investigation of practice in cases of State succession might reveal situations in which States did waive the continuous nationality principle. The comments by Mr. Momtaz on the International Tribunal for the Former Yugoslavia were interesting in that regard.

35. Two further comments were necessary. First, article 9 suffered from a structural imbalance. The axis of the provision was the concept of a bona fide change of nationality following an injury, but there was no indication of the applicable law or of the precise conditions of that change.

36. The second comment related to the human rights dimension. There was a tendency to forget that diplomatic protection was a means of providing individuals with protection and assistance. Although it was admittedly a discretionary power of the State, it was still a valid institution. Of course, it did not guarantee that human rights would be safeguarded, but the machinery for the protection of human rights, including the institutions in Strasbourg, did not constitute guarantees either and the results achieved were far from impressive. It was unwise to criticize certain institutions of international law for inadequately protecting human rights, when the new institutions established for that purpose did no better. All those institutions had to be kept in place in the hope that their coincident efforts would to some extent protect human rights.

37. The Commission must ask itself whether it would not be advisable to adopt a more structured approach to the special cases or functionally specialized topics, including legal persons, mentioned by various members

38. Mr. RODRÍGUEZ CEDEÑO congratulated the Special Rapporteur on article 9 and said that he particularly appreciated its "human rights" focus.

39. In his first report, the Special Rapporteur acknowledged that continuous nationality was a well-established rule of international law, while pointing out that it could give rise to serious injustice when the injured person had changed nationality, voluntarily or not, following an injury. In the Special Rapporteur's opinion, it was essential to free the institution of diplomatic protection from the chains of that rule, which was no longer valid, and to strive to establish a flexible regime that took account of the current realities of the world.

40. The Special Rapporteur's argument was based on developments in international law, which reflected shifts in international relations and tended to place increasing emphasis on the individual as a subject of international law. The modern view of international law was that its purpose was not solely to regulate relations between States, but to provide individuals with stronger protection, particularly of their human rights. To that end, legal rules must not only be consistent with social reality, but promote change, and that entailed the difficult task of re-appraising accepted standards.

41. The aim was therefore to draw up a rule which guaranteed better protection of the human rights of natural, but not of legal persons. The approach adopted by the Special Rapporteur required the use of criteria other than that of continuous nationality, which should not be merely theoretical. Nor should it be forgotten—and that was an argument for retaining the current rule—that efforts to offer stronger protection of human rights might produce sensitive, if not dangerous, situations.

42. The Special Rapporteur's approach was valid, although not sufficiently supported by practice or legal theory. A rule would have to be formulated which struck a balance between the need to develop the law and the concern to prevent abuses in the exercise of diplomatic protection, especially by the most powerful States. The complexity of naturalization procedures, the criterion of the effective link and the amount of attention paid to questions of nationality by general international law were guarantees against abuses. In his opinion, the purpose of the condition laid down in the second part of paragraph 1, and above all in paragraph 4 of article 9, which should be retained at all costs, was to prevent possible abuses.

43. In conclusion, he believed that further thought should be given to the criterion of nationality, if the maintenance of an established rule of international law were to be reconciled with the need to prevent abuses.

44. Mr. CRAWFORD drew attention to the fact that, historically, diplomatic protection had been based on the notion that the State was seeking to vindicate rights which it had established for itself in the person of its nationals, whether individuals or corporations. That conceptual basis had then been extended to ships, aircraft and their crews. Subsequently, there had been a substantial development of individual human rights, whose field of application overlapped to a considerable extent that of diplomatic protection. It should be remembered that human rights had three specific characteristics: they had been conceived as the rights of individuals themselves and not as the rights of a particular State, they also applied to the nationals of the State responsible for the breach and the procedures by which States could seek to vindicate human rights did not expressly or implicitly require any connection of nationality between the acting State and the individual whose rights had been impaired. Some parallelism therefore existed between the protection of human rights and diplomatic protection, which the European Court of Human Rights had clearly recognized in the field of expropriation in the *Lithgow* case. The question was whether that underlying theory had changed and it was tempting to think that that was so in a world where there was much less reluctance to recognize the rights of non-State entities at the international level.

45. Nevertheless, for the reasons given by Mr. Brownlie, it seemed unwise to start from the opposite assumption. There was a large grey area where some of the purposes and functions of diplomatic protection could and should be extended to persons who, for whatever reason, lacked the nationality of the protecting State, but who must be assimilated with that State for that purpose. Indeed, bilateral agreements on the protection of investments contained broad provisions in that respect. Nonetheless, the structure of modern diplomatic protection, which was

largely treaty-based, was highly dependent on negotiations between States, in which the role of the State as legislator could not really be divorced from its role as the ultimate insurer of the rights in question. A leading case had shown that it was possible to think of diplomatic protection while at the same time considering that individuals had rights at the international level, without classifying those rights as human rights. States still had a role as legislators, but they had a major role as protectors and the principles of diplomatic protection remained valid, though not exclusive.

46. Without subscribing to all the Special Rapporteur's premises, it was therefore possible to arrive at a considerable number of his conclusions if sufficiently carefully drawn exceptions were made, for example, with regard to involuntary changes of nationality. In doing so, the recommendation made by Mr. Gaja (2685th meeting) should be followed and care should be taken to ensure that States were not able to vindicate rights that were not opposable to them. The tendency to amalgamate all the innumerable bilateral investment treaties into one treaty seemed to ignore the fact that the treaties had been negotiated on their own merits and disputes which arose under them related to rights conferred on the parties by those treaties.

47. The Special Rapporteur's proposals should therefore be referred to the Drafting Committee, but on the opposite assumption to the one he had adopted, with a view to achieving middle ground on the need for functional protection consistent with the bases of the institution of diplomatic protection.

48. Mr. PELLET said that he was one of those who considered diplomatic protection to be a fiction, and a fiction which had outlived its usefulness. The fact remained, though, that if its fictional aspect—in other words, the artificial and ideologically oriented explanation of Vattel and of PCIJ in the *Mavrommatis* case—was removed, the institution of diplomatic protection could be helpful. In that connection, he considered that Mr. Brownlie had provided a somewhat partial view of the principle set out in the judgment in the *Mavrommatis* case and of the criticisms it had prompted. No one was disputing the fact that the State could protect individuals possessing its nationality when an internationally unlawful act had caused them an injury. The criticisms related to another element, namely, the trick of claiming that, by exercising its protection, the State was exercising its own right. That was where the fiction lay.

49. As the Special Rapporteur had indicated on a number of occasions in his report, it was clear that the peculiar idea that, when a State took up the cause of one of its nationals, it was exercising its own right had been fabricated to thwart recognition of the international legal personality of private individuals at a time when the "sovereignty-minded" sensitivity of States had been exaggerated. But that "sovereignty-minded" obsession no longer had any justification: the individual had well and truly become a subject of international law, as ICJ had recognized in its judgment in the *LaGrand* case. In that regard, he noted that the Special Rapporteur contradicted himself in his report because he endorsed that view in one paragraph of his report only to challenge it subsequently in another. It was certainly a controversial

question, but as far as he was concerned there was no doubt: the individual was a subject of international law who, as such, could either assert his rights directly (particularly in the areas of human rights and investments) by taking his case to the competent international courts or seek the protection of the State of which he was a national. Given the marginal and often ineffective nature of the direct submission of a case to international courts by individuals, the institution of diplomatic protection was useful, and even indispensable.

50. Like the Special Rapporteur, he considered that a State which extended its diplomatic protection to one of its nationals was asserting the right of the interested party and not its own right. In such a context, the criterion of continuous nationality no longer had any *raison d'être* and must definitely be rethought. Even so, it seemed that article 9 did not follow through to its conclusion the logic that was its inspiration. If the State defended the right of a national, what authorized a State whose nationality the injured person no longer had to exercise its protection on behalf of that person? If the fictional aspect of the *Mavrommatis* principle was abandoned, the traditional rule should purely and simply be reversed: the protecting State was only and could only be the State whose nationality the individual injured by the internationally wrongful act had at the time of the claim. The State of original nationality, for its part, could not complain about anything, except if the injured individual had dual nationality, and that could be a source of problems that should be dealt with in the draft, or if it had itself suffered a direct injury by reason of the internationally wrongful act. In such a case, it was not exercising its diplomatic protection, but acting on its own behalf. The problem was then no longer one of diplomatic protection, but one of reparation. In addition to those two situations, there was a third, that in which the State of original nationality had already begun to act, as rightly provided for at the end of paragraph 1.

51. To be logical, it would first be necessary to state the principle that only the second State, namely, the State whose nationality the injured individual had at the time he introduced his claim, could act, and only subsequently mention the exceptions to the rule. It was true that it might be asked whether that approach was valid because it represented a radical break with the traditional approach. In fact, despite the Special Rapporteur's efforts, he was not convinced that the rule of continuous nationality was not a customary rule, the criticisms being of the fiction rather than of the existence of the rule itself. On that point, he shared the opinion of Mr. Momtaz.

52. Rules were made in order to be amended when they were no longer adapted to a changing international society. In the same way as Mr. Melescanu, he held to the conviction that the Commission would be continuing to play its role in the progressive development of international law by proposing to amend that traditional rule because it was out of step with all contemporary developments in international law. Moreover, that change of direction would not go against any of the previous articles that the Commission had referred to the Drafting Committee, since the draft articles proposed by the Special Rapporteur were careful not to take up the principle stated by Vattel and PCIJ in the *Mavrommatis* case in any of the three options set out at the fifty-second session for ar-

ticle 1 following informal consultations.<sup>7</sup> His view was that the new direction would be entirely in line with option three which had been adopted at that session for article 1, as well as for article 3, and which he preferred.

53. In short, the Commission should therefore clearly and firmly indicate that, in a case of change of nationality, only the State of actual nationality at the time of a claim could exercise its protection. Then, and only then, should it state the exceptions, namely: first of all, the case mentioned in article 9, paragraph 1, where the State of original nationality had exercised or was in the process of exercising its protection at the date on which the change of nationality occurred; and then the case in which the State of original nationality itself had suffered injury, which was the subject of paragraph 3, although there one was straying outside the strict confines of diplomatic protection and it would perhaps be preferable to refer to it in the commentary. If, however, one wanted to keep it in the draft article, the wording might be amended to read: "Nothing in the preceding paragraphs affects the right of the State of original nationality to bring a claim on its own behalf for injury it has suffered by the internationally unlawful act having also caused harm to the injured person while he or she was its national." Paragraph 4, which prevented the new State of nationality from exercising its diplomatic protection against the State of original nationality, should be retained, partly for the reasons given by the Special Rapporteur in the last paragraph of his report. But there was a slightly different problem in that one was no longer really in the realm of diplomatic protection on account of an injury caused by a third State. In that regard, he considered that the Helms-Burton Act was quite simply unacceptable under international law.

54. He had some reservations about two aspects of article 9. First, paragraph 1 did not satisfy him for two reasons. The Special Rapporteur did not exclude the possibility of the State of original nationality exercising its diplomatic protection, whereas it should be excluded in principle, as had already been said. It would be desirable not to stick to the half-measure proposed by the Special Rapporteur. He also disagreed with the introduction of the idea of good faith. He was far from convinced by the analysis the Special Rapporteur had made, in the section of the report containing conclusions, of the judgment of ICJ in the *Nottebohm* case. In fact, the Court had carefully avoided saying that Mr. Nottebohm had acquired Liechtenstein nationality in bad faith; it had simply observed that that nationality was not enforceable against Guatemala through the lack of an effective link. The effective link requirement was sufficient to prevent the risks of abuse of recourse to diplomatic protection because the granting of nationality produced an effect only if an effective link existed. In that regard, he was surprised that the Special Rapporteur was inventing new rules of the law of nationality in the context of the draft articles on diplomatic protection. Secondly, he did not understand how one could assign a claim. For him, the notion of assigning a claim or of the assignability of a claim was alien to international law; it was a common law concept transposed into international law. He was therefore opposed both to paragraph 2 and to the inclusion of the notion of

<sup>7</sup> *Ibid.*

assigning a claim in paragraph 3. In any event, it was the principle that mattered and, although he approved of the premise developed by the Special Rapporteur, he disagreed with his conclusions. The problem which that raised was a fundamental one and it would therefore be desirable if the Commission adopted a clear position on the matter.

55. Lastly, he was concerned by the proposal made by certain members of the Commission that consideration should be given only to classical diplomatic protection, in other words, protection which the State exercised on behalf of individuals having its nationality. In his opinion, it would be very regrettable to stop there. The diplomatic protection of legal persons or shareholders was an essential aspect of the matter, and of considerable practical importance, and the Special Rapporteur should therefore not exclude it from the scope of his study.

56. Mr. DUGARD (Special Rapporteur) thanked Mr. Pellet and said that he had every intention of dealing with that question in his draft articles.

*The meeting rose at 12.45 p.m.*

## 2687th MEETING

*Wednesday, 11 July 2001, at 10 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma.

### **Diplomatic protection<sup>1</sup> (continued) (A/CN.4/506 and Add.1,<sup>2</sup> A/CN.4/513, sect. B, A/CN.4/514<sup>3</sup>)**

[Agenda item 3]

<sup>1</sup> For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook . . . 2000*, vol. I, 2617th meeting, para. 1.

<sup>2</sup> See *Yearbook . . . 2000*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

### **FIRST AND SECOND REPORTS OF THE SPECIAL RAPPOREUR (continued)**

1. The CHAIRMAN opened the meeting by extending a warm welcome to Judge Al-Khasawneh, a member of the Commission until his election to ICJ.

2. Mr. SIMMA, praising the Special Rapporteur's heroic but not always successful efforts to imbue the traditional law on diplomatic protection with a progressive human rights element, said that article 9 was a good example of where human rights considerations might not be well placed. The rule of continuous nationality was firmly endorsed by State practice and even recent jurisprudence, and his impression was that Governments also seemed to be quite satisfied with it and applied it flexibly. It was clear, therefore, that continuous nationality was a rule of customary international law and very urgent and convincing reasons were needed for the Commission to change it as thoroughly as was proposed in the first report of the Special Rapporteur (A/CN.4/506 and Add.1). Again, a decisive factor for him was that the continuous nationality rule remained popular with foreign ministries and had not really led to major problems.

3. The general trend in international law of strengthening the position of individuals and even elevating them into bearers of rights under international law did not provide a sufficiently convincing reason to overturn the rule. One might even say that the development of international human rights law and the relevant procedures available to individuals could justify a certain division of labour between diplomatic protection and international human rights concerning the protection of individual rights and interests. With all due regard to the weaknesses of existing regimes in the field of human rights and in the protection of foreign investment, it was undeniable that those treaties and machineries were capable of reinforcing, and filling certain gaps in, the traditional law of diplomatic protection. That was particularly true with regard to the continuous nationality rule.

4. Attention had been drawn to various regimes such as those of UNCC and even the International Tribunal for the Former Yugoslavia, but they were not proof that general international law could not cope with the matter of adequate protection any longer. Rather they should be regarded as testimony to the fact that international law could very well come up with custom-made solutions if need be, and that should lead to some relaxation of pressure on established rules of diplomatic protection. However, he could accept that the rule ought to be made subject to certain exceptions, and that the desirability of such exceptions was growing under the impact of human rights. Exceptions should be allowed in the case of involuntary changes of nationality, for instance through marriage, and might follow the example of some countries in relaxing the condition of nationality having to be present throughout.

5. Some members had pointed to the mantra of globalization as a reason to overhaul the rule of continuous nationality. The impact of globalization on many issues in international law was undeniable, but as far as natural persons were concerned it did not lead to a really substantive increase in changes of nationality, although it might

have led to increases in changes of residence. The picture might be different in the case of legal persons, although the main reasons for companies or corporations changing or establishing certain nationalities were to avoid tight fiscal supervision or what was seen as over-rigid social legislation, and in such a context the notion of bona fide changes of nationality made little, if any, sense. He hoped that there would be no attempt to facilitate shareholder value shopping to the detriment of the fiscal or social policies of States by dismantling the rule of continuous nationality.

6. Lastly, article 9 should be referred to the Drafting Committee, where it should be revised in order to maintain the principle of continuous nationality but make it subject to exceptions for cases of involuntary changes of nationality.

7. Mr. ELARABY, praising the wide-ranging research and the impressive analysis of State practice and doctrinal issues contained in the first report, said that diplomatic protection was commonly exercised by all foreign ministries and it had always been standard practice for diplomatic missions to intervene in various countries to protect the interests of individuals and legal persons. The new development in recent years, which should affect the doctrine itself, was the currently well-established tradition of having recourse to international organizations, such as WIPO, WTO and UNCC.

8. He fully shared the view expressed in the section of the report containing conclusions that the traditional rule of continuous nationality had outlived its usefulness and had no place in a world in which individual rights were recognized by international law, but it had to be borne in mind that there were certain conditions such as those set out in article 9 and certain exceptions. Consideration had to be given to the conditions under which a claim might be espoused by a State other than the State of original nationality. The Special Rapporteur had enumerated three conditions: that the State of original nationality had not exercised diplomatic protection itself, that it could bring a claim on its own behalf for injury to its general interests, and that diplomatic protection might not be exercised against any previous State of nationality. He fully subscribed to those conditions. However, he had some difficulty in accepting the reference to bona fide in paragraphs 1 and 2 of article 9. The term was rather subjective and introduced elements that were not easy to ascertain. It was usually open to various interpretations and he would prefer it to be replaced by the word "legal" or at least by a concrete term which would not create double standards. The genuine link formula referred to by ICJ in the *Nottebohm* case was more than adequate, as the Special Rapporteur himself recognized in the conclusions.

9. He fully supported the Special Rapporteur's emphasis on the individual, which was in line with the evolution in legal thinking about the rights of the individual in contemporary international law. Such a shift had occurred in UNCC of whose Provisional Rules for Claims Procedure article 5 permitted international organizations to submit claims on a par with Governments in the sense that they had the right to submit claims on their own behalf and also on behalf of individuals who were not able to find a Government to submit their claim.

10. Lastly, he fully endorsed the view expressed by other members that article 9 should be referred to the Drafting Committee.

11. Mr. ADDO, commending the Special Rapporteur for a lucid, objective and well-argued report, said that, although the traditional rule of continuous nationality appeared to be well entrenched in State practice, it was not entirely satisfactory. Rigid adherence to it and applying it strictly and doggedly would in certain instances lead to inequity. He had in mind involuntary changes brought about by State succession, where the population was sometimes subject to more than one change of nationality. Clearly, the rule might therefore cause great injustice in cases where the injured individual might have undergone a change of nationality in a bona fide manner. He inclined to the view that there was a need for a reassessment of the rule, which did not enjoy the status of an immutable and universal postulate and therefore had to be subjected to rigorous reappraisal in the light of current development in the law. The traditional rule of continuous nationality had outlived its usefulness and was indeed decadent. He himself joined the body of opinion which would reject it altogether. He endorsed the Special Rapporteur's view that article 9 sought to free the institution of diplomatic protection from the chains of the continuity rule, and in that regard would urge the Commission to adopt paragraphs 1, 2 and 4. He did not see the usefulness of paragraph 3, although he did not hold strong views about it. He too thought that the article should be referred to the Drafting Committee.

12. Mr. SEPÚLVEDA congratulated the Special Rapporteur for having systematized the subject of diplomatic protection and linked his analysis to State responsibility, and for the way in which he had questioned traditional concepts and prompted thought about the validity of principles which had been accepted as absolute truths but which nevertheless had to be subjected to new legal tests in order to determine their validity or obsolescence. Provoking controversy and encouraging discussion had undeniable merits, but it also entailed risks, one of which was that the debate might produce a negative outcome for the proposals formulated because the principle in question was deemed inadequate or was not yet right for incorporation as a rule in terms of progressive development of international law.

13. For example, the result of the controversy over article 2 had been that diplomatic protection did not include, in any circumstance, the use of force. Another example regarding a legal hypothesis to affirm the existence of a State obligation to provide diplomatic protection to an injured national had led to the conclusion that the hypothesis, formulated in article 4, did not have sufficient support in State practice and that there was no *opinio juris* to make it valid. A further illustration was to be found in article 5. The Special Rapporteur had referred to the *Nottebohm* case as authority for the position that there should be an effective or genuine link between the individual and the State of nationality and had questioned whether that principle reflected a principle of customary international law which should be codified. That too raised the question of habitual residence as a criterion for diplomatic protection.

14. Another highly controversial case was the one reflected in article 6, which specified that the State of nationality might exercise diplomatic protection on behalf of an injured national against a State of which the injured person was also a national where the individual's dominant or effective nationality was that of the former State. Equally controversial was whether a State might exercise diplomatic protection in the case of stateless persons and refugees, especially when that protection might be directed against the State of origin of the stateless person or refugee, a matter not provided for in article 8.

15. As for the debate on article 9, the Special Rapporteur's proposals were also the subject of controversy. The point was to decide whether there was enough justification for essentially changing a rule that had generally been recognized as a rule of customary law. Thus, it had to be determined whether diplomatic protection could be provided only when the claim was attributed continuously and without interruption to a person possessing the nationality of the claimant State. The Special Rapporteur considered that it was not imperative to reaffirm the principle of continuous nationality of the injured person, judging that it could cause a grave injustice to the individual who would potentially be left without protection. The Special Rapporteur had presented a lengthy list of State practice, judicial decisions and doctrinal opinions reaffirming the need for the continuous nationality rule, and there seemed to be no real basis for the statement in the report that it was supported by some judicial opinions, some State practice, some codification attempts and some academic writers.

16. On the contrary, there was in fact very little literature and argument that would call for a change in the continuous nationality rule. Umpire Parker had simply said that the rule was not clearly established.<sup>4</sup> Politis had said that protection ought to be exercised in favour of the individual without regard to change of nationality unless such change was fraudulent.<sup>5</sup> Van Eysinga had said that the continuity practice had not been "crystallized" into a general rule.<sup>6</sup> Orrego Vicuña's opinion was that the continuity rule could be dispensed with in special circumstances,<sup>7</sup> for example in the context of global financial and service markets and operations related thereto. The separate opinion of Sir Gerald Fitzmaurice in the *Barcelona Traction* case was that too rigid and sweeping an application of the continuity rule could lead to situations in which important interests went unprotected.<sup>8</sup>

17. As for the substance of the report, there was no clear State practice to justify changing the principle. The legal sources referred to dissenting opinions and separate opinions of judges, and the doctrine was sparse and uncertain. In those circumstances, it was preferable to abandon for good the idea of altering the rule.

18. A separate issue was the introduction of exceptions to the rule. They would include examples which had

been provided by the Special Rapporteur and mentioned during the debate. There were the cases of involuntary change of nationality which occurred in the case of State succession, of nationality being imposed, or of nationality being acquired through marriage or adoption.

19. It would be necessary to determine the final fate of paragraph 2 of article 9. The conclusion in chapter III of the report on paragraph 2 was insufficient to understand the nature and scope that should be attached to the transfer of claims and the report should explain the legal reasons underlying the transferability of claims.

20. Article 9, paragraph 3, created confusion, as it contained hybrid provisions that related to State responsibility as well as to diplomatic protection. The wording should be brought into line with that of the draft articles on State responsibility, especially in regard to the invocation of State responsibility for the breach of an international obligation.

21. Paragraph 4, was somewhat problematic in that the domestic legislation of many States stipulated that their nationals never lost their nationality. If paragraph 4 was applied, the new State of nationality would not be able in any circumstances to bring a claim against the original State of nationality, irrespective of whether the injury had occurred before or after the individual had changed nationality.

22. With those comments, he thanked the Special Rapporteur for having encouraged the Commission to challenge certain truths that, before the submission of his report, had seemed immutable.

23. Mr. GALICKI congratulated the Special Rapporteur on his first report and on his courage and honesty in contesting the widely applied rule of continuous nationality. He had presented all the pros and cons in an attempt to prove that the rule had outlived its usefulness. After a thorough presentation of the rule, its status, content and operation, the Special Rapporteur had concentrated mainly on criticizing it instead of developing the reasoning behind the new proposals contained in article 9. It was inadequately explained why, for example, article 3 stressed that diplomatic protection was a right of the State, which the State could exercise at its discretion, while article 9 sought to link diplomatic protection to injured persons and even to claims.

24. Although he fully agreed with the observation in the report that the individual's basic rights were currently recognized in both conventional and customary international law, the trend in the development of human rights protection could not be taken exclusively as justification for departing from the traditional rule of continuous nationality. Diplomatic protection also encompassed other rights, and more State practice should be adduced to support the new rule proposed in article 9.

25. Consideration should be given to the extent to which the Vattelien fiction that an injury to the individual was an injury to the State itself had become a reality in State practice. It should be remembered that, in diplomatic protection, States were exercising their own rights, while in human rights protection, priority was given to the rights of individuals.

<sup>4</sup> See 2680th meeting, footnote 13.

<sup>5</sup> *Ibid.*, footnote 14.

<sup>6</sup> *Ibid.*, para. 4.

<sup>7</sup> *Ibid.*, footnote 20.

<sup>8</sup> See 2685th meeting, para. 22.



26. The proposals for the content of article 9 were very interesting and constituted progressive development of international law, but the section of the report containing conclusions did not provide sufficient explanations for them and should be reviewed and developed further. One paragraph indicated that in the contemporary world, nationality was not easily changed. Quite the opposite was true. The modern trend, based on growing recognition of the human right to a nationality, was to give more freedom for changes of nationality by individuals. That was even more apparent in relation to the nationality of legal persons, and article 9 should accordingly differentiate between natural and legal persons. The requirement of a bona fide change of nationality following an injury seemed weak, especially in respect of legal persons.

27. Much more should be said in the conclusions about the extension of the new rule to the transfer of claims; otherwise, article 9, paragraph 2, was somewhat enigmatic. No explanation was given as to what might be the result of the retention in paragraph 3 of the right of the State of original nationality to bring a claim on its own behalf. Did that open the door to the parallel competence of two States, that of the former nationality and that of the current nationality, to bring claims for an injury suffered by an individual?

28. Despite those doubts, he was firmly convinced that article 9, together with the comments made during the discussion, should be referred to the Drafting Committee.

29. Mr. CANDIOTI commended the Special Rapporteur for the stimulating material he had provided, which had given rise to a fruitful debate. His own view was that article 9 should begin by enunciating a rule that must reflect State practice, the opinions of writers and judicial decisions. The rule should state that the nationality of the protected person must be that of the protecting State at the time of the injury and at the time of the claim. It was the course that was generally accepted and, in his experience, was applied by foreign ministries. What was usually done when assessing the feasibility of exercising diplomatic protection was to verify the existence of the injury, ascertain that it had been committed against a national of the State and that the person was a national at the time he or she suffered the injury and remained a national, and determine whether local remedies in the responsible State had been exhausted.

30. One of the primary tasks of the Commission in codification was to take account of State practice and to reflect it in rules. He shared the Special Rapporteur's concern for the protection of individual rights, but thought that diplomatic protection was too limited an institution to take on that all-important task on a wide scale. Diplomatic protection was not a panacea for human rights problems, but rather a tool designed for a specific purpose, namely to give effect to State responsibility for wrongful acts against nationals abroad. While it could be instrumental in the defence of individual rights, it was not the only and ideal instrument for that purpose.

31. The Commission must not go beyond its mandate. It must acknowledge the very specific role of diplomatic protection. Article 9 should be referred to the Drafting

Committee, with the recommendation that the article should incorporate a general principle regarding the requirements of nationality at the time of the injury and of presentation of the claim, followed by possible exceptions, particularly those involving cases of involuntary change of nationality.

32. Mr. PELLET said that he both agreed and disagreed with Mr. Candioti. He strongly agreed that a principle should be enunciated in article 9 and the principle was simply that the protected individual must have the nationality of the State exercising diplomatic protection at the time of the claim. He strongly disagreed, however, with the blunt statement that the individual must also have had the nationality of the protecting State at the time the injury was caused. Was the principle that of continuous nationality or was it that only the State of nationality could exercise diplomatic protection? At the previous meeting he had said that the nationality at the time of the injury was of no importance, while conceding that that was contrary to the traditional customary rule. He therefore endorsed the view of the Special Rapporteur and considered that the existence of a rule did signify that the rule was still suited to the modern international legal context.

33. Mr. ECONOMIDES said he fully shared Mr. Candioti's point of view. It was borne out by the section of the comments on article 9 of the report, which described the fundamental principle of continuous nationality according to which the person who suffered injury must have been a national of the protecting State from the time of the injury through the time of the claim, and even beyond, through to the ruling on the claim. It was a rule of customary international law and the basis of extensive State practice. The first responsibility of the Commission in codification was to take account of that rule. Exceptions existed, of course, but they were mainly related to involuntary change of nationality. That was the foundation on which article 9 should be built, namely to add the exceptions to the basic rule.

34. Mr. MELESCANU said everyone was so far agreed on one point: that the discretionary power of the State was an acknowledged component of the institution of diplomatic protection. The question was when an individual was considered to be a national of a State, and when a State could exercise that power. Logically, if diplomatic protection was deemed to be a matter for the discretion of the State, it must be left to the State to decide whether a person was its national or not. Any additional conditions, for example, that the individual suffering injury must have been a national at the time of birth would only circumscribe that discretionary power.

35. Unquestionably, the individual must be a national of the State exercising diplomatic protection. But why must the individual be a national at the time of the injury? No arguments in support of that view had so far been advanced, by Mr. Candioti or any other member, apart from references to the Vattelien fiction. He therefore agreed with Mr. Pellet that article 9 should address the very substance of the institution of diplomatic protection. A number of fundamental principles had already been identified and it should be a simple exercise to write them into the draft article.

36. Mr. OPERTTI BADAN said that he had serious doubts as to whether the discretionary power of the State to exercise diplomatic protection extended to recognition, also discretionary, of citizenship. The status of a national was a legal category that had nothing to do with protection. If one assumed that all rights had a temporal element and that any act with legal consequences must also have some temporal element, then protection must be deemed to come into play for an act that caused injury. The law normally considered that every act had its roots in the time at which it occurred. If the Commission wished to give precedence to the rights of the injured person, it could give the protecting State the option to choose the temporal element that provided the best protection for that person. The temporal element of the act that had caused the injury could not be ignored at the discretion of the State. Discretion could be exercised, however, in relation to whether the individual had also to be a national at the time when protection was exercised.

37. Mr. CANDIOTI, responding to Mr. Melescanu's call for justification of the link between nationality and the time of the injury, said that the justification was State practice. The principle generally applied was that the protected person must be a national of the protecting State at the time of the injury and at the time of presenting the claim. The State espoused that person's claim, adopting the injury as a violation of international law against itself in the person of one of its citizens. The initial relevant date for the exercise of diplomatic protection was normally that of the injury, and the test of the nationality link was applied, *inter alia*, to prevent protection shopping. Obviously, there could be exceptions, including involuntary change of nationality.

38. Mr. GALICKI said the Special Rapporteur had already answered the question of whether article 9 would be innovative or traditional, for in the first paragraph of the section of the report containing conclusions he proposed to free the institution of diplomatic protection from the chains of the continuity rule and to elaborate a new rule. Personally, he found the proposal very attractive and thought that there was indeed room for innovation, based on State practice of course. He had merely criticized the weak theoretical underpinnings of the proposal and suggested that it should be elaborated further. There was certainly room for progressive codification that could be incorporated in the draft.

39. Mr. KUSUMA-ATMADJA commended the Special Rapporteur for his excellent first report and his brave effort to create a new rule on diplomatic protection. He recounted a case illustrating State practice in the field of diplomatic protection in which legislation had been enacted in Indonesia to cater specifically for Indonesian nationals who had lost their nationality through marriage in the Netherlands.

40. Mr. PELLET said that he, for one, was not convinced by Mr. Candiotti's argument. To say that the traditional rule should be retained simply because it existed was no explanation of the rule. To suggest that the aim was to prevent forum shopping was also extremely artificial, since such a practice had only recently come into being and a provision could be made that, if it occurred, it would not be valid. The fact was that in virtually ev-

ery case a change of nationality was involuntary, occurring as a result of State succession, and the Commission was at one in thinking that, in such cases, the continuous nationality rule did not apply. True, in some countries women were still obliged to take their husband's nationality on marriage, but otherwise a change of nationality was almost invariably involuntary.

41. The case might also be argued on theoretical grounds, on the basis of the *Mavrommatis* case, but that argument, too, failed to stand up. It stemmed from the Vattelien fiction, dating from the early eighteenth century, which was a purely ideological construct based on the theory that the State was everything and the individual nothing. A State's prerogative of exercising diplomatic protection implied the requirement that an individual should have that State's nationality when the injury occurred. It was surely time, at the beginning of the twenty-first century, to move on from such an intolerable concept.

42. Mr. BROWNLIE said it was surprising that some members, especially Mr. Galicki, claimed that there was evidence of a change in State practice. The Special Rapporteur had clearly shown the paucity of current information. He himself had pointed out in print several times over the past decades that there were faults in the continuous nationality rule, particularly in relation to involuntary changes of nationality, but, if the Commission was to revise the rule, it must do so on a proper basis. Which part of the rule should be changed? Should the *Mavrommatis* approach be abandoned altogether or—more rationally—should unjustified aspects of the rule be discarded? If there was no proper evidence of State practice, it would be difficult to say what the effect of any change would be. It was known that States generally adopted a flexible, and often quite sensible, approach, but more information was required before any decision was made.

43. Mr. SIMMA said he entirely endorsed Mr. Brownlie's view. Those in favour of changing the rule neglected to consider the interests of the State confronted by a claim. If the Commission based itself on the *Mavrommatis* case, as it did in general, and on the *Nottebohm* case, it should surely hold that to cut the link between the injury and the claim would have an undesirable impact on what could be called the genuine nationality of the claim.

44. Mr. MELESCANU said that he had not been convinced by Mr. Candiotti's argument. Indeed, apart from ideological considerations, there was no real practical argument for requiring absolute continuity of nationality. As for the more general point made by some members that abandoning the absoluteness of the rule could give rise to abuse, with individuals indulging in forum shopping, States surely did not expose themselves to such abuse so easily. The Commission seemed to agree that the continuous nationality rule needed amending. The suggestion was that the amendment should take the form of a list of exceptions, but that merely amounted to another way of changing the rule.

45. Mr. CRAWFORD said that the occasional case of abuse or of forum shopping was not in itself the main consideration. More important was the fact that the rule dealt with rights that were essentially relative. For example, the expropriation by a State of property belonging

to one of its nationals did not retrospectively become a breach of international law if the person concerned changed nationality, at any rate not as far as the law relating to compensation for the expropriation of foreign property was concerned. It was true that human rights rules on the security of property applied irrespective of nationality, but not in such a case as he had cited. Most of the field was also covered by the vast number of treaty rules, too, even if some general principles of international law could be discerned behind them. The fact was that the jurisdictional clauses that would be used in invoking such responsibility were relative to treaty rights. An individual not a national of a country at the time of the breach did not, by definition, enjoy the treaty rights. It was irrelevant that many treaties were themselves drafted on the basis of some approximation of the *Mavrommatis* principle.

46. Therefore, he could not agree with the first part of Mr. Melescanu's comments, although he endorsed the second. The Commission should consider the whole situation and suggest practical solutions, especially in the context where individuals might be deprived of rights that they should have enjoyed under either dispensation. There was thus a need for some kind of "conflict rules", as adumbrated by Mr. Gaja (2685th meeting). Ultimately, however, many rights were conferred on individuals in their capacity as nationals of a particular State and no tampering with the *Mavrommatis* principle could change that situation.

47. Mr. ECONOMIDES said that the basic premise of the article was the protection of "genuine" nationals—individuals who had the same nationality throughout their lives—and he saw nothing wrong with that. Secondly, the time at which the injury occurred was crucial, according to the jurisprudence of the *Mavrommatis* case, because, as Mr. Pellet had said, it was from then on that the State itself was deemed to have suffered injury. The *raison d'être* of the rule was to avoid abuse, which was sometimes also a feature of State practice: large States would use diplomatic protection to place intolerable pressure on a smaller State to try and gain money or concessions. At the same time, an individual whose own State was not strong enough to provide protection might seek a stronger State. The continuous nationality rule had come into being to prevent such abuses. Without fully endorsing Mr. Melescanu's comments, he agreed that the rule could be retained but should be adapted to current circumstances by providing for exceptions to protect human rights. That was preferable to abandoning the provision altogether.

48. Mr. LUKASHUK said that those who favoured retention of the concept of continuous nationality nonetheless appeared to acknowledge that it did not fully correspond with modern requirements. It should be made more specific. One problem arose in connection with the situation in which an individual obtained the nationality of a State after suffering an injury. The Commission should state, if only in the commentary, whether such an individual was entitled to diplomatic protection. Indeed, the Commission should broach the whole question of defining what was meant by the term "diplomatic protection", how it was applied and when it was deemed to start. Clarification was necessary because, in some cases, current practice was for States to provide protection at a

consular or even an ambassadorial level without awaiting the exhaustion of local remedies.

49. Mr. HAFNER said he shared Mr. Economides's preference for listing exceptions to the existing rule. The Commission should therefore start to consider what those exceptions should be. Mr. Brownlie, Mr. Candioti, Mr. Pellet and Mr. Simma had, for example, suggested that the exceptions should include cases of involuntary changes of nationality. The term would, however, need to be defined. Marriage was not an involuntary action, nor could nationality acquired as a result of skill at basketball be considered involuntary. The Commission should give further consideration to the scope of any exceptions to the rule.

50. Mr. GALICKI said that he had sought only to find a realistic approach to the problem. The report described a number of failed attempts to codify the principle of continuous nationality and it was for the Commission to decide whether to make yet another attempt, along with a list of exceptions, or to adopt a more modern, courageous approach and create a principle suitable for current circumstances, along the lines suggested by the Special Rapporteur.

51. Mr. Brownlie had misunderstood his position: there was indeed insufficient evidence of State practice and the Special Rapporteur could usefully develop that aspect. Nonetheless, the Commission could not avoid the need to develop a new, precisely formulated principle, rather than adding a large number of exceptions which risked changing the balance within the article, to the point where it might be hard to determine which was more important, the principle or the exceptions. He had no doubt that, in its usual spirit of cooperation, the Commission would find an appropriate solution to the question.

52. Mr. CANDIOTI said that it would be useful to define how the Commission viewed its mandate with regard to diplomatic protection. Meanwhile, he wished to correct the impression that he was an adherent of an absolute continuous nationality rule: that would be an extreme position.

53. Far from supporting an absolute rule of continuous nationality, he believed that the article should open with a statement of the principle, including the relevant dates when the existence of the nationality link was required: the time at which the injury occurred and the time when the claim was formally made. In other words, the article should reflect State practice and the doctrine of many authorities. However, he also believed that, as Mr. Hafner had said, the Commission should consider the specific cases of an involuntary change of nationality that should be regarded as exceptions to the principle.

54. Mr. GOCO, congratulating the Special Rapporteur on his well-researched report on an extremely important topic, said that some features of article 9 did, however, call for further consideration. For example, clarification was required with regard to paragraph 2, whereby the rule that a new State might exercise diplomatic protection on behalf of the injured person, provided the original State had not exercised such protection, applied when a claim had been transferred bona fide to a person possessing the

nationality of another State. What exactly was meant by bona fide in that context? Plainly the citizenship issue was no longer involved, because there had been a transfer of claim. Since a change of nationality did not debar the original State from bringing a claim on its own behalf, although the claim was also that of an individual, was the claim in fact being pursued in the State's general interests or in the interests of the individual?

55. The view that a new State of nationality might not be entitled to exercise diplomatic protection was perfectly valid and stemmed from the hostile response to the Helms-Burton Act. Nevertheless, the essential point was that diplomatic protection was afforded at the discretion of a particular State and there were many situations in which a State might justifiably hesitate to give such assistance. On the other hand, he recalled an example he had quoted at the preceding session in which a State had exercised diplomatic protection on behalf of a person who had been naturalized in another country, because of the peculiar circumstances of the case and the plight of the individual concerned.<sup>9</sup>

56. While the comment on the article contained in the report defined the rule by quoting Oppenheim, the principle of continuous nationality and the transferability of claims could be summarized by stating that the basic requirements were the continuing viability of the claim itself and the continuing nationality of the claimant.

57. According to the Special Rapporteur, as there was uncertainty about the content of the continuous nationality rule, it was difficult to reconcile that rule with the Vattelian fiction that an injury to a national was tantamount to an injury to the State itself. Moreover that rule conflicted with the modern tendency to view the individual as a subject of international law. The report recommended the approach of recognizing the State of nationality at the time of the injury to its national as the claimant State. Hence article 9 was formulated as a means of freeing the institution of diplomatic protection from the chains of the continuity rule and of introducing a degree of flexibility consistent with modern international law, while at the same time taking account of the fears of potential abuse that had inspired the rule. In his opinion, those trepidations were far-fetched, because it was not easy to acquire citizenship through naturalization.

58. It was also necessary to re-examine paragraph 3. If the State of original nationality had not exercised protection, the change of nationality of an injured person, or the transfer of the claim to a national or another State did not preclude the State of origin from bringing a claim on its own behalf for injury to its general interests. But what was the origin of the claim? Was it the injury to the person or the injury to the State? It seemed to him that, although the claim arose from an injury to a person, the State considered that its general interests had been injured, because the person in question had suffered harm while he or she was still its national. In his view, that paragraph was consonant with the Vattelian fiction and was therefore more important than paragraph 1.

59. The rule governing the transmissibility of the claim was not dissimilar to the provisions in local and domestic statutes on the transferability of claims. It was, however, unclear whether in essence citizenship was of any significance if a claim had been assigned to a person possessing the nationality of another State. It was referred to in paragraph 1, but paragraph 2 stated that the rule applied to a bona fide transfer of a claim. In his opinion, the nationality of the injured party was indeed a central issue, even if the notion was absent in paragraph 2.

60. He recommended that article 9 should be referred to the Drafting Committee.

61. Mr. HERDOCIA SACASA said that the Special Rapporteur's excellent report had enabled the Commission to focus on the relationship between the State and the individual, a subject of major importance in international law. Article 9 did not really call into question the continuous nationality rule in the context of diplomatic protection. The principle that an individual must have been the national of the claimant State, both at the time the injury occurred and when the claim was presented, in order to enjoy that State's diplomatic protection had been accepted in Latin America since 1925. The article purported to revise the basis of diplomatic protection, because a new actor had appeared on the international stage and was demanding his full rights as a subject of international law. The crux of the matter was how to reconcile the appearance of an individual possessing "arms" rights and claims with an institution born of a fiction, where according to Vattel the injury suffered by an individual constituted an injury to the State and where, as a result of the findings in the *Mavrommatis* case, diplomatic protection was regarded as the right of a State. As ICJ had acknowledged in paragraphs 77 and 89 of its judgment in the *LaGrand* case, article 36 of the Vienna Convention on Consular Relations applied not only to the rights of States, but also to those of the individual. Harmonization of the situation arising from the Vattelian fiction with individual rights, which often did not owe their existence to the State but were inherent, was difficult. Contrary to the opinion held by some people, a strengthening of the rights of the individual enhanced State sovereignty and that was also the intention behind the draft article.

62. The problem was how to secure congruence between the rights of the individual and the rights of the State without upsetting the delicate balance between them. Overemphasis of either would seriously damage an institution that had the dual purpose of safeguarding the rights of both States and individuals. In his opinion, the two functions were interrelated. Those who said that diplomatic protection, and therefore the continuity rule, should be revised in the light of the modern focus on the individual were right on the whole, yet such a revision should not jeopardize the efficacy of the institution and must follow the criteria guiding the Commission in its codification and progressive development of international law, namely State practice, judicial decisions and doctrine.

63. He therefore believed that article 9, while protecting States from abusive claims, should provide for exceptions in cases where the continuous nationality rule would certainly lead to a denial of justice to persons

<sup>9</sup> See *Yearbook* . . . 2000, vol. I, 2620th meeting, para. 13.

who had acquired a new nationality. The introduction of provisions to that effect would constitute true progressive development of the subject matter. In that context, reference would have to be made to State succession and to the possibility of retaining the nationality of the predecessor State, for example, in the event of a transfer of territory or the separation of part of territory, as well as to other cases, like unification or dissolution of States, in which no such possibility existed.

64. He was in favour of an article 9 which, in paragraph 1, would embody the general rule of continuous nationality and, in paragraph 2, would set out as fully as possible well-founded exceptions to the rule to cover instances of involuntary acquisition of nationality, since that would greatly further the progressive development of international law.

65. Mr. DUGARD (Special Rapporteur) said the debate had shown that there were no absolute truths when it came to diplomatic protection. Obviously, the Commission had choices to make with respect to continuous nationality. The prominence given in the debate to the Vattelien fiction and the *Mavrommatis* case had demonstrated the relevance of history, yet it was important to stress that the Vattelien legal fiction, which had infected the thinking of all members, did not really form the foundation of the continuous nationality rule because, according to that rule, the State was injured at the moment of injury to its national and hence the State of nationality at the time of injury would be the claimant State and there would be no need for the injured national to retain his or her nationality at the time the claim was presented.

66. Article 9 was innovative in that it required the Commission to abandon the traditional continuity rule in favour of a more flexible, just rule. Although strong support had been expressed for that position by Mr. Melescanu, Mr. Pellet and several other members, that had been a minority view. It was, however, interesting that those adopting that stance had accepted that the traditional rule on continuous nationality had the status of a customary rule of international law. Clearly, he had been much more convincing in his arguments than counsel before Umpire Parker,<sup>10</sup> because in the *Administrative Decision V* case the customary rule had been rejected.

67. On the other hand, there had been unanimous agreement that flexibility and change of some kind were necessary. Mr. Economides had summed up the idea very well by saying that reasonable exceptions should be allowed and it had also been suggested that those exceptions should be made in the event of State succession and marriage. Personally he disagreed with Mr. Pellet that most changes of nationality were involuntary, because people did change nationality by means of naturalization. The question might well arise in the Drafting Committee whether such changes of nationality after a long period of residence were sufficiently reasonable to constitute an exception to the rule. Nevertheless, it was quite clear that there was support for the view that reasonable exceptions should be permitted to the traditional rule, but that an attempt should be made to avert abuse. At the same time,

Mr. Hafner and Mr. Kateka had warned that it would be difficult to distinguish between voluntary and involuntary changes of nationality.

68. The criticisms of article 9 had not challenged the philosophy of the views advanced in it. Some valid criticisms had been voiced in relation to the notion of a bona fide change of nationality and some members had felt that insufficient attention had been paid to the transfer of claims. Fault had likewise been found with some of the paragraphs of the article.

69. Unfortunately some important issues affecting the traditional rule had not been dealt with in the debate. If that rule were to be retained, consideration would have to be given to the *dies a quo* and the *dies ad quem* when the provisions were reformulated.

70. The apparent differences of opinion in the debate had not really been very wide. The question was whether a change should be made to the guiding principle itself or whether exceptions should be made to the rule. It was, at the current time, plain that a new rule had to be formulated which confirmed the traditional view subject to some exceptions. He therefore recommended that the text be referred to the Drafting Committee.

71. The CHAIRMAN stated that, in his opinion the most appropriate action would be to refer article 9 to the Drafting Committee.

72. Mr. ECONOMIDES said that if article 9 were sent to the Drafting Committee, it would be tantamount to starting again from zero, as so far no principles or exceptions had been put down on paper. The Commission had a very heavy programme and he feared that the Committee would be unable to produce a valid amended text in the short time available to it. He therefore proposed that the Special Rapporteur should submit a new version of article 9 to the Commission at its next session taking account of all the ideas expressed in the debate.

73. Mr. DUGARD (Special Rapporteur) said he agreed entirely with Mr. Economides.

74. Mr. SIMMA said that the Drafting Committee could best employ the short time at its disposal with consideration of the draft articles referred to it at the preceding session.

75. Mr. PELLET said that, apparently, he was not the only person who held that the concepts of the transfer of claims and the nationality of claims were common-law notions which had nothing to do with international law. He hoped that the Special Rapporteur would take note of his concern and respond at some later date.

76. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to request the Special Rapporteur to recast article 9.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

<sup>10</sup> See footnote 4 above.

## 2688th MEETING

Thursday, 12 July 2001, at 10 a.m.

Chairman: Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda.

### Diplomatic protection<sup>1</sup> (*continued*) (A/CN.4/506 and Add.1,<sup>2</sup> A/CN.4/513, sect. B, A/CN.4/514<sup>3</sup>)

[Agenda item 3]

#### FIRST AND SECOND REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to outline how he would like to deal with article 9 proposed in chapter III of his first report (A/CN.4/506 and Add.1).

2. Mr. DUGARD (Special Rapporteur) said that, following a suggestion made by Mr. Economides (2687th meeting), he had indicated that he would be drawing up a new draft article that he would submit to the Commission. He would be making a proposal in writing to the Drafting Committee, which would be meeting at the next session. He felt that the debate in the Commission on the draft article had been exhaustive and that no point would be served in taking it up again. At the current time, he simply wanted article 9 to be sent back to the Committee after an informal discussion had been held in the Commission to enable him to explain his views on the matter.

3. The CHAIRMAN said that he did not see any reason why informal consultations open to all members of the Commission should not be held on the draft article during the following week. Meanwhile, if there were no objections, he would take it that the Commission wished to refer article 9 to the Drafting Committee.

*It was so agreed.*

<sup>1</sup> For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook . . . 2000*, vol. I, 2617th meeting, para. 1.

<sup>2</sup> See *Yearbook . . . 2000*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

4. Mr. DUGARD (Special Rapporteur), introducing articles 10 and 11 proposed in his second report on diplomatic protection (A/CN.4/514), said that the exhaustion of local remedies was clearly accepted as a rule of customary international law and had been reaffirmed as such on a number of occasions by ICJ, particularly in the *Interhandel* and *ELSI* cases. It was generally accepted that the State in which an alien suffered an injury must be given the opportunity to remedy that injury before the case was brought before an international court. That rule was founded on respect for the sovereignty of the host State and for its own judicial organs. Members of the Commission would recall that, originally, an article on the rule of the exhaustion of local remedies had been included in the draft articles on State responsibility adopted on first reading (art. 22).<sup>4</sup> The Commission had, however, decided not to retain it in the draft articles on State responsibility in order for it to be dealt with in the framework of the draft articles on diplomatic protection. In his comments on article 22 in his second report,<sup>5</sup> the Special Rapporteur on State responsibility had expressed strong criticism of article 22 originally proposed by Special Rapporteur Ago in his sixth report.<sup>6</sup> As he pointed out in his own proposals, he too considered that it was difficult to accept the earlier provision.

5. Article 10 was essentially of an introductory nature and was intended to create a setting in which to accommodate the other articles on the exhaustion of local remedies. Paragraph 1 clearly stated that there was a generally accepted rule of the exhaustion of local remedies and that it applied to natural as well as to legal persons. It did not, however, apply to diplomats or to State enterprises engaged in *acta jure imperii* because an injury to them was a direct injury to the State, to which the exhaustion of local remedies rule was inapplicable.

6. Article 10 and the other draft articles formulated thus far fell into the category of secondary rules. However, in paragraphs 7 to 10 of his second report, he had shown that it might not be possible to maintain a distinction between secondary and primary rules throughout the draft articles. That distinction, which was justified for State responsibility, did not have the same object in terms of diplomatic protection and, more specifically, in terms of the exhaustion of local remedies rule. The reason was that the concept of denial of justice took pride of place in most attempts to codify the rule. At a later stage, probably during the next quinquennium, he would ask the Commission for guidance as to whether he should include a provision on denial of justice in his draft or not. At the current stage, he simply wanted the Commission to know that he considered it very difficult to accept a distinction between primary and secondary rules for the purposes of the exhaustion of local remedies, especially since there was no clear-cut distinction between the two types of rules. There was therefore nothing to prevent the Commission from considering certain primary rules in

<sup>4</sup> See 2665th meeting, footnote 5.

<sup>5</sup> *Yearbook . . . 1999*, vol. II (Part One), document A/CN.4/498 and Add.1–4.

<sup>6</sup> *Yearbook . . . 1977*, vol. II (Part One), p. 3, document A/CN.4/302 and Add.1–3, at p. 43, para. 113.

the context of the exhaustion of local remedies, particularly with regard to denial of justice. At the fifty-second session, Mr. Sepúlveda had argued forcefully in favour of preparing a study of denial of justice.<sup>7</sup> Like most members of the Commission, he himself felt that it was a primary rule that should not be considered. After giving it some thought, he had reached the conclusion that the Commission should reconsider the matter—not during the current session, but perhaps at a later stage.

7. In article 10, paragraph 2, he was attempting to define local remedies and to determine which remedies must be exhausted. It was quite clear that all legal remedies must be exhausted before a claim was brought at the international level. There were difficulties, however, in defining the expression “legal remedies”. Clearly, that concept included all judicial remedies and administrative remedies when they were available as of right, but not administrative remedies which were discretionary or available as a matter of grace. The ruling in the famous *Ambatielos* case raised difficulties in that respect. In that case, the claimant had failed to call a crucial witness in proceedings before the courts in the United Kingdom and, for that reason, had been unable to prove his case. In finding that the alien concerned had not exhausted all the available local remedies, the tribunal had held that it was incumbent on him to exhaust procedural facilities that might be available to him in the municipal courts. It was not clear exactly what was meant and it was very difficult to draw a principle from that decision. It was, however, a clear warning that a claimant who failed to present his case properly at the municipal level, whether as a result of poor preparation or of poor legal advice, could not expect to have the matter reopened at the international level. Another principle that seemed to be generally accepted was that the alien must raise before the domestic courts all the arguments that he intended to raise at the international level. That rule had not been included in article 10, paragraph 2, but had been dealt with in the commentary, where it belonged. Paragraph 2 made it clear that the remedies must be available both in theory and in practice. Whether they were available was a matter of fact that must be decided, however, in each particular case.

8. Article 11 dealt with the distinction between direct and indirect claims for the purpose of the rule on the exhaustion of local remedies. Basically, the problem was whether that rule applied when the injury was done to both the national of a State and to the State itself. It was necessary to include a rule on that subject in the draft in order to indicate quite clearly which cases fell within its scope. That suggestion had in fact been made by the Special Rapporteur on State responsibility in his second report. The basic principle was that the rule on the exhaustion of local remedies applied only when there had been an injury to a national of a State, in other words, when the State was injured through its own national, i.e. indirectly. The rule did not apply when there had been a direct injury to the State itself. The difficulty was that, in many cases, there would be elements of both direct and indirect injury. A number of cases which illustrated that point were cited in paragraph 19 of his report.

9. The question that arose in cases of that kind was how to decide whether the rule on the exhaustion of local remedies applied or not and how the distinction was to be drawn between direct and indirect injury. Article 11 suggested two criteria which were different sides of the same coin: the preponderance criterion and the *sine qua non* or “but for” criterion. It should be asked whether the injury was preponderantly to the national of the claimant State, in which case it was indirect and the rule on the exhaustion of local remedies applied. One could also apply a *sine qua non* test and ask whether the claim would have been brought if the national of the claimant State had not been injured. Other criteria had been suggested, such as that of the subject of the dispute: if the individual injured was an ordinary citizen, the injury must be considered to be indirect and, if the individual injured was a diplomat or consul, it must be considered to be a direct injury. According to the criterion of the nature of the claim, it must be determined whether the claim was public or private. Using the criterion of the nature of the remedy sought, if the State would content itself with a mere declaratory order, without compensation for injury to an individual, that might indicate that the injury was direct and not indirect. The difficulty was that, in many instances, a State would seek not only a declaratory order, but also compensation for injury to the individual, and the court had to decide which was the preponderant factor. It was important in such cases to guard against the possibility that a State might seek a declaratory order in its favour and then regard the matter as being *res judicata*, in order simply to avoid the application of the exhaustion of local remedies rule. That was why article 11 made it clear that a request for a declaratory judgement did not exempt the State from compliance with the exhaustion of local remedies rule. In his view, the subject of the dispute, the nature of the claim and the nature of the remedy were factors that should be considered in deciding whether the claim was preponderantly direct or preponderantly indirect. They were not separate factors which deserved mention in the draft article and he had referred to them in square brackets because he did not feel strongly about the matter. In any event, they would have to be dealt with in the commentary.

10. Mr. LUKASHUK said that, in article 10, the Special Rapporteur had successfully formulated a provision that gave precise expression to the general principle that local remedies must be exhausted. The provision was adequately supported by the commentary. The distinction drawn between primary and secondary rules, however, which had played a significant role in the codification of the law of State responsibility, was by no means justified in all cases. Indeed, the Special Rapporteur had correctly emphasized that the exhaustion of local remedies was well established in customary international law. Article 10 was also correct in including in the concept of local remedies those that were available not only before the courts, but also before administrative authorities. That position was generally accepted in both practice and doctrine. It was, however, regrettable that the Special Rapporteur was too restrictive in his commentary in paragraph 14 of his report, when he stated that administrative or other remedies that were not judicial or quasi-judicial in character were not covered by the local remedies rule. It was well known that many legal systems had an admin-

<sup>7</sup> See *Yearbook* . . . 2000, vol. I, 2626th meeting.

istrative hierarchy which acted to provide reparation in certain areas. Such administrative remedies fully qualified for the category of local remedies. There was thus a contradiction between article 10 and the commentary by the Special Rapporteur, even though the Special Rapporteur himself recognized that, according to doctrine, local remedies included administrative remedies.

11. The sentence in paragraph 6 of the report concerning diplomats or State enterprises engaged in *acta jure imperii* was unclear. The Special Rapporteur gave no explanation in his commentary, although that was a provision of vital importance. The footnote referring the reader to paragraph 27 made the matter no clearer. It was regrettable that the Special Rapporteur had not drawn sufficiently on the practice of the European Court of Human Rights, which, more than any other court, had had to attend to the problem of the exhaustion of local remedies. The words “international claim” in article 10, paragraph 1, were also incomprehensible. No explanation was provided on their meaning by the Special Rapporteur in his commentary, despite their defining importance for the draft articles as a whole. In his view, however, the draft article could be referred to the Drafting Committee.

12. Article 11, on the other hand, unfortunately raised serious difficulties. The problematic concept of “international claim” reappeared, but with the addition of “legal proceedings”. It made no sense. Diplomatic protection did not always take the form of legal proceedings. The example showed yet again how important it was to define from the outset what was meant by means and methods of diplomatic protection.

13. The argument that a claim should not have been brought but for the injury to a national was highly questionable. If there was no injury, the problem of responsibility or diplomatic protection simply did not arise. The criterion was therefore unacceptable. In a case where, by its actions, State A violated the rights of a national of State B, held by that national under a trade agreement between the two States, the violation of the agreement automatically engaged the responsibility of the author of the violation. The fact that the violation concerned human rights in no way limited the responsibility. Therefore, contrary to the thrust of article 11, the injured State was entitled to require the immediate cessation of the violation of the agreement. The generally accepted rule of previous exhaustion of local remedies could not possibly apply in such a case. The injured State was entitled to require the cessation of the violation of the agreement concurrently with its injured national's entitlement to seek local remedies. The State of the injured national could not be involved in the details of the claim. It could not stand in for its national in the settling of the legal disagreement. In his view, that was the significance of the position taken by ICJ in the *Interhandel* case, on which the Special Rapporteur based his argument, but without interpreting it correctly. Indeed, the Special Rapporteur recognized the logic of the situation when he stated in paragraph 29 of the report that a State could seek a declaratory judgement on the interpretation of a treaty relating to the treatment of nationals without exhausting local remedies provided

it did not couple that request with a claim for compensation or restitution on behalf of its national. That was an extremely precise and clear expression of the situation, which should serve as the basis for the draft article. It was regrettable that the Special Rapporteur was, as he had stated in his introductory comments, not in favour of following that course. It would be helpful if the Special Rapporteur could recast the draft article.

14. Mr. GAJA said that the structure of article 10 was not entirely satisfactory. It should have started with a precise definition of the exhaustion of local remedies rule, followed by more detailed provisions concerning specific aspects of the rule, together with any exceptions. The definition developed by the Institute of International Law<sup>8</sup> and repeated in article 45 (Admissibility of claims) of the draft articles on the responsibility of States for internationally wrongful acts brought together the existence of local remedies and their effectiveness. The wording of article 10, with its requirement for the exhaustion of “all available local legal remedies”, was not only too broad, but it did not specify that such remedies must be effective.

15. Moreover, despite a somewhat clumsy wording, article 22 of the draft articles on State responsibility adopted on first reading, on the exhaustion of local remedies rule, had contained an interesting element not present in article 10, namely, the *raison d'être* of local remedies. In certain cases, local remedies existed to prevent an injury, but, in many others, only to provide reparation. The latter kind of remedy was the more common, although, when it existed, the first was considerably more important, in that prevention was preferable to reparation.

16. Paragraph 16 of the report referred to the *Finnish Ships Arbitration* and the *Ambatielos Claim*, which suggested that the allegations of fact by the claimant State should be considered as well founded. Otherwise, there would be no scope for reparation. In the former case, the arbitrator had stated that every relevant contention, whether well founded or not, brought forward by the claimant Government in an international procedure must have been investigated and adjudicated upon by the highest competent municipal courts. The provision thus did not concern only the exhaustion of local remedies; the approach adopted by the arbitral tribunal in that case was equally relevant in determining whether there were available remedies. That should be clearly indicated, either in the body of the article or, at least, in the commentary.

17. With regard to article 11, he generally agreed with the Special Rapporteur's approach, which seemed to reflect prevailing practice. However, the proposal to use two tests to decide whether a claim was “direct” or “indirect” and thus whether or not it was subject to diplomatic protection was not entirely convincing. As currently

<sup>8</sup> Draft on “International responsibility of States for injuries on their territory to the person or property of foreigners” (*Yearbook* . . . 1956, vol. II, p. 227, document A/CN.4/96, annex 8).



worded, article 11 seemed to provide for the cumulative application of such tests. He was particularly concerned about the Special Rapporteur's implication that consideration should first be given to whether the claim was brought preponderantly on the basis of an injury to a national and whether the legal proceedings in question would not have been brought but for the injury to the national. The second test, with its *sine qua non* condition, was in his view extremely subjective and difficult to apply. There could be speculation on the reasons why Switzerland and the United States had, respectively, brought claims in the *Interhandel* case and the *ELSI* case. In the former case, there was some support for a subjective test, as the Special Rapporteur noted in paragraph 26 of the report. However, in both cases, the determining factor for ICJ—and a factor that should be expressed in the draft article—had been to determine whether one and the same dispute was involved and whether it related to an injury to a national. If that was so, any attempt by the claimant State to split the claim and request declaratory relief for a direct injury, in order to bypass the exhaustion of local remedies rule, was bound to fail.

18. Mr. HE said that the exhaustion of local remedies was a well-established rule of customary international law affirmed by bilateral and multilateral treaties, State practice, the decisions of national and international courts, various attempts at codification and the writings of jurists. Like the Special Rapporteur, he thought it preferable to deal with the subject in several articles, rather than in just one.

19. As far as article 10 was concerned, the addition of the phrase “exhausted all available local legal remedies” made the text clearer, the key word being the adjective “legal”. Legal remedies obviously included judicial remedies and remedies before administrative bodies, but not extralegal remedies, such as grace, or those whose purpose was to obtain a favour and not to vindicate a right. As the Special Rapporteur had pointed out at the end of paragraph 14 of his report, administrative or other remedies which were not judicial or quasi-judicial therefore fell outside the application of the local remedies rule. That comment was important, but the exact meaning of the term “quasi-judicial” required clarification.

20. Article 11 applied only to cases where the claimant State had been “indirectly” injured in the person of one of its nationals, not to cases where it had been “directly” injured by the wrongful act of another State. In order to determine whether injury was direct or indirect, account should be taken of various factors, such as the remedy claimed, the nature of the claim and the subject of the dispute, which were enumerated in square brackets at the end of article 11. In his opinion, those factors should be listed in the commentary rather than in the body of the article.

21. In practice, it was difficult to decide whether a claim was “direct” or “indirect” when the case was “mixed” or, in other words, when injury was caused both to the State and to a national of that State. In the event of a “mixed” claim, it would be for the tribunal to decide which element was preponderant. If the claim was mainly indirect,

local remedies must be exhausted. The “but for” test was closely related to the preponderance test and article 11 retained both as decisive factors for the application of the principle of the exhaustion of local remedies.

22. Articles 10 and 11 were both concerned with the application of that principle considered from two different angles. He proposed that they should be merged into one single article comprising two paragraphs; the first would deal with the exhaustion of all local legal remedies and the second, dealing with the claim, should be based preponderantly on the injury to the national.

23. Mr. SEPÚLVEDA said that the principle of exhausting local remedies formed part of customary international law, as was borne out by a large number of decisions of national and international courts, bilateral and multilateral treaties, State practice and the writings of jurists. It was based on some undisputed arguments, including that put forward by ICJ in the *Interhandel* case that the State where the injury had occurred must have an opportunity to redress it within the framework of its own domestic system. It was only when justice had been denied that diplomatic protection came into play or a claim could be submitted to an international court.

24. He agreed with the Special Rapporteur that no excessively rigid criteria should be applied when classifying rules as primary or secondary. Roberto Ago, who had referred to both categories of rules in the context of State responsibility, had drawn up a fairly wide-ranging provision on the exhaustion of local remedies, without, however, trying to define those rules. Since it was difficult to distinguish between the two categories of rules, it was preferable to ask whether such a differentiation was helpful in all cases. He thought that, if maintaining that distinction led to the deletion of the article on the exhaustion of local remedies, the treatment of the topic would suffer, because it would not be understood why a fundamental aspect of diplomatic protection had been excluded. Furthermore, such an exclusion might lead to that of other essential aspects, such as the concept of denial of justice, which was closely related to the rule of the exhaustion of local remedies. Both elements together constituted the bedrock of the study of diplomatic protection.

25. Lastly, he drew attention to two major errors in the Spanish version of the second report. First, in paragraph 67, in the text of draft article 14, the words *Es necesario agotar* should be replaced by the words *No es necesario agotar*, in line with the original English version. At the beginning of article 10, paragraph 1, the word *acción* should be replaced by the word *reclamación*.

*The meeting rose at 11.10 a.m.*

## 2689th MEETING

Friday, 13 July 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

### Diplomatic protection<sup>1</sup> (*continued*) (A/CN.4/506 and Add.1,<sup>2</sup> A/CN.4/513, sect. B, A/CN.4/514<sup>3</sup>)

[Agenda item 3]

#### FIRST AND SECOND REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GOCO said that the second report on diplomatic protection (A/CN.4/514) provided a deep insight into the genesis of a well-established rule of customary international law, namely the exhaustion of local remedies. Failure to comply with that principle would lead to the dismissal of a claim by an international tribunal, since a State's executive branch had to be given a chance to correct or redress an error before the matter was brought before an international court. Articles 10 and 11 embodied that rule, while article 14 set out exceptions to it. Nevertheless, in the context of diplomatic protection, the rule applied only when the claimant State had been injured indirectly through injury to its national. Since it was, however, difficult to draw the line between direct and indirect injury and there was even a category of "mixed" injury, combining elements of injury to both the State and its national, it was alarming that no conclusive finding on that subject could be issued until the tribunal or arbitral body had reached its decision, because the *Ambatielos Claim* had established the very significant precedent that the whole system of legal protection had to be put to the test before it could be asserted that all local remedies had been exhausted.

<sup>1</sup> For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook . . . 2000*, vol. I, 2617th meeting, p. 35, para. 1.

<sup>2</sup> See *Yearbook . . . 2000*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

2. A variety of tests could be used to determine whether a claim was direct or indirect and he was in favour of the wording in square brackets in article 11, but thought that it should also contain a reference to the parties involved. Article 11 should perhaps require the court or tribunal to rule on any preliminary objection that local remedies had not been exhausted, as that had been the procedure followed in the *Interhandel* case.

3. Similarly, a number of factors had to be taken into consideration in deciding what was meant by direct, indirect and mixed injury. A book by Mr. Brownlie<sup>4</sup> shed some light on the role of the local remedies rule in diplomatic protection and its implications for the determination of the existence of direct or indirect injury.

4. Parties were sometimes justifiably apprehensive about bringing a case before local courts because, although the independence of the judiciary was guaranteed in some countries, in others courts were subservient to the executive and cases might not be decided on their merits in accordance with the law. Indeed, he had had personal experience of a hearing where the jury might well have been biased. Some international agreements which specified the forum obviated any disputes about the exhaustion of local remedies.

5. He was concerned about the gist of the decision in the *Finnish Ships Arbitration* that local remedies had to be exhausted first, even though the right of appeal had been illusory or ineffective. The right of appeal was a factor deserving consideration when examining all the aspects involved in the exhaustion of local remedies.

6. From the formulation of the draft articles, it appeared that the principle of the exhaustion of local remedies applied only to civil claims. Presumably, the reason why criminal cases were excluded was that a national court trying the national of another State indicted for a breach of a local criminal law had sole jurisdiction over the case. Was there any scope for diplomatic protection in criminal cases? After all, the national deserved the protection of the State to which he owed allegiance. In criminal cases where States had attempted to provide diplomatic protection, they had had to operate without any fixed rules and had had to wait until their national had already been convicted and imprisoned before they could intervene at the highest level and secure that person's release.

7. In his opinion, articles 10 and 11 should be referred to the Drafting Committee for minor changes.

8. Mr. PELLET said that the exhaustion of local remedies was certainly a well-founded rule or principle of customary international law which should be embodied in the articles on diplomatic protection, for the exhaustion of local remedies, along with the nationality link, constituted one of the two undisputed and traditional conditions for the exercise of such protection.

9. Regrettably, in paragraph 4 of the report the Special Rapporteur announced five articles on diplomatic protection, whereas the document contained only four. That

<sup>4</sup> I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford University Press, 1998).

made it difficult to gain an overall picture, especially as article 10 adverted to a non-existent article 15, presumably on the potential effectiveness of remedies. Moreover, he saw no need to refer expressly to that article in article 10, paragraph 1.\* Again, why had legal persons suddenly been mentioned in article 10 but not in the previous provisions? The expression “natural or legal person” should be omitted, as it was perfectly clear that the articles applied to both categories of person, unless expressly stated otherwise. The same comment held good for paragraph 2 of the article. Subject to those two reservations, he was in agreement with article 10.

10. On the other hand, the theoretical argument about the distinction between primary and secondary rules in paragraphs 7 to 10 of the report served no useful purpose and was not pertinent to article 10. Moreover, he thought that the Special Rapporteur was wrong to challenge what had proved to be a helpful distinction, without which the Commission would never have completed its work on the draft articles on the responsibility of States for internationally wrongful acts. That distinction should be borne in mind, without necessarily adopting too rigid a conception of the matter, in the continuation of the work on the topic.

11. The introduction of the notion of a denial of justice in the draft was inadvisable. As several members had asserted, the rule of the exhaustion of local remedies presupposed not only their availability, but also their effectiveness. Perhaps wording to that effect should be included in article 10. It would seem that the Special Rapporteur intended to refer to that requirement in future articles, the contents of which were broadly outlined in paragraph 67 of the report. If there was a denial of justice it would signify that local remedies were ineffective. While the lack of effectiveness could have many causes, the consequences were the same. Either the principle of the exhaustion of local remedies did not apply or those remedies had been exhausted. In the event of a denial of justice, even if the remedies were ineffective, the rule applied. It was hard to see what could be gained from embarking on the difficult issue of what, from the standpoint of international law, constituted a denial of justice in municipal law. The crucial question was whether internal remedies had been exhausted, or whether any such remedies that appeared to be reasonably effective did exist. He therefore saw no point in attempting to codify the concept of denial of justice as such. It was but one example of a situation in which the remedies were ineffective. Nor was he sure that drawing a distinction between primary and secondary rules offered any assistance in deciding that issue.

12. As to the Special Rapporteur's presentation of the draft articles, he was troubled by the word “tribunal” in the first sentence of paragraph 14 of the report, since the remedy in question would be an appeal to an administrative officer and not one lodged with a tribunal. The sentence should be rectified, because an appeal to an administrative officer or to an ombudsman was also a local remedy and had to be taken into consideration.

13. He doubted whether the principle mentioned in paragraph 16 of the report, namely that all the means invoked in international proceedings must also have been exhausted in the course of domestic proceedings, was as established or well founded as the Special Rapporteur alleged. The purpose of the rule of the exhaustion of local remedies was not to turn international courts into courts of appeal against the decisions of domestic courts. The text ignored the inherent difference between municipal and international law. A decision that was consistent with municipal law could well be unlawful in international law, or vice versa. The statement made by the arbitrator in the *Finnish Ships Arbitration*, which the Special Rapporteur had cited, but with a reference to the wrong footnote, was erroneous, because it was not the contentions that had to be identical in municipal and international proceedings, but the submissions. Different arguments would naturally be advanced in municipal and international courts. In his view, the reasoning behind the *Finnish Ships Arbitration* was poor and not a valid precedent.

14. Some drafting changes should be made to article 11. In paragraph 31 of the report, the Special Rapporteur had expressed doubts about the wisdom of retaining the sentence in brackets, but since the latter set out criteria, rather than examples, and as any decision on the matter in question was rather subjective and rested on a nexus of fairly complex factors, it was perfectly legitimate to keep the sentence in brackets. His main criticisms were directed more at the explanation and the terminology employed by the Special Rapporteur than at the text of the draft article itself. On several occasions a distinction had been drawn between direct and indirect injury and even between a direct and an indirect claim. In his opinion, such terminology was highly misleading and ought to be avoided at all costs. Indirect injury did not stem directly from an internationally wrongful act; the latter was merely a contributory factor, whereas direct injury was the direct result of such an act. Since that was not, however, the point at issue, there would be merit in using a different vocabulary. In the French-speaking world, legal theorists distinguished between *dommage médiate* and *dommage immédiat* (“mediate” and “immediate” injury). “Immediate” injury was that suffered directly by the State. “Mediate” or remote injury was that suffered by the State in the person of its nationals. If those were the types of injury referred to in the draft articles, the Commission was unfortunately cleaving to the fictive aspect of the *Mavrommatis* case and, if that was so, the French terminology would be greatly preferable to that used by the Special Rapporteur.

15. The passage, cited in paragraph 26 of the report, of the judgment by ICJ in the *Interhandel* case showed how artificial the *Mavrommatis* fiction was. The statement by the Court that “one interest and one alone” [p. 29] was the sole cause of the proceedings reflected the reality in an infinitely more convincing manner, in that cases involving diplomatic protection were concerned solely with the interest of the protected person.

16. Lastly, while from the point of view of legal theory he disagreed with the Special Rapporteur, he agreed with the draft articles and proposed that they should be referred to the Drafting Committee.

\* The report was corrected as follows: in the last sentence of paragraph 4, for “no less than five articles” read “several”; and in article 10, paragraph 1, for “article 15” read “article 14” (A/CN.4/514/Corr.1).

17. Mr. HERDOCIA SACASA, describing the report as well balanced and containing no major surprises, said it dealt with the topic in a fairly traditional manner. Proposed articles 10 and 11 provided a good basis for discussion. The exhaustion of local remedies was a well-established rule and an important principle of customary international law.

18. The Convention relative to the Rights of Aliens, of 1902,<sup>5</sup> stated that, when aliens brought claims against States, those claims should not be made through diplomatic channels unless there was a manifest denial of justice by a court, unusual delay or an obvious violation of principles of international law. The principle had been expressed in similar terms in 1925 by the American Institute of International Law in Project No. 16 concerning “Diplomatic Protection”.<sup>6</sup> The Seventh International Conference of American States, held in Montevideo in 1933, had taken the same view in its resolution on “International responsibility of the State”.<sup>7</sup>

19. It had been rightly said during the discussion on article 9 that there were differences between the protection of human rights and diplomatic protection, but it was important to establish what those differences were. In the case of protection of human rights, the exhaustion of local remedies made reference to international law: the new rules of the Inter-American Commission on Human Rights established that the Commission would verify whether local remedies had been exhausted in accordance with the generally recognized principles of international law. There was a similar provision in the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). The Inter-American Court of Human Rights, in the *Velásquez Rodríguez* case had pointed out that the reference to the principles of international law showed, inter alia, that those principles were relevant not only to determine in which situations the exhaustion of local remedies was exempt but also because they were necessary elements for the analysis by the Court of problems related to the way in which non-exhaustion of local remedies must be proved or the question of who bore the burden of proof, or even the meaning to be attached to “local remedies”.

20. Principles had been developed by commissions and courts concerning the effectiveness, sufficiency and nature of local remedies. In his third report on State responsibility, García Amador had asked what would happen if local remedies were ineffective, or did not exist, or if there was too great a delay in securing them.<sup>8</sup> That was not dealt with in article 10, which spoke only of the exhaustion of all available local legal remedies. There was a discrepancy between that article and article 45 of the draft articles on the responsibility of States for internationally wrongful acts, which said that the responsibility of a State might not be invoked if the claim was one to which the rule of exhaustion of local remedies applied

and any available and effective local remedy had not been exhausted. The concepts of availability and effectiveness were of crucial importance and should appear in the draft article. The commentary to article 45 reaffirmed that only those local remedies that were available and effective had to be exhausted before invoking the responsibility of a State. In other words, the word “all”, in article 10, would impose an excessive burden on the injured person, although it was anticipated that the possibility of an injured person being prevented from exhausting local remedies would be covered in a future draft article.

21. The rule of exhaustion of local remedies was far from being a dogma and there could be exceptions which were linked to their effectiveness and appropriateness. Article 22 of the draft on State responsibility originally proposed by Special Rapporteur Ago,<sup>9</sup> had referred to “effective” local remedies.

22. In the Spanish version, paragraph 1 of article 10 said that a State may not bring an international “action” (*acción*) arising out of an injury to a national. Article 45 of the draft articles on the responsibility of States for internationally wrongful acts used the word “claim” (*reclamación*), and he wondered what the Special Rapporteur’s view was on that matter. He agreed with the Special Rapporteur that there was a close link between exhaustion of local remedies and denial of justice, which raised the question of whether a flexible analysis should be made in regard to the distinction between primary and secondary rules.

23. As for article 11, he agreed with other members that the sentence in square brackets, or at least the items mentioned in the sentence, should be retained.

24. Mr. OPERTTI BADAN said that local remedies had to be available and effective, and the exhaustion of local remedies in each State was posited on respect for the sovereignty and jurisdiction of that State. Accordingly, it was a question of deciding what the remedies were that had to be exhausted. Each State regulated its remedies in accordance with its own procedures, which depended on the legal family to which it belonged. In many cases, constitutional law was responsible for establishing principles regarding procedural guarantees. When considering remedies and their exhaustion it was essential to find a way of distinguishing between those remedies which were by definition mechanisms for defence in the service of justice and those which were mechanisms directed to control of the State’s legislative activity and the effects and scope of that activity.

25. At the fifty-second session, Mr. Brownlie had said that diplomatic protection could be exercised if a foreign national was able to prevent the injury in question through a legislative act that was under discussion. That was a typical case of a remedy which was not *stricto sensu* available and effective to the person making the claim. Care had to be taken in referring to exhaustion of remedies that reference was not made to other mechanisms that were available: the remedies had to be available to any interested citizen and not just to injured persons.

<sup>5</sup> Partially reproduced in *Yearbook . . . 1956*, vol. II, p. 226, document A/CN.4/96, annex 5.

<sup>6</sup> See 2680th meeting, footnote 6.

<sup>7</sup> Reproduced in *Yearbook . . . 1956*, vol. II, p. 226, document A/CN.4/96, annex 6.

<sup>8</sup> *Yearbook . . . 1958*, vol. II, p. 47, document A/CN.4/111, at pp. 55–60.

<sup>9</sup> See 2688th meeting, footnote 6.

26. The remedy of cassation, which differed depending on the legal system, was available in some cases only, keeping a check on the law and not on acts. While that remedy was concerned with the regularity or irregularity of the law applied and the act of application of the applicable legal rule, it could not be assimilated to a body of third instance nor was it compulsory. It was a remedy which must be available so that the person concerned could determine whether it was appropriate to apply it.

27. Another important element to consider was that of contentions. In paragraph 16 of his report the Special Rapporteur mentioned that all the contentions of fact and propositions of law should be exhaustively presented in municipal proceedings. The arguments of a claim naturally constituted a unity, and there should be no innovation in submitting the claims in international courts. But it was clear that at the international level the bringing of an international claim added to the local arguments. Hence, the reference to the identity of arguments should be nuanced in order to acknowledge the diversity of jurisdictions in which claims were made. In local courts, for example, a claim would necessarily exhaust the arguments for local remedies, but not the contentions for international remedies.

28. As for the basis of an injury, paragraphs 18 and 19 of the report went to the heart of the matter. He agreed with Mr. Pellet and others that it would be preferable and certainly clearer to speak of “mediate” and “immediate”, rather than “indirect” and “direct”, injury. In any event, the terms should refer not to the effect but to the fact which gave rise to the claim. Plainly, an injury that was “immediately” caused by the unlawful act of a State called for exhaustion of local remedies, and until that had occurred no diplomatic protection could be exercised. That was the idea of denial of justice, but there should be no link between exhaustion of local remedies and denial of justice because the latter did not in itself imply the former; it could come from a failure to exhaust local remedies. It was an autonomous hypothesis that should not conceptually be rigidly linked with the principle of exhaustion.

29. International diplomatic protection did not add a new instance to local remedies, so that an act of the State could not establish a *litis consortio* that was active between the subjective litigant and the State. It was the State that defined its status as the claimant, and that was something that had to do with the discretionality with which protection was exercised. It was in part political law. A State could reach the conclusion that it was appropriate and reasonable to exercise protection, but it could also decide otherwise. It struck a balance between the act and its scope and the appropriateness of taking action. Diplomatic protection must be clearly separated from the other means of protection of human rights, which had mechanisms in which discretionality disappeared and under which it was the person who had the right, not the State itself, that was the individual subject of the claim.

30. Lastly it was quite clear that protection of legal persons opened up too broad an area for diplomatic protection in a globalized world. It was impossible to reason in the same way as a few years ago, and the Commission should be very careful in its use of language that ranked

diplomatic protection of individuals with protection of legal persons. The issue was a very sensitive one and the text, directly or indirectly, alluded to legal persons as if they could be assimilated to individuals. It raised the danger of extending diplomatic protection in such a way as to cause difficulties for States. In his opinion, it would be better to leave references to legal persons in brackets.

31. Mr. HAFNER, referring to article 10 said that he disagreed with certain conclusions drawn by the Special Rapporteur in connection with denial of justice. A clear distinction must be made between denial of justice and the rule on exhaustion of local remedies, from the standpoint of access to local remedies. Under the primary rules, States had a duty to grant access to local remedies, yet such access was also a procedural obligation for the exercise of diplomatic protection. Access to remedies could thus be the subject of two different legal issues, denial of justice, in which the State was under an obligation, and exhaustion of local remedies, in which the obligation was upon the claimant. The problem could be seen merely as an academic one; however, in his view there was no need to deal with denial of justice in the context of the current approach to diplomatic protection.

32. What was far more important was the definition of “local legal remedies”. He agreed with Mr. Lukashuk that more light should be shed on the rich practice of the European Court of Human Rights, with Mr. Gaja that the article 10 should include more on such remedies and with Mr. Pellet that the term “legal remedies” had to be clarified. It certainly included administrative procedures, although the first sentence in paragraph 14 of the report was misleading in that it referred to redress from a tribunal. Administrative authorities were not tribunals, unless the reference was to administrative tribunals only. The last sentence of the paragraph was likewise misleading, as it implied that many administrative procedures common in many countries fell outside the local remedies rule.

33. The question could be raised as to what “legal” meant. The Special Rapporteur indicated that it did not mean discretionary remedies, but might be taken to include all those legal institutions from which the individual had a right to expect a decision, whether negative or positive. The word “local” had already been queried: did it include a complaint before the European Court of Human Rights? A request for a preliminary ruling by the European Court of Justice? At the current time, a direct claim by an individual against a State was not possible in the latter institution, but the possibility was under consideration.

34. Changes in the whole system of international law had to be taken into account. The instrument of diplomatic protection, including the rule of exhaustion of local remedies, had been established when individuals had had no access to international institutions to present claims against States, but that situation was changing. The Commission must respond to the change, or at least consider it, especially as it had already been addressed in the literature. Local remedies should not necessarily be deemed to include international institutions accessible by individuals, but some thought should be given to the matter.

35. International environmental law presented a particular case in respect of the definition of local remedies. Was an individual who suffered transboundary damage from acts attributable to a neighbouring State required to exhaust local remedies in that State before diplomatic protection could be granted? That issue had already found its way into the literature. It could be argued that the rule on exhaustion of local remedies had to be applied, since that would give the State the opportunity to make good the original wrong. That position could nonetheless be attacked as unfair, since the individual would be required to go before judicial or administrative authorities in a different country, something that would increase the costs and risks of the procedure. It could also be described as unfair inasmuch as the individual had not voluntarily placed himself or herself under the legal or factual influence of the State, but had been so placed by necessity, namely through proximity to the border. Accordingly, the rule could be deemed not to apply in such a situation.

36. Various recent international instruments stipulated, however, that there was a duty to give foreigners access to judicial and administrative institutions in the event of transboundary damage. The State of origin of the damage could easily say that, because it was obliged to grant access to local remedies, the individual was obliged to exhaust them. However, that reasoning would have to take account of transboundary damage that occurred at great distances, in which case it would be extremely difficult to use institutions in the State of origin, even if they were open to foreigners. For the time being he was inclined to discount the obligation of exhaustion of local remedies in such situations and to consider that the rule applied only if injury originated and occurred within a State's borders. Nevertheless he would be interested to see the Special Rapporteur's reaction on that point. Very little was said in the report about the circumstances in which local remedies did or did not need to be exhausted, yet it was a decisive issue.

37. Article 11 covered a complex matter and he favoured a radical solution: deletion of the article, as it tended to go beyond diplomatic protection. In the situation addressed by the article, different claims could be presented at the same time for two kinds of damage, as Mr. Pellet had pointed out. The question would be whether the separate claims should be combined. In some cases resulting from aerial incidents, for instance, different claims had been submitted for one and the same incident by private individuals as well as by the State. The State itself could be deemed to have been injured by the attack on an aeroplane it owned, but damage, of a different nature, had likewise been done to individuals. That was why he was not convinced of the need for a draft article on the subject, but if it was thought necessary to include one, he agreed with Mr. Gaja that only one criterion should be used to decide whether or not the exhaustion of local remedies should be required.

38. Article 10 should be referred to the Drafting Committee and he would not oppose the referral of article 11 if that was the wish of the Commission.

39. Mr. LUKASHUK said he wished to respond to one point raised in the detailed and incisive statement by Mr. Hafner concerning the dual nature of legal remedies. Le-

gal remedies were determined by the legal system of the State, but they also included administrative measures. For example, the release of an alien who had been unjustly detained was an administrative matter, not a judicial one. The Special Rapporteur should give a brief explanation of that point in the commentary.

40. Mr. PELLET, referring to Mr. Hafner's point about bringing cases before regional human rights institutions, asked whether he was envisaging a complement to the exhaustion of local remedies, namely the exhaustion of regional human rights remedies. If so, it was an attractive idea but one that needed further elaboration. The rule on exhaustion of local remedies would appear not to enter into play at all if a State opposed a claim for diplomatic protection on the pretext that regional remedies had not been exhausted: the State would be bound by the treaty creating the regional human rights court.

41. Mr. HAFNER said he fully agreed with Mr. Lukashuk that the definition of legal remedies should be fleshed out and that additional criteria should be addressed: he had wished to provoke discussion on precisely those points. The experience of applying article 6 of the European Convention on Human Rights could be used, judiciously, in relation to the definition of tribunals and local remedies. Responding to Mr. Pellet, he said he did not think that the exhaustion of local remedies entailed the submission of a complaint to, for example, the European Court of Human Rights, but that possibility should nevertheless be mentioned in the commentary, since it had already been raised in the literature.

42. Mr. GOCO said he thought the term "local remedies" was generally understood by both laymen and lawyers as relating to the entire system of legal protection within a municipal system.

43. Mr. BROWNLIE said the report was helpful and thorough. Although he experienced some difficulties with articles 10 and 11, he was in favour of referring them to the Drafting Committee. He agreed with Mr. Gaja's suggestions regarding a more synthetic approach and in particular the replacement of "available" remedies by "effective" remedies.

44. Everyone agreed that a customary rule did exist, yet there was a limit to the specificity that could be required in legal regulation in that area. The local remedies rule was applied in a highly contextual manner, as could be seen from the range of relevant cases, including the *Finnish Ships Arbitration*, which dated back to the 1930s.

45. He was uncomfortable with the relationship posited by the Special Rapporteur in paragraph 27 between direct injury and the seeking of declaratory relief by a State, for he was not convinced that the relationship existed. What troubled him most, however, was that no one seemed to have looked into the policy basis for the local remedies rule, and he would like to hear other members' views on that matter. In his opinion, there was a highly pragmatic reason for it: busy foreign ministry officials did not wish to see private claims get in the way of government, particularly relations with other States, and sought to dispatch private claims, to the extent possible, for settlement in local courts.

46. The result was very similar to the workings of the jurisdiction established by the European Convention on Human Rights, although the policy basis there was different. That jurisdiction was not a system of appeals from local courts but instead a monitoring arrangement. The assumption, as set out in article 13 of the Convention, was that States had to make local remedies available and that the Convention applied domestically, but only as a correction of the situation created under domestic legislation. The Convention was neither a substitute for nor an invasion of domestic jurisdiction, at least not in law, because it was treaty-based. Examples from its workings could be informative, but they should be used with some caution, precisely because of the differing policy background. Looking at the policy background to diplomatic protection might also facilitate the fine tuning that had to be done in relation to such issues as whether a private claimant should have a voluntary link with the jurisdiction concerned as a condition for application of the local remedies rule.

47. Mr. LUKASHUK said that Mr. Brownlie's statement had crystallized an idea that had been taking form in his mind: it might be worthwhile to incorporate in a separate article a positive obligation for States to establish effective remedies against the violation of foreigners' rights.

48. Mr. ECONOMIDES said that the report was clear, detailed and very useful. Article 10 presented some problems, but they were merely of a drafting nature. To whom, for example, must a State submit an international claim—another State, an international organization or a domestic or international court? Surely, it should be to the State which, through an internationally wrongful act, had injured a national—a natural or legal person—of the State that was exercising diplomatic protection, but that should be made clear in article 10, paragraph 1.

49. He queried the French phrase *formuler une réclamation internationale* (bring an international claim) and would prefer the words *présenter une requête de protection diplomatique* (submit a request for diplomatic protection). He agreed with other members that the phrase "available local legal remedies" should be explicated. Article 22 of the draft on State responsibility proposed by Roberto Ago, quoted in paragraph 4 of the report, had spoken of "effective local remedies available". He agreed with Mr. Herdocia Sacasa that it was only effective remedies, not all the remedies theoretically available, that were involved. The word "legal" before "remedies" was superfluous and could be deleted in both paragraphs 1 and 2, as the remainder of paragraph 2 clearly explained that the remedies were legal in nature.

50. Article 11 was highly complex and its application would be difficult, if not impossible. The preponderance of injury to a State as opposed to injury to a national was a difficult notion, as Mr. Goco had pointed out. Again, the reference to a request for a declaratory judgement related to the claim complicated matters further. The provision should be radically simplified by stressing the essential points. First, it should be made clear that the requirement of exhaustion of local remedies applied solely to cases of diplomatic protection, but that was already stated quite well in article 10 and must not be repeated. Next, it should

be indicated, in article 11 or elsewhere, that if the main victim was in fact the State that had suffered the injury, the national of that State being only secondarily or incidentally affected, the rule of exhaustion of local remedies did not apply, since the situation was one of direct responsibility between States.

51. A third situation might arise if preponderance could not be applied because the injury suffered by the State was equivalent, or nearly so, to that suffered by the individual. That situation was not envisaged in the report and to his knowledge there were no relevant rules of international law. Preponderance could be given to injury to the State, in which case the rule of exhaustion of local remedies would not apply, or to injury to the individual, in which case the rule would operate. Parallel claims could also be envisaged—by the State, in the context of international responsibility, and by the national, under diplomatic protection.

52. He agreed with Mr. Lukashuk that article 11 should be revisited with a view to simplifying or even deleting it, as suggested by Mr. Hafner. Lastly, he concurred that the article should deal with the important issue of denial of justice.

**Reservations to treaties<sup>10</sup> (continued)\* (A/CN.4/508 and Add.1–4,<sup>11</sup> A/CN.4/513, sect. D, A/CN.4/518 and Add.1–3,<sup>12</sup> A/CN.4/L.603 and Corr.1 and 2)**

[Agenda item 5]

**FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (continued)\***

53. Mr. PELLET (Special Rapporteur), introducing his sixth report (A/CN.4/518 and Add.1–3), regretted that, for a variety of reasons, including his ever-growing realization of how complex the subject was, his task had not been completed. The decision of the Commission to give priority to other topics, however, made the delay less important. There would not be time for the Drafting Committee to consider all 14 draft guidelines, but he hoped that the Commission would at least refer them to the Committee, which would then consider them under a newly elected Commission.

54. The introduction to the report sought to bring all the latest information to bear on the topic. In particular, paragraphs 20 to 23 contained the latest information on the difficulty that seemed to have arisen between the International Law Commission and the Subcommission on the Promotion and Protection of Human Rights, which, by its resolution 1999/27 of 26 August 1999, had appointed Ms. Françoise Hampson Special Rapporteur with the task of preparing a comprehensive study on reservations to human rights treaties. Her report had not yet appeared, as far as he knew. Moreover, given the lack of

\* Resumed from the 2679th meeting.

<sup>10</sup> For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth, fifty-first and fifty-second sessions, see *Yearbook . . . 2000*, vol. II (Part Two), para. 662.

<sup>11</sup> See footnote 2 above.

<sup>12</sup> See footnote 3 above.

enthusiasm displayed by members of the International Law Commission for the idea that he should approach Ms. Hampson directly, he had not taken any further action over the past two months. The report also gave indications concerning new events regarding reservations to treaties; in that context, he asked any members who were aware of any jurisprudence, practice or studies not mentioned in the report to inform him.

55. Chapter II of the report discussed the fairly minor—although unexpectedly complicated, since, as Mr. Brownlie had said, the devil was in the detail—issue of the formulation of reservations. He wished to emphasize that for the time being only reservations were being considered; acceptance or objection was to be considered at the next session. Some of the draft guidelines appearing in the annex to the sixth report, containing the consolidated text of all the guidelines on the formulation of reservations and interpretative declarations proposed in the fifth (A/CN.4/508 and Add.1–4) and sixth reports, were already obsolete, since the Drafting Committee had, to his considerable displeasure, deleted some of them. The annex would, however, be useful in indicating how he had proceeded.

56. He proposed to begin by introducing guidelines 2.1.1 to 2.1.4, 2.4.1 and 2.4.2, which included two *bis* drafts (2.1.3 *bis* and 2.4.1 *bis*) that were currently in square brackets and might be deleted from the final version. He was also submitting two alternatives for guideline 2.1.3.

57. Guideline 2.1.1 (Written form) related to the form of reservations, which had to be in writing. There was no equivalent with regard to interpretative declarations, although the requirement of the written form was taken up in guideline 2.4.2 (Formulation of conditional interpretative declarations). Guideline 2.1.1 reproduced the text of the first sentence of article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions. He considered it important that the Guide to Practice should be able to stand on its own. It should therefore contain all the information needed to formulate and implement reservations and interpretative declarations, whether they appeared in the Conventions or not. The corollary of that was that, if provisions on reservations to treaties appeared in the Conventions, they should be reproduced word for word in the Guide. Paragraphs 40 to 47 of the report recalled the *travaux préparatoires* for the Conventions, in connection with which he pointed out that there had been practically unanimous agreement that it went without saying that reservations must be in writing. “Practically” unanimous, because the question had arisen during the discussions in the Commission as to whether a reservation could be formulated orally. It was not impossible but, as Sir Humphrey Waldock had observed, that was of little practical consequence, because under article 23, paragraph 2, of the Conventions, a reservation had to be formally confirmed at the time of the definitive consent to be bound. That undoubtedly implied that confirmation should be in written form, as stated in guideline 2.1.2 (Form of formal confirmation). Some reservations were “perfect” and did not need confirmation, in cases where they were made at the time of the signature of a treaty that was not subject to ratification. In such cases, however, it was clearly essential that the reservation should be in writing from the

outset. There was no need to devote a separate guideline to the matter: it was required under guideline 2.1.1 and was again taken up in guideline 2.2.3 (Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]), which had been retained by the Drafting Committee.

58. It remained to be seen whether the rules, which he doubted would pose particular problems, could be transposed to interpretative declarations. That question was broached, and some solutions sought, in paragraphs 83 to 90. Practice, which was far from accessible, was not very helpful in that respect. A distinction should be drawn between “simple” and conditional interpretative declarations. The former—in accordance with the definition contained in guideline 1.2 (Definition of interpretative declarations)—had the sole object of specifying or clarifying the meaning or scope that the author gave to the treaty or to certain of its provisions. There was no reason to require them to take any particular form nor did the rare decisions on the subject do so. That was why guideline 2.4.1 (Formulation of interpretative declarations) contained no requirements as to the form of interpretative declarations. The problem was, however, quite different in cases of conditional interpretative declarations, which guideline 1.2.1 (Conditional interpretative declarations) defined as declarations whereby the State or international organization subjected its consent to be bound to a specific interpretation of the treaty or of certain provisions thereof. In such cases, there was no reason to do away with the accepted rule on reservations, whereby a State or international organization making a conditional interpretative declaration wished to set its interpretation against that of the other parties. The latter should, of course, be aware of that and be ready to react if need be. That was the justification for requiring the written formulation of reservations and the same should therefore apply to conditional interpretative declarations, as provided for in guideline 2.4.2.

59. In that context, he would point out that the rules applying to conditional interpretative declarations were identical to those on reservations, even if their definitions were not. Some members of the Drafting Committee had therefore considered it superfluous to devote specific provisions to conditional interpretative declarations. While that might be true, he urged the Commission to wait until it had considered the effects of reservations and of conditional interpretative declarations before reaching a final decision. Only then, if it was found that the two followed the same rules, would he be fully in favour of deleting all the guidelines relating specifically to conditional interpretative declarations and adopting a single guideline stating that the rules relating to reservations would also apply *mutatis mutandis* to conditional interpretative declarations. Meanwhile, it would be prudent not to change course abruptly. He acknowledged that some members of the Commission knew far more than he about the law on reservations and interpretative declarations, but he would still urge that the Commission should not compromise the possible force of the Guide to Practice by taking a decision that it might later regret.



60. Returning to specifics, he said that the consequences of formulating a reservation or a conditional interpretative declaration were dealt with, respectively, in paragraphs 53 to 82 and paragraphs 85, 86 and 89 to 95. The Commission was not constrained by the 1969 and 1986 Vienna Conventions in that regard, since they did not mention any consequences. Sir Humphrey Waldock, however, had successfully suggested, in article 17 of the draft articles on the law of treaties,<sup>13</sup> that they should specify not only the kind of instruments in which reservations should appear—it was pointless for the Guide to Practice to broach the matter, since the list was not exhaustive and Sir Humphrey Waldock had acknowledged that there were no special rules in that regard—but also the person or the organization competent to do so. As stated in paragraph 54 of the report, Waldock's definition was unsatisfactory, being both repetitive, non-restrictive and somewhat tautological. In that regard, he drew attention to an error in the footnote to that paragraph: paragraph 43 of his report, referred to therein, contained the text of article 18, paragraph 2 (a), of the draft articles on the law of treaties adopted by the Commission at its fourteenth session,<sup>14</sup> which was silent on the question of competence. The reference should have been to article 17 proposed by Sir Humphrey Waldock.

61. The Commission was not entirely without guidance, however, since reservations had an effect not on the formal instrument that constituted the treaty, which remained unaffected, but on the parties, or the *negotium* itself. It would therefore be logical to ascribe the competence to make reservations to those authorized to commit the State or international organization to the treaty itself, and to them alone. And those competent authorities were fully enumerated in article 7 of the 1969 and 1986 Vienna Conventions. The practice was wholly confirmed by that of the United Nations Secretary-General, who systematically called for reservations sent to him by an authority other than the "three authorities" mentioned in article 7, paragraph 2 (a), to be regularized by one of those authorities or the grant by one of them of full powers to another representative. Nevertheless, as indicated in paragraphs 63 and 64 of the report, one might well ask whether the ambassador to the depositary State and the permanent representative to an international organization which was a depositary could not, without being given special powers, be authorized to formulate a reservation, the more so as that was the practice in OAS and the Council of Europe, which were, after all, significant depositaries. He had given much consideration to the question of whether to suggest giving more flexibility to the rules of article 7, which, incidentally, did not formally relate to reservations, or whether to retain the requirement for the three authorities—which, in fact, amounted to more than three under the 1986 Vienna Convention—listed in article 7, paragraph 2. He would welcome the advice of the Commission.

62. Meanwhile, he had produced alternative texts for guideline 2.1.3 (Competence to formulate a reservation at the international level), appearing in paragraphs 69

and 70, which were both hybrids, reproducing the rules in article 7 but preceded by the phrase "Subject to the customary practices in international organizations which are depositaries of treaties". That had the advantage of challenging neither the principles of article 7 nor the practices of the Council of Europe and OAS—and, he believed, IMO—which seemed not to have caused any particular problems, judging by the replies given by those organizations to the questionnaire on reservations to treaties. He was open to persuasion: both solutions had their merits and drawbacks. A decision must, however, be taken one way or the other.

63. He also sought the advice of the Commission on the two drafts of guideline 2.1.3. His own preference was for the longer version contained in paragraph 70, which, with the addition referred to earlier, reproduced the text of the 1986 Vienna Convention; the Guide to Practice should be able to stand on its own and, if the shorter version were adopted, the user would need to refer to the Convention. It would be possible to omit from the longer version paragraph 2 (d), in which, although it came from article 7 of the Convention, the hypothesis envisaged was marginal. He was nonetheless ready to retain it for the sake of completeness.

64. The considerations that applied to reservations also applied, *mutatis mutandis*, to interpretative declarations, whether conditional or not, although "simple" interpretative declarations did not require as much formalism as reservations. They could not in themselves commit a State or an international organization making them unless they were made by a person with the authority to do so. To avoid any abuse, therefore, such authorization should be limited to people or bodies competent to represent the State for the adoption or authentication of a treaty, or to express consent to be bound. That notion was expressed in guideline 2.4.1.

65. Reservations and interpretative declarations were, like treaties themselves, at the interface between internal and international law. Before being formulated at the international level, reservations were made at the internal level. That obvious truth had led him to wonder whether the Guide to Practice should include guidelines on internal procedures for the formulation of reservations and interpretative declarations and, in particular, on the requisite competence. Replies to the questionnaire on reservations to treaties showed that no general rule was followed; States and international organizations differed widely in their practice and international law had nothing to say on the subject. Simply to set his mind at rest, he had drafted two guidelines to cover that point—2.1.3 bis for reservations and 2.4.1 bis for interpretative declarations—but he doubted that they were really needed. Users of the Guide would not be illiterate in legal matters, after all, and those draft guidelines really stated the obvious. Even if international law was silent on internal procedures, the fact remained that a breach of internal regulations might invalidate a reservation, or a ratification, at the international level. Article 46 of the 1969 and 1986 Vienna Conventions dealt with the matter in an admirably pragmatic way, saying that the violation of a provision of its internal law regarding competence to conclude treaties did not invalidate a State's consent to be bound inter-

<sup>13</sup> *Yearbook* . . . 1962, vol. II, p. 60, document A/CN.4/144.

<sup>14</sup> *Ibid.*, p. 176, document A/5209.

nationally unless that violation was manifest and concerned a rule of its internal law of fundamental importance. The question was whether that provision should be transposed to reservations. Having found no evidence of practice one way or the other, he found it hard to take a categorical stance. However, on balance, he believed that transposition was not desirable. It would be extremely difficult—or even impossible—to establish, in accordance with article 46, that a violation was “objectively evident”. There was no “normal practice” among States and international organizations. Moreover, rules on ratification were generally of a constitutional nature, accessible to other States, whereas those on procedure and competence with regard to reservations were, in most States, empirical, relating to practice rather than parliamentary acts or the constitution. If it was decided that reservations could not be subject to the same rules as imperfect ratifications, however, that should be expressly stated in the Guide, since it was not obvious on the face of it. That was the aim of guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations). If a violation with regard to competence to formulate reservations had consequences at the international level, it followed that the same applied to interpretative declarations, whether conditional or not, as stated in paragraph 2 of guideline 2.4.1 bis. Perhaps, however, it was too obvious to need stating. There, too, he would welcome guidance: he recognized that, while the reasons he had given were not necessarily Cartesian, his own enthusiasm for Cartesianism was not shared by all members of the Commission.

66. He hoped that draft guidelines 2.1.1 to 2.1.4, 2.4.1 and 2.4.2 could be referred to the Drafting Committee, where they could be improved. During the discussion, however, he would be grateful for answers to a number of questions in particular. First, should the Commission adopt for reservations the rules in article 7 of the 1969 and 1986 Vienna Conventions on competence to express consent to be bound, or should those rules be made more flexible? Secondly, which of the two suggested versions of guideline 2.1.3 would provide a better basis for discussion in the Committee? Thirdly, if, as he would prefer, the longer version of guideline 2.1.3 was adopted, should the marginal hypothesis contained in paragraph 2 (*d*) be mentioned? Fourthly, should the Guide to Practice contain guidelines on competence at the internal level to formulate a reservation or interpretative declaration? Lastly, should there be a guideline on the international consequences—or lack thereof—of a violation of internal rules on the formulation of interpretative declarations? As far as reservations themselves were concerned, he had no doubt that their international consequences must be mentioned in the Guide.

*The meeting rose at 1 p.m.*

## 2690th MEETING

*Tuesday, 17 July 2001, at 10 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

### Diplomatic protection<sup>1</sup> (*concluded*) (A/CN.4/506 and Add.1,<sup>2</sup> A/CN.4/513, sect. B, A/CN.4/514<sup>3</sup>)

[Agenda item 3]

#### FIRST AND SECOND REPORTS OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of articles 10 and 11, contained in the second report of the Special Rapporteur (A/CN.4/514).

2. Mr. MOMTAZ said that the rule that local remedies must be exhausted, set forth in article 10, was indisputably a rule of customary international law, supported by case law, legal writings and State practice and based on respect for the sovereignty and jurisdiction of the State on whose territory the wrongful act had been committed. Two important questions merited closer attention. The first concerned the meaning and scope of the definition of “local legal remedies”, while the second related to the circumstances in which it was not necessary for local remedies to have been exhausted.

3. The Special Rapporteur’s answer to the first question was satisfactory, although it required fuller explanation in the commentary. For instance, the Special Rapporteur excluded from the scope of the provision administrative and other remedies which were not judicial or quasi-judicial, and were of a discretionary character. He had some doubts as to the validity of such an approach, for, given that the purpose of local remedies was to provide

<sup>1</sup> For the text of draft articles 1 to 9 proposed by the Special Rapporteur in his first report, see *Yearbook . . . 2000*, vol. I, 2617th meeting, para. 1.

<sup>2</sup> See *Yearbook . . . 2000*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

satisfaction for the victim, what counted was the result, not the means whereby it was achieved. Consequently, there was no reason to exclude the means available to a country's authorities to provide relief in the exercise of its discretionary powers, particularly in view of the fact that remedies as of grace were sometimes more effective than legal remedies. On the other hand, he agreed with the Special Rapporteur that the commentary should retain the notion that the exhaustion of local remedies also included the use of legal procedural facilities which municipal law made available to litigants before courts and tribunals. He thus found paragraph 15 of the report entirely satisfactory.

4. The commentary should perhaps also mention the cases in which the States concerned, namely, the State on whose territory the wrongful act had been committed and the State whose national had been injured, had come to an agreement not to require the application of the rule that local remedies must be exhausted. That was what had happened when the United States and the Islamic Republic of Iran had undertaken to settle their disputes before a court of arbitration. The converse could arise when States agreed to offer their nationals remedies before international bodies. That question perhaps deserved a mention, even though it did not strictly concern local remedies.

5. With regard to the second question, he noted that article 10 simply stated that local remedies must be "available". However, according to paragraph 17 of the report, that meant that the remedies must be available both in theory and in practice. Moreover, in paragraph 13, the Special Rapporteur referred to the jurisprudence of the European Court of Human Rights in the *Nielsen v. Denmark* case, according to which the local remedy must offer "an effective and sufficient means of redress" [p. 438]. That led one to suppose that local remedies would not have to be exhausted in the absence of effective means of redress. Yet, unlike the criterion of availability, which was eminently objective, the criterion of effectiveness was highly subjective. How was the effectiveness of a local remedy to be determined? That question inevitably raised the question of fair trial, one that was somewhat controversial in international law. The administration of justice was one of the essential attributes of the sovereignty of States. States must clearly ensure that their judicial system met the required standards of independence and impartiality, but other States should not, *a priori*, make value judgements concerning the effectiveness or ineffectiveness of other States' judicial systems. In his view, the rule that local remedies must be exhausted should be disallowed only in exceptional cases, for instance, when there had been an unjustified delay in the proceedings or when the judicial apparatus of the State concerned had collapsed.

6. The wording of article 11 was entirely satisfactory. However, the commentary should refer to cases where the wrongful act injured the nationals of several States. It would also be better, as suggested by the Special Rapporteur, to leave it to the commentary to deal with the question of the factors to be taken into consideration in deciding whether the claim was "direct" or "indirect". As for denial of justice, that was covered by the availability condition set forth in article 10 and there was thus no need to refer to it again. Lastly, it was appropriate and

useful to maintain the distinction between primary and secondary rules.

7. In conclusion, he recommended that both draft articles should be referred to the Drafting Committee.

8. Mr. ELARABY said that respect for the sovereignty of States was the rationale for the rule that local remedies must be exhausted, a fact that was of great importance for the developing countries. Although, as several members had pointed out, the Commission would not be able to discuss the question in depth except in the light of article 14, he nevertheless wished to make three brief comments of a practical nature.

9. The first related to the nature and dimensions of the remedies available. Should the rule that local remedies must be exhausted be interpreted as extending to the highest available court of law in the land? In some countries, such as Egypt and France, there was a court of last resort, the Court of Cassation, which ruled only on points of law, never on points of fact.

10. The second question concerned the amount of compensation, which might vary from one country to another, *inter alia*, because of differing levels of economic development. Might it be possible for a litigant who had obtained compensation in one country to introduce a second claim in another country where the amount of potential compensation was higher? Could such a situation arise?

11. The third point related to paragraph 16 of the report, according to which, in order to satisfactorily lay the foundation for an international claim on the ground that local remedies had been exhausted, the foreign litigant must raise in the municipal proceedings all the arguments he intended to raise in international proceedings. Personally, he thought that that restriction was likely to penalize litigants. The time factor was important, as it was probable that the municipal proceedings would precede the international proceedings by several months. It was thus possible that, when local remedies had already been exhausted, new facts might emerge, on which new legal arguments could be based.

12. He considered the wording of article 11 to be satisfactory and recommended that both draft articles should be referred to the Drafting Committee.

13. Mr. GALICKI praised the logical structure on which the Special Rapporteur's proposed set of draft articles was based. The Special Rapporteur began by confirming, in article 10, the general principle that local remedies must be exhausted, including therein a concise definition of the term "local legal remedies". In article 11, he undertook the even more ambitious task of differentiating between so-called "direct" and "indirect" claims.

14. Although he accepted the general substance and structure of both articles, he wondered why article 10 referred to natural and legal persons, while no such differentiation was made in other articles. The Commission had agreed that the draft articles would endeavour to cover the protection of both natural and legal persons and that the term "national" was wide enough to cover both types of persons. Consequently, a distinction should

be drawn between those two categories of persons only when a specific article did not cover both categories.

15. In the description appearing in article 10, remedies to be exhausted were qualified by the four adjectives “all”, “available”, “local” and “legal”. All those characteristics were equally important and none of them should be omitted. In practice, however, problems might arise with non-exhaustion of administrative and other remedies that were not judicial or quasi-judicial in character or were of a discretionary nature. In paragraph 14 of his report, the Special Rapporteur rightly pointed out that those remedies were not covered by the rule that local remedies must be exhausted. On the other hand, article 10, paragraph 2, referred to “judicial or administrative courts or authorities whether ordinary or special” before which local legal remedies were open. The concept of “available remedies” could thus be interpreted differently from country to country.

16. Although the right to exercise diplomatic protection was regarded as the prerogative of States, its practical application depended on the behaviour of individuals. Thanks to the principle of the exhaustion of local remedies, the State could not exercise diplomatic protection unless its national had previously taken legal action. But even when local remedies had been exhausted, intervention by the State was not automatic.

17. As the Special Rapporteur had pointed out in his first report (A/CN.4/506 and Add.1), diplomatic protection remained an important weapon in the arsenal of human rights protection. It was interesting to note that the principle of the exhaustion of local remedies played as important a role in the context of the human rights treaty monitoring bodies as in the field of diplomatic protection. That parallelism seemed to strengthen the links between diplomatic protection and international protection of human rights.

18. With regard to article 11, the main problem concerned the need to determine whether the claim was “direct” or “indirect”, although, in practice, it was often “mixed”, combining elements of injury to the State and of injury to its nationals. To facilitate that determination, the Special Rapporteur included in square brackets a list of factors to be taken into account in deciding that question. Was that list an exhaustive one? If so, the square brackets should be deleted; if not, the list should either be expanded or deleted. In any case, it would be better to avoid giving examples in a codification text and to confine them to the commentary. He therefore proposed that, instead of constructing article 11 as a rule stating that “local remedies shall be exhausted”, it should set forth the exceptions to that rule, beginning with the words “local remedies shall not be exhausted”. Such an approach would be in accordance with the general principle embodied in article 10. Furthermore, it seemed easier to formulate exceptions on the basis of the criterion of the real interests of States than of the highly controversial criterion of the preponderant character of the claim.

19. Nevertheless, he considered that the texts of the two draft articles should be referred to the Drafting Committee, together with the comments on them made in the course of the debate.

20. Mr. ROSENSTOCK said that he endorsed the general approach adopted by the Special Rapporteur and recommended the two draft articles for referral to the Drafting Committee. The Committee would, however, need to have some idea of the form that articles 13 and 14 would take, in order to have an overview of the issue.

21. In reply to the member of the Commission who had expressed doubts as to the subjective criterion of the effectiveness of the remedies, he said that, while those doubts were understandable, some guidance should be given to the institutions that would be called upon to pronounce on the question.

22. Mr. TOMKA said that the method adopted by the Special Rapporteur was unusual. Normally, special rapporteurs began by considering the principles drawn from jurisprudence and doctrine before proposing a draft article. The reverse approach adopted by the Special Rapporteur was not always easy to follow and he wondered about its *raison d'être*.

23. As for article 10, he shared the Special Rapporteur's view that the exhaustion of local remedies rule applied not only to legal remedies, but also to all remedies provided for by the local legal system, including those that were open to administrative authorities.

24. The Special Rapporteur should not have to deal with the question of denial of justice. In fact, if the method the Commission had adopted on State responsibility was correct, the distinction between primary and secondary rules should also apply in the case of diplomatic protection.

25. Without being opposed to article 11, he considered that, in the light of the definition of diplomatic protection that had been adopted, it was not indispensable. In fact, when diplomatic protection was exercised, the rule embodied in article 11 had no *raison d'être*. It would then be sufficient to distinguish between cases where injury was directly caused to the State and those where the State endorsed the claim of a national who had not obtained reparation.

26. Mr. PELLET, referring to Mr. Tomka's question about method, said that the Special Rapporteur was following the guidelines the Commission had given at its forty-sixth session, i.e. that the draft article should be stated first and then the commentary should be written on it.<sup>4</sup> He himself had had difficulty following that method in his own reports, since he was not as disciplined as Mr. Dugard. In terms of substance, he had the same problem as Mr. Tomka in the sense that it was sometimes not clear why the Special Rapporteur was proposing a particular provision, but he did not think that he could be reproached for his method.

27. Mr. AL-BAHARNA said that the Special Rapporteur set out clearly in paragraph 6 of his report the persons required to exhaust local remedies.

28. However, article 10 did not seem to reflect the distinction established by the Special Rapporteur between legal persons which engaged in *acta jure gestionis*, for which the exhaustion of local remedies rule applied, and

<sup>4</sup> See *Yearbook* . . . 1994, vol. II (Part Two), para. 399.

those which engaged in *acta jure imperii*, which were not subject to the rule because injury to them was considered to be a direct injury to the State. He did agree with the Special Rapporteur that too strict a distinction should not be made between primary and secondary rules in the context of diplomatic protection.

29. The Special Rapporteur rightly recalled that, in the *Nielsen v. Denmark* case, the European Commission of Human Rights had stated that the exhaustion of local remedies rule required “that recourse should be had to all legal remedies available under the local law” [p. 440]. Likewise, in the *Ambatielos Claim*, the arbitral tribunal had declared that it was the whole system of legal protection, as provided by municipal law, which must have been put to the test. It was clear from article 10 that what was involved were remedies that were open before ordinary and special courts as well as administrative courts. If judicial and administrative courts could provide a legal or judicial remedy satisfactory to the injured alien, it might seem questionable that the same could be true of special or extraordinary courts. Moreover, the term “authorities” was ambiguous and misleading in that it referred to the political organs of the State and to officials of those organs. The authorities to which the Special Rapporteur was referring in the last footnote to paragraph 14 of his report clearly confirmed that administrative or other remedies which were not judicial or quasi-judicial in character and were of a discretionary character therefore fell outside the application of the local remedies rule.

30. Furthermore, like the Special Rapporteur, he considered that it was not necessary for the principles contained in the cases referred to in paragraphs 14 to 17 of the report to be reflected in the draft article, given that, in practical terms, the expression “all available local legal remedies” covered recourse to all available local remedies, whether procedural or otherwise.

31. Article 11 distinguished between direct and indirect injury to the State. The Special Rapporteur confirmed that the exhaustion of local remedies rule did not apply where the claimant State was directly injured by the wrongful act of another State. It was true that in practice it was difficult to decide whether the claim was “direct” or “indirect” where it was mixed, in the sense that the injury was caused both to the State and to its nationals. In that respect, the draft article introduced the criterion of “preponderance”, which was to be found in both the *Interhandel* and the *ELSI* cases. Accordingly, as stated in paragraph 21 of the report, in the case of a “mixed” claim, it was incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element was preponderant. Article 11 thus stated that the local remedies rule applied where the international claim was brought preponderantly on the basis of an injury to a national, but it did not reflect fully the principles provided in the international cases and claims cited in the report.

32. Moreover, the Special Rapporteur emphasized that article 11 reflected the idea that, if local remedies were required to be exhausted, the dominant factor in the initiation of the claim should be injury to the national. However, the draft article should reflect clearly the case law

principles regarding the direct and indirect factors related to the initiation of the international claim formulated on behalf of the injured national and should indicate the cases in which the preponderance criterion was applicable.

33. Other factors, such as the subject of the dispute, the nature of the claim and the nature of the remedy sought should also be considered in the assessment of whether the claim was predominantly weighted in favour of a direct or of an indirect claim. Those principal factors should be presented in the body of the article and not in the commentary in order to make the draft article more comprehensive and to ensure that it better reflected case law principles. Contrary to what was proposed in paragraph 31 of the report, there was a case for removing the square brackets in the draft article, since the factors in question were not merely examples to be relegated to the commentary, but elements of the rule of which due account should be taken.

34. Mr. LUKASHUK, said he thought that Mr. Al-Baharna was dividing the State in two, with courts, on the one hand, acting within the framework of the law and the administration, on the other, acting outside the law because it did not respect legal rules. However, the law was as compulsory for the administration as for judicial bodies. In many cases, moreover, administrative remedies offered much more effective protection and it would not be wise to exclude them.

35. Mr. AL-BAHARNA said that, in order to clear up any misunderstanding, he had no objection to legal remedies also comprising remedies before administrative bodies. He had particularly emphasized the reference made in article 10 to ordinary and special courts because he considered that it was not justified in the sense that there could be doubts as to the application of judicial or quasi-judicial remedy procedures.

36. Mr. HAFNER, referring to the institution of ombudsman or mediator which existed in certain countries and was even provided for in many constitutions, asked Mr. Al-Baharna whether the exhaustion of local remedies rule applied also to a mediator. In other words, must the ombudsman have been seized before diplomatic protection came into play?

37. Mr. AL-BAHARNA said that he was not trying to call into question recourse to administrative bodies; he was simply wondering about the relevance of a reference to special courts.

38. Mr. GOCO said that each State had its own rules regarding the application of remedies. Thus, under the administrative law applicable in his own country, an entity which invested in the country and expressed reservations concerning or objections to a directive that had been adopted, for example, by the Minister of Commerce, could initiate an administrative remedy. The question was whether such an action enabled the legal remedies proper to the system to be exhausted, since that would avoid subsequently bringing the matter before a court. In fact, when the executive had already taken a decision, addressing the courts could turn out to be ineffective. In the

*Interhandel* case, it had been stated that it was the entire system of local legal protection which should be put to the test, but that was often very difficult.

39. Mr. LUKASHUK said that Mr. Al-Baharna had likened special or extraordinary courts to courts of special jurisdiction, whereas in fact they were simply special bodies which considered certain types of disputes. In the Russian Federation, for example, it was special courts that handled economic or commercial disputes, but they were certainly not courts of special jurisdiction.

40. Mr. DUGARD (Special Rapporteur) said that the question raised by Mr. Hafner was an interesting one. He did not know of any cases in which local remedies had not been exhausted because the injured foreigner had not brought the matter before an ombudsman. Maybe Mr. Hafner knew of some. In any event, the institution of ombudsmen post-dated most of the cases relating to diplomatic protection.

41. Mr. HAFNER said that the question of the ombudsman had come to mind during the debate on what was meant by “administrative bodies”; he had not said that the exhaustion of local remedies rule should apply to the ombudsman. In fact, to his knowledge, an ombudsman was not competent to have a decision which had caused an injury annulled or amended; he could make recommendations, but he could not require an authority to take a particular decision. The fact of addressing an ombudsman could therefore not, in his opinion, be regarded as a local remedy. However, he would like to know the Special Rapporteur’s view on the matter, which was more political than legal.

42. The CHAIRMAN, speaking as a member of the Commission, pointed out that, in certain courts, the ombudsman did have the power to amend the decision of an administrative body. In Uganda, the ombudsman’s jurisdiction was similar to that of an appellate court.

43. Mr. HERDOCIA SACASA said that the principal element with regard to local remedies was their effectiveness. As indicated in paragraph 13 of the report, in the *Nielsen v. Denmark* case, “the crucial point [was] not the ordinary or extraordinary character of a legal remedy, but whether it [gave] the possibility of an effective and sufficient means of redress” (p. 438). As Mr. Momtaz had said, it would be useful to include that element in the draft article itself.

44. Mr. GOCO said that there were many ways of satisfying the rule on the exhaustion of local remedies, and the Office of the Ombudsman was one of them. At the same time, however, a special civil action for *certiorari* could be brought before the Supreme Court if an injured party considered that the ombudsman had committed abuse of discretion or exceeded his jurisdiction.

45. The CHAIRMAN announced that the Commission had completed its discussion of articles 10 and 11. He invited the Special Rapporteur to sum up the discussion.

46. Mr. DUGARD (Special Rapporteur) thanked Mr. Pellet for having rescued him by replying to Mr. Tomka’s

difficult question and confirming that he had followed the practice of the Commission. Articles 10 and 11 did not seem to have presented great difficulties for the members of the Commission, contrary to what had been the case with article 9.

47. In his introductory statement, he had raised the question whether, in addressing the exhaustion of local remedies rule, he should strictly observe the distinction between primary and secondary rules. He had asked the question because the term “denial of justice” cropped up frequently enough in attempts to codify the rule to make him suggest that an article on the subject might be included in the draft. The Latin American members of the Commission, particularly Mr. Sepúlveda, had on many occasions supported that proposition. It was quite clear, however, that the majority of the Commission remained opposed and he would take that into account in his future work. He suspected that the concept of denial of justice would require at least some consideration in the commentaries.

48. Regarding article 10, paragraph 1, there had been some reservations about the phrase “bring an international claim”, but the term “international claim” was used frequently in codification attempts relating to the exhaustion of local remedies. That was a matter that could be considered in the Drafting Committee. A number of members had rightly criticized the inclusion of the words “natural or legal person”. He intended to incorporate in the draft one or more provisions dealing with legal persons, but he agreed that no distinction should be drawn between natural and legal persons except where one wished to make that distinction and that those words should be deleted. It had been pointed out, moreover, that the reference to article 15 was erroneous and should be replaced by a reference to article 14, the text of which was contained in paragraph 67 of the report. Other articles dealing with the issues raised in paragraph 67 might have to be included.

49. There had been strong support for the inclusion of the word “effective” in the phrase “all available local remedies”. His intention had been to deal fully with the rule on effectiveness of remedies in a separate article. Mr. Momtaz had opposed the inclusion of the word “effective” on the grounds that it introduced a subjective element, whereas available remedies could be determined by objective means. There was a considerable amount of State practice, however, which supported the view that the remedies should be both available and effective. Mr. Elaraby had drawn attention to the fact that, in many countries, the highest court had jurisdiction only over legal questions and that, in such cases, an appeal on a question of fact was not available. It might be said that, in such circumstances, the availability test was sufficient. There were instances, however, in which one had to consider the effectiveness of the local remedy in the context of the judicial system of the respondent State, and that meant questioning standards of justice in that State. Cases in which it had to be determined whether there was an effective remedy by looking at the judicial system of the respondent State were few and far between.

50. In paragraph 2, he had attempted to describe rather than to define local remedies, in order to express as general a principle as possible. He had carefully avoided using the term “quasi-judicial” because it had different meanings in different jurisdictions and would raise more difficulties than it would resolve. That, too, was something that the Drafting Committee could consider. The discussion on the question whether the injured individual must approach an ombudsman had emphasized the difficulties involved. As Mr. Hafner had rightly pointed out, in some countries, the ombudsman could make suggestions only on how a case was to be decided, whereas, in others, he had greater powers. To use the dictum quoted in paragraph 13 of the report (see para. 43 above), the crucial point was not the ordinary or extraordinary character of the legal remedy, but whether it gave the possibility of an effective and sufficient means of redress. In other words, one had to look at the facts of the particular case, and that meant that a provision seeking to cover all possibilities had to be drafted. There had been some criticism of the principle expounded in paragraph 16 that the foreign litigant must raise in the municipal proceedings all the arguments that he intended to raise in international proceedings. It had rightly been pointed out that the provision failed to take account of the differences frequently encountered between procedures in municipal law and in international law. The principle was difficult to apply in practice and it was for that reason that he had not attempted to include it in the draft article itself. Mr. Elaraby and Mr. Kabatsi had raised the question of compensation at the national level, asking whether an individual who had failed to comply with all the national procedures could attempt to gain a hearing at the international level. In his view, that was a procedural question and it did not relate to substantive issues such as compensation. Clearly, if the individual was dissatisfied with the quantum of compensation awarded at the municipal level, he could bring it up at the international level. As to whether the individual could seek a remedy at the international level without having exhausted local remedies, he said it was a difficult principle to incorporate in a draft article and should therefore be covered in the commentary.

51. One or two members had felt that one could do without article 11. Others had been in favour of merging articles 10 and 11. Mr. Galicki had made a helpful suggestion as to how that might be done. Most members, however, had been in favour of retaining article 11. Mr. Gaja had suggested that only one of the two criteria proposed, the preponderance test, should be employed, but the general feeling had been that both had to be retained. Most members were opposed to including the factors in square brackets in the draft article. Some had been in favour of retaining them, providing it was made clear that they were part of the rule and not simply examples. The terms “direct” or “indirect” were not used in article 11, although they were employed fairly frequently in the commentary, as had been pointed out by Mr. Economides and Mr. Pellet, who had thought it might be wiser to use the terms “mediate” and “immediate”. That was something that might also be considered by the Drafting Committee.

52. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer articles 10 and 11 to the Drafting Committee.

*It was so agreed.*

**Reservations to treaties<sup>5</sup> (continued) (A/CN.4/508 and Add.1–4,<sup>6</sup> A/CN.4/513, sect. D, A/CN.4/518 and Add.1–3,<sup>7</sup> A/CN.4/L.603 and Corr.1 and 2)**

[Agenda item 5]

**FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (continued)**

53. Mr. PELLET (Special Rapporteur), introducing the second set of draft guidelines proposed in his sixth report (A/CN.4/518 and Add.1–3), said that they consisted of guidelines 2.1.5 (Communication of reservations), 2.1.6 (Procedure for communication of reservations), 2.1.7 (Functions of depositaries) and 2.1.8 (Effective date of communications relating to reservations), dealing with procedures for the communication and publicity of reservations, and 2.4.2 (Formulation of conditional interpretative declarations), paragraph 3, and 2.4.9 (Communication of conditional interpretative declarations), paragraph 2, relating to interpretative declarations.

54. Those six guidelines were based on the same concern, namely, to ensure that reservations were known to the partners of the State or international organization that formulated them so that they could respond in good time. The same was true of interpretative declarations when they called for a reaction or, in other words, when they were conditional interpretative declarations. In accordance with the methods he had used from the start and which the Commission clearly seemed to have endorsed, he had taken the relevant provisions of the 1969 and 1986 Vienna Conventions as a starting point, although they left some grey areas that the guidelines tried to remove. He was thinking in particular of the major relevant provision of the Conventions, article 23, paragraph 1, which stated that a reservation must be communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty. The situation was the same for both States and for international organizations. The contracting States, as indicated in article 2, paragraph 1 (f), of the 1969 Vienna Convention, were those that had consented to be bound by the treaty, whether or not the treaty had entered into force. Identifying which States were entitled to become parties might be extremely difficult in certain circumstances, however. As indicated in paragraphs 101 to 109 of the report, the Commission had hesitated for a long time before incorporating the concept of the State entitled to become a party to the treaty in the provision that was to become article 23, paragraph 1, of the 1969 Vienna Convention. The con-

<sup>5</sup> For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth, fifty-first and fifty-second sessions, see *Yearbook . . . 2000*, vol. II (Part Two), para. 662.

<sup>6</sup> See footnote 2 above.

<sup>7</sup> See footnote 3 above.

cept did not give rise to any particular difficulties when the treaty in question defined the States that were entitled to become parties to it in a clear and restrictive way. That was not always the case by any means, however, and the practice of the Secretary-General showed that there was some confusion in that regard. Curiously enough, no special difficulties were reported in the replies by depositary States to the questionnaire on reservations, although they might be expected to encounter some, especially when they had to communicate the text of reservations to States that they did not recognize or, even worse, to entities that they did not recognize as States. He had wondered whether an effort should be made to define a State entitled to become a party, but had decided against it, since the question of which State or international organization was entitled to become a party to a treaty did not relate to the law of reservations. It arose quite frequently in the law of treaties in general. His position on that point was not categorical, however, and, as indicated in the footnote to paragraph 112 of the report, he would be very grateful if members of the Commission could give him their views on the subject.

55. He had used article 23, paragraph 1, of the 1986 Vienna Convention in drafting paragraph 1 of guideline 2.1.5. His only addition—an important one—was that the communication must be in writing. It was indeed important for States that might have to react to a reservation to be able to do so with full knowledge of the facts, and that meant that the exact text of the reservation must be communicated to them. In addition, that was, if not indispensable, at least very useful in determining the precise date on which the communication was deemed to have been made. It was with that in mind that he had drafted paragraph 2 of guideline 2.1.6, which provided that “Where a communication relating to a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or by facsimile]”. He admitted to having no strong views on that point, which was also one on which he would find the opinion of the members of the Commission useful. With or without facsimile, the requirement of written confirmation, which was, moreover, in conformity with practice, seemed always to come into play for the same reasons, namely, that States and other interested parties must be able to react with full knowledge of the facts.

56. Article 23, paragraph 1, of the 1986 Vienna Convention did not contain anything specifically about reservations to the constituent instruments of international organizations. Guideline 2.1.5 must, however, be supplemented in that regard. Article 20, paragraph 3, of the Convention implicitly required that the organization in question should have had knowledge of the reservation and hence that it should have been communicated to it, even though article 23 did not say as much. That was the practice, after all, and it was sometimes problematic, as demonstrated by the famous reservation by India of 1959<sup>8</sup> to the constituent instrument of the Intergovernmental Maritime Consultative Organization (IMCO), which had subsequently become the International Maritime Organization (IMO). In that case, however, the difficulties had arisen from the substance of the reservation,

not from the communication of the reservation in and of itself. As could be seen from paragraph 121 of the report, such communication was a consistent practice and he proposed that it should be referred to in paragraph 2 of guideline 2.1.5. Some clarification was necessary because of what some saw as the recent watering down of the concept of international organization. He had got the idea for the clarification from a passage in the lengthy arguments by the Secretary-General in the case of the Indian reservation.<sup>9</sup> The Secretary-General had stated at that time that he invariably referred reservations, and accordingly communicated the texts of the proposed reservations, to the body involved when they related not only to the constituent instruments of international organizations per se, but also to conventions that created “deliberative organs”, an expression that very probably referred to the General Agreement on Tariffs and Trade (GATT). A fair number of treaties adopted since the 1960s had set up institutions whose status as international organizations had been challenged, including the treaty monitoring bodies in the fields of disarmament, arms control and environmental protection and the International Criminal Court. In his view, those were indeed international organizations, but, since their characterization as such was sometimes disputed, he proposed to reproduce the phrase used by the Secretary-General in paragraph 2 of guideline 2.1.5, by adding a reference to a convention that created a deliberative organ after the reference to the constituent instrument of an international organization. That was nevertheless a delicate issue on which the views of the members of the Commission would be welcome.

57. As indicated in paragraphs 124 and 126 to 128 of the report, he had wondered whether further clarification would be advisable in guideline 2.1.5. For example, was it necessary to stipulate that the reservation had to be expressly communicated to the heads of secretariat of international organizations? Must it be communicated to any preparatory committees which might exist before the entry into force of the constituent instrument? Must it be communicated to not only the organization, but also to the organization’s member States, when it related to a constituent instrument? In his opinion, that last question should be answered affirmatively, if only as a matter of good policy because, in international organizations, it was always the organs composed of member States that would decide whether a reservation was admissible and so they should preferably know about it as early as possible. That was what was implied by the word “also” in paragraph 2 of guideline 2.1.5. On the other hand, there should be no requirement to communicate a reservation exclusively or expressly to heads of secretariat. That was probably what would happen in practice, but it might not always be the case because of the actual structure of the organization concerned. At any rate, that was of little importance, so long as the text of the reservation reached the organization. Similarly, it seemed unwise to mention preparatory committees expressly; first, it was a moot point whether they always had the capacity to decide whether a reservation was admissible and, secondly, if they did, a reference to “deliberative organs” might suffice. If the Drafting Committee decided not to mention deliberative

<sup>8</sup> See A/4235, annex I.

<sup>9</sup> *Ibid.*, para. 21.



organs, however, the question would have to be reconsidered. Could the rules on reservations contained in guideline 2.1.5 be transposed to interpretative declarations? The answer seemed to be “no” as far as simple interpretative declarations were concerned because they did not involve any formalities and it would be absurd to require that they should be communicated in writing when they did not have to be formulated in writing. In that field, as in many others, however, the regime for conditional interpretative declarations should be modelled on that of reservations. That was the purpose of paragraph 3 of guideline 2.4.2, which transposed *mutatis mutandis* the rules of guideline 2.1.5 to declarations. That was, nevertheless, a provisional arrangement because the Commission would have to decide whether those guidelines on conditional interpretative declarations were needed, but it should not adopt a final position on that point until it had studied and compared the effects of reservations and the effects of conditional interpretative declarations. If the Commission found that conditional interpretative declarations operated in the same way as reservations, it could then delete the draft guidelines relating to them, but it should be careful about doing so until it was certain that they had the same effects.

58. The other draft guidelines related to much more secondary problems, but might help simplify the life of States and international organizations, whether they were the authors of reservations or interpretative declarations, other parties or the depositaries themselves, whose role was dealt with in guidelines 2.1.6 and 2.1.7. As indicated in paragraphs 135 to 138 of the report, the Commission and the special rapporteurs on the law of treaties had, at one time, thought about devoting a special provision to the depositary's role in respect of reservations. They had finally decided not to do so, having rightly considered that that role was the same for all communications relating to treaties. At its eighteenth session, the Commission had therefore decided to include all the rules on notifications, communications and the role of the depositary in what had become articles 77 and 78 of the 1969 Vienna Convention and articles 78 and 79 of the 1986 Vienna Convention.<sup>10</sup> He drew attention to a mistake in paragraph 138 of the report, which should read: “article 78” instead of “article 79”. There was thus no doubt that communications relating to reservations were covered by those general provisions, but the Guide to Practice would be incomplete if those provisions were not reproduced in it after they had been adapted to communications relating specifically to reservations. That was the purpose of guideline 2.1.6, paragraph 1 of which reproduced the wording of article 79, subparagraph (a), of the 1986 Vienna Convention, as adapted to reservations. For the purpose of that adaptation, it had seemed wise to use the terminology relating to reservations in respect of the recipients of those communications rather than the slightly different wording used in the part relating to depositaries. On that technical point, he drew the members' attention to paragraphs 139 to 141 of his report. Furthermore, the *chapeau* of paragraph 1 of the guideline provided for cases in which the contracting States and organizations had expressly or implicitly agreed on other

modalities, just as had been done in the *chapeau* of article 78, paragraph 1, of the 1986 Vienna Convention.

59. When there was a depositary—and there generally was one for multilateral treaties—it should be encouraged to act as speedily as possible. That was the aim of the words “as soon as possible” in guideline 2.1.6, since it was difficult to set a precise deadline, if only because, in practice, deadlines varied from one depositary international organization to another. In fact, the situation seemed to be satisfactory, since, according to the replies of depositary international organizations, communications relating to reservations were made within a period that might be as short as 24 hours, but was never longer than three months. Paragraph 2 of guideline 2.1.6 referred to the form of those communications. For the sake of clarity, he proposed that the important rule contained in article 79, subparagraph (b), of the 1986 Vienna Convention should be reproduced in a separate guideline, which was, for the time being, numbered 2.1.8. It was obviously important to know when those communications took effect, since that date determined the time period during which recipient States could properly formulate objections to reservations in accordance with the provisions of article 20 of the 1969 and 1986 Vienna Conventions.

60. Like article 77, paragraph 1, of the 1969 Vienna Convention and article 78 of the 1986 Vienna Convention guideline 2.1.6 related to the purely mechanical role of the depositary. If there were no differences of opinion between the reserving State, the recipients of reservations and the depositary, there was no problem, but there could be differences of opinion between the reserving State or international organization and the depositary, for example, with regard to the admissibility of the reservation or the recipients of a communication might consider that the depositary had overstepped its role. In such circumstances and particularly in the first case, two attitudes were possible. The depositary could act as a sort of guardian of the integrity of the treaty and some old, well-known episodes vouched for the fact that, in the past, that had been the natural tendency of some depositaries. After the advisory opinion of ICJ on *Reservations to the Convention on Genocide* and the reservation by India to the Convention on the Intergovernmental Maritime Consultative Organization (see para. 56 above), however, the General Assembly of the United Nations had substantially restricted the freedom of action of the Secretary-General in his role as depositary and it was those restrictive rules contained in its resolutions 598 (VI) of 12 January 1952 and 1452 B (XIV) of 7 December 1959 which had been used as a model by the drafters of the 1969 Vienna Convention, article 77, paragraph 2, of which, as reproduced in article 78, paragraph 2, of the 1986 Vienna Convention, permitted the Secretary-General to do no more than bring such questions to the attention of signatory or contracting States and organizations and, where appropriate, of the competent organ of the international organization concerned. That was the “letter-box” principle, it being understood that the “postman” could for all that ring the bell to alert States and international organizations to what was, in his opinion, a problem. He could, however, not adopt a stance, even provisionally. There would be no point in going into detail on the advantages and disadvantages of that system, for it was consistent with positive

<sup>10</sup> *Yearbook* . . . 1966, vol. II, pp. 173 *et seq.*, document A/6309/Rev.1, Part II.

law and embodied in the 1969 and 1986 Vienna Conventions, from which the Commission did not *a priori* wish to depart. Hence there was no alternative but to reproduce those rules and that was what guideline 2.1.7 did.

61. He had forgotten to transpose those rules to conditional interpretative declarations and it would be legitimate to instruct the Draft Committee to rectify that omission and to add a third paragraph to guideline 2.4.9, which would indicate that the provisions of guidelines 2.1.6, 2.1.7 and 2.1.8 also applied to conditional interpretative declarations. The Commission would decide at a later stage whether that provision should be retained.

62. He requested the members of the Commission to give him their opinion on six particular questions which were, of course, in no way exhaustive. First, would it be wise to specify in the Guide to Practice itself what was meant by “State or international organization entitled to become a party to the treaty”? Secondly, even if it was not of fundamental significance, could a communication relating to reservations or conditional interpretative declarations be validly confirmed or made by facsimile, as provided for in square brackets in guideline 2.1.6? Thirdly and more importantly, should reference be made to treaties creating “a deliberative organ that has the capacity to accept a reservation” (guideline 2.1.5, para. 2), in addition to the reference to the constituent instruments of international organizations? Fourthly, should the communication by the depositary of a reservation to the constituent instrument of an international organization exempt the depositary from communicating the text of the reservation to the member States or States entitled to become parties to that constituent instrument? Fifthly, was it necessary to mention in guideline 2.1.5 not only international organizations and, possibly, deliberative organs, but also the preparatory committees which were often set up pending the entry into force of a constituent instrument? Could the members of the Commission agree that the Drafting Committee should provide, at least temporarily, as he very much hoped, that the rules relating to reservations contained in guidelines 2.1.6, 2.1.7 and 2.1.8 should be transposed to conditional interpretative declarations.

63. Lastly, he drew attention to the fact that he wrote his reports exclusively in French and therefore did not understand why, since the previous session, they had been marked “Original: English/French”. According to the secretariat, the reason was that the reports contained quotations in English. Yet the four preceding reports on the subject had also done so and they had been marked “Original: French”. Furthermore, quotations might sometimes be in Spanish or Italian. A point of fundamental importance was that it was scientifically essential to cite legal theory and judicial decisions in the original language. Quotations in English were always accompanied by a translation into French which he himself had prepared with the assistance of the secretariat. For all those reasons, he very much hoped that there would be a return to previous practice so that the impression would not be given that he wrote his reports in English or, worse still, that he had passages of his report written in that language. If that were not done, he would be forced not to include any quotations in English and would therefore be unable to cite English-speaking legal writers.

64. Mr. KATEKA, supported by Mr. HAFNER, said he was surprised that, in the English version of the report, quotations which were originally in English were accompanied by a French translation and asked what the purpose of that practice was.

65. Mr. MIKULKA (Secretary of the Commission) said that a technical error had been made by the secretariat. Replying to Mr. Pellet, he explained that, if a document submitted in one language contained even one sentence in another language, the existing rules governing the editing of documents required that, when the secretariat published the document, it had to give both as the original languages.

66. Mr. LUKASHUK said that, if Mr. Pellet’s view point were accepted, some quotations would have to be published in Arabic, Chinese or Russian, which were official languages and that was likely to give rise to problems.

67. Mr. ILLUECA said that he fully agreed with Mr. Pellet’s opinion. For the sake of the scientific rigour of the work of the Commission, it was essential for quotations to be given in their original language. It was also very helpful for academics, jurists and Governments that relied on Commission documents to have the original quotations.

68. Mr. ROSENSTOCK said that silence about the distinction the Special Rapporteur wished to draw between conditional interpretative declarations and other declarations did not mean consent. The fact that the issue had not been raised for the time being should certainly not be interpreted as approval of that idea.

*The meeting rose at 1.10 p.m.*

## 2691st MEETING

*Wednesday, 18 July 2001, at 10.05 a.m.*

*Chairman: Mr. Peter KABATSI*

*Present: Mr. Addo, Mr. Al-Baharna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.*

**Reservations to treaties<sup>1</sup> (*continued*) (A/CN.4/508 and Add.1–4,<sup>2</sup> A/CN.4/513, sect. D, A/CN.4/518 and Add.1–3,<sup>3</sup> A/CN.4/L.603 and Corr.1 and 2)**

[Agenda item 5]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR  
(*continued*)

1. Mr. LUKASHUK said that, rather than dwell on the considerable merits of the sixth report of the Special Rapporteur (A/CN.4/518 and Add.1–3), he would make a number of substantive points. First, as between the two versions of guideline 2.1.3 (Competence to formulate a reservation at the international level), contained in paragraphs 69 and 70, his preference was for the longer one. Since the Guide to Practice was intended to be of practical use, it made sense to have all the relevant provisions to hand, rather than force the user to look up references elsewhere. Secondly, far more important than the question of competence to make a reservation was the question of the competence to accept it; yet, unfortunately, that issue, which was, moreover, relevant to guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations), was not discussed at all in the report. Thirdly, with regard to guideline 2.1.6 (Procedure for communication of reservations), it would be more logical to reverse subparagraphs (a) and (b): the positive phrase “If there is a depositary” should precede the negative phrase “If there is no depositary”. He proposed the change simply for cosmetic reasons. In guideline 2.1.8 (Effective date of communications relating to reservations), the word “only” appeared, he presumed, because the same phrase was used in the 1969 and 1986 Vienna Conventions. It was, however, redundant and could be omitted. Guideline 2.2.1 (Reservations formulated when signing and formal confirmation) was, as the Special Rapporteur himself had noted, not particularly significant and it might be preferable, rather than devote a provision to the issue, merely to mention it in the commentary. In guideline 2.2.3 (Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]), the phrase “[an agreement in simplified form]” should be deleted, since the concept was extremely controversial. Support for that point of view could be found in an authoritative work by Smets,<sup>4</sup> and in judicial practice, as shown by a decision of the Austrian Constitutional Court in 1973 on the validity of treaties in the *Land Sale to Alien* case. As to guideline 2.2.4 (Reservations formulated when signing for which the treaty makes express provision), it was admittedly possible for reservations to be formulated when signing for which the treaty made express provision, but they were in any case rare and the statement that they did

not require formal confirmation would go against all the existing rules. The Commission had no mandate to create such a rule of law: formal confirmation was always required. The definition of those competent to formulate an interpretative declaration, contained in guideline 2.4.1 (Formulation of interpretative declarations), was too narrow. In practice, such declarations were made by a wide range of representatives of a State and it was for that State to decide. He urged the Special Rapporteur to reconsider the provision. In guideline 2.4.2 (Formulation of conditional interpretative declarations), he would prefer a reference simply to an “organ”, not a “deliberative organ”. The latter phrase had presumably been taken from the usage of the Secretary-General, but it was both incomprehensible and superfluous. “Organ” on its own would suffice and would be legally precise. With regard to guideline 2.4.7 (Interpretative declarations formulated late), there was a case for saying that interpretative declarations were an integral part of the functioning of a treaty and could be made at any time. A Government could not be forbidden to express its position on a treaty at any stage. Therefore, he could see little justification for retaining the guideline. The phrase “does not elicit any objections”, in guideline 2.4.8 (Conditional interpretative declarations formulated late), should be replaced by a more precise form of words, such as “unless the other Contracting Parties express their clear or tacit consent”.

2. Lastly, he wished to raise a matter of basic legal principle. The draft provisions relating to late reservations contained substantive alterations to the existing norms of international law, departing from the regime of the 1969 and 1986 Vienna Conventions, to which the Commission frequently paid tribute. True, the Guide to Practice adopted a negative attitude to late reservations. Practically speaking, however, it legalized them. Moreover, it proposed a regime close to that governing lawful reservations: objection to the reservation within a 12-month period. The only real obstacle to a late reservation lay in guideline 2.3.3 (Objection to reservations formulated late), according to which a late reservation was not operative if just one contracting party objected. Notwithstanding his dislike for late reservations, he thought that provision, too, was not entirely justified. That an objection by one of 150 States could block the whole process hardly seemed fair. For the time being, the Commission should stop considering the question of late reservations. He wondered what the need for such provisions was or why there should be such a departure from the rules of positive law. It was not that it was warranted by extensive practice. As the Special Rapporteur had said, late reservations were a rare occurrence. Accordingly, they should not be enshrined in law. States, in any case, had legal ways of achieving agreement with the other parties. Overall, however, the draft guidelines should be referred to the Drafting Committee.

3. The CHAIRMAN urged members to specify which cluster of guidelines they were referring to and, unless it was absolutely essential, not to revert to texts already adopted by the Drafting Committee.

4. Mr. PELLET (Special Rapporteur) confessed himself disturbed by Mr. Lukashuk’s statement. He had taken note of the comments on guidelines 2.1.3, 2.1.4, 2.1.5, 2.4.1 and 2.4.2, but for the rest it was as though a

<sup>1</sup> For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth, fifty-first and fifty-second sessions, see *Yearbook* . . . 2000, vol. II (Part Two), para. 662.

<sup>2</sup> See *Yearbook* . . . 2000, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 2001, vol. II (Part One).

<sup>4</sup> P.-F. Smets, *La conclusion des accords en forme simplifiée* (Brussels, Bruylant, 1969).

film were being rewound. Even in an earlier statement made on the guidelines (2678th meeting), Mr. Lukashuk had adopted a less radical stance than in the statement he had just made. While it was regrettable that shortage of time had necessitated the joint consideration of two clusters of guidelines, the annex to the report was a consolidated text containing the guidelines presented in the fifth (A/CN.4/508 and Add.1–4) and sixth reports. Some guidelines had already been adopted by the Drafting Committee and others not. It would be a great mistake to revert to the consideration of guidelines already adopted.

5. Mr. LUKASHUK denied that he was reverting to old difficulties over the text: he had suggested only one change, and that of a purely drafting nature. He had merely attempted, however clumsily, to express a conceptual viewpoint, in which guidelines already adopted by the Drafting Committee were inextricably linked with those still under consideration.

6. Mr. KATEKA said that part of the confusion was due to the fact that the annex contained guidelines still under consideration as well as those adopted following the fifth report. In future, the Commission would do well to consolidate only guidelines that had already been adopted.

7. Mr. PAMBOU-TCHIVOUNDA, specifying that he was referring to chapter II of the report, said that its clarity was such that a reader might come away with the impression that the topic was simple. Any such impression would be erroneous. He fully endorsed the Special Rapporteur's approach to improving the modalities of formulating reservations and conditional interpretative declarations, even though at times the report did not go into them in enough depth. Thus, for example, in discussing the competence to make reservations or the functions of the depositary—both topics closely linked with the problem of the existence or otherwise of reservations and conditional interpretative declarations—the Special Rapporteur was apt to state the obvious and say too much, while at other times saying too little about elements that, in his view, were crucial.

8. The Special Rapporteur had hardly held to his aim, stated in paragraph 32 of the report, to restrict himself to the examination of procedural issues, to the exclusion of issues concerning lawfulness, for he had not fully explained the material significance of a number of problems arising out of the procedural questions that he had considered. For example, on the relevance of the distinction drawn in the 1969 and 1986 Vienna Conventions between contracting States and States qualified to become party to the treaty, on which the Special Rapporteur sought guidance from the Commission, he did not devote enough attention to what was perhaps of secondary importance, but ought to be considered: the formal structure that a written reservation should take in order to be identified or authenticated.

9. Again, he would have welcomed further discussion of how to manage the balance of obligations in the dialogue on reservations between the entity making the reservation and that accepting it, since proof that the communication had been received was a prerequisite for the effectiveness of the reservation. Another problem concerned the inadequacy of the discussion on the deposi-

tary's ability to monitor the validity of the reservation. It was not a mere question of procedure but—although it might have a bearing on procedure—a substantive matter. The draft should treat the matter more fully. However, whether discussed or not, the existence of such problems gave rise to the question of whether they merited impartial examination. His own reply was in the affirmative. The question of competence to formulate a reservation or conditional interpretative declaration, for instance, was one that deserved closer examination; another was the requirement—appearing in guidelines 2.1.1 (Written form) and 2.1.2 (Form of formal confirmation), which drew heavily on the *travaux préparatoires* that had led to the adoption of article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions—that a reservation or its confirmation should be made in writing.

10. There was a universal desire for certainty, stability and access to all the available information. The requirement for the written formulation of a reservation paralleled the written nature of the treaty itself, showing the will of one or more of the contracting parties to limit the scope of the treaty *ratione personae*. The requirement was therefore of a technical nature, with the aim of establishing not merely the physical existence of the reservation but its legal existence. The logic of requiring a written formulation should be seen in the context of uniting the validity and the opposability of the two functions; that logic should be reflected in guideline 1.1 (Definition of reservations) with a reference to the structure or formal conception of the reservation, namely that it should be in writing.

11. In his opinion, competence was a question of less importance in respect of the formulation of reservations. The amount of space devoted to the subject in the report would have been justified only if the Special Rapporteur had thought that such competence had a bearing on the admissibility of the reservation, since it would then have been an essential component of the regime of reservations and failure to comply with the rules on competence would nullify the act by which a reservation was made, something which would mean that the reservation itself would cease to exist. While Georges Scelle would have ventured to argue that it was so, the Special Rapporteur had espoused the position of Paul Reuter, in considering that the international phase of the formulation of reservations was only the tip of the iceberg and the culmination of an internal process, which might be highly complex. The Special Rapporteur had therefore held that international law did not impose any specific rule with regard to the internal process for the formulation of reservations, whereas the conclusion he should have drawn was that the authorities competent to formulate the reservation at international level were the same as those competent to adopt or authenticate the text of a treaty or to express consent to be bound thereby.

12. Personally, he believed that guideline 2.1.3 should be divided into two succinct paragraphs, the first of which should contain the wording of guideline 2.1.3 *bis* (Competence to formulate a reservation at the internal level) and the second that of the first variant of guideline 2.1.3, but deleting the first part, namely “subject to the ... of treaties”. The second variant was not apposite, because the notion of representation, expressed through the

instrument of full powers, provided a sufficiently strong basis for the competence of persons other than those who possessed full powers under the law of treaties.

13. As to the question of the communication of reservations and conditional interpretative declarations and the need first to clarify the categories of contracting States and States entitled to become parties to a treaty, as well as the role of a depositary seized of a reservation to a constituent instrument of an international organization, he endorsed the sentiments expressed in paragraph 109. The entitlement of a third State to become a party to a treaty presupposed that the treaty itself allowed for such a possibility. In that case, those third States would have the special status of potential contracting parties and might be more inclined to accede to a treaty if they had full knowledge of the background to its implementation and had been apprised of the reservations made by other States. The notion of *qualité* found in the French version of guidelines 2.1.5 *et seq.* and in the provisions of the 1969 Vienna Convention on the process of communication would be better rendered by the term *vocation*. He was not unduly worried by the query contained in paragraph 123, subparagraph (c), and was in favour of the action advocated by the Special Rapporteur in the last sentence of paragraph 126, save that once again it should speak of *vocation* rather than *qualité* in French.

14. Mr. ECONOMIDES said that his comments would be confined to the draft guidelines concerning the form of reservations and interpretative declarations. The content of guideline 2.1.1 was axiomatic. Guideline 2.1.2 could be simplified to read: "The formal confirmation of a reservation must be made in writing", it being understood that the guideline applied only when formal confirmation of a reservation was necessary. He preferred the shorter variant of guideline 2.1.3, although it should be accompanied by a footnote referring to article 7 of the 1969 and 1986 Vienna Conventions. There was no need for guideline 2.1.3 *bis*, for the reply to the issue it raised was given in guideline 2.1.4. While he was basically in favour of the latter, subject to a minor drafting correction, he considered that the term "invalidating" was inappropriate, because a State was always free to withdraw a reservation which had not been formulated in accordance with its municipal law, or it could remedy that situation and present the reservation as a late reservation. He had no objections to the substance of guidelines 2.4.1 and 2.4.2, but thought that guideline 2.4.1 *bis* (Competence to formulate an interpretative declaration at the internal level) was pointless and superfluous.

15. Mr. GAJA said that the Special Rapporteur had highlighted a number of pertinent issues and expressed some apt criticism of certain provisions of the 1969 and 1986 Vienna Conventions.

16. The title of the two variants of guideline 2.1.3 might be confusing, for the guideline did not in fact relate to competence to formulate a reservation at the international level. The text was clearly modelled on article 7 of the 1969 Vienna Convention, which did not use the word "competence" but related to full powers and dealt in essence with the question of whether an organ was expressing a State's position. For example, under article 7, a minister for foreign affairs was entitled to express con-

sent, even if he had no competence in the formation of the State's will. Similarly, he could express a reservation, but did not have competence to make it. Competence to make reservations fell in effect under article 46 of the Convention, as an analogous rule.

17. Municipal law and even the rules of international organizations did offer some solutions with regard to competence to make reservations. Guideline 2.1.4 suggested, however, that the infringement of provisions of domestic law on the formulation of reservations might not affect their validity, which meant that even if the rules on competence had been violated, that would have no implications for the validity of a reservation. If a minister added a reservation without the authorization of the competent constitutional organ, or forgot to express a reservation proposed by that organ, that could also have consequences on the validity of consent to the treaty itself. In his opinion, a more detailed examination of the question of the validity of consent and the validity of a reservation should be made in the light of the apportionment of competence. At all events, it should be made clear in the commentary that guideline 2.1.4 related solely to the validity of reservations and left open the question of the validity of consent to a treaty because of the presence or the absence of reservations demanded by the competent constitutional organ.

18. Guideline 2.1.8 introduced a modification to the regime under article 78, subparagraph (b), of the 1969 Vienna Convention in that it referred to receipt by the State or organization to which the reservation had been transmitted but made no mention of receipt by the depositary. It was true that, according to article 20, paragraph 5, of the Convention, the deadline for objecting to a reservation was determined by the date of its notification. However, the reservation had already been made at the time of ratification. If other dates were mentioned, that might give the wrong impression that the reservation was late and for that reason it would be wise to retain the principle contained in the Convention.

19. As for guideline 2.1.7, the Special Rapporteur had made it clear that the idea of limiting the depositary's role to that of a letter box was political in origin because States did not want active depositaries. Accordingly, it would be difficult to change that practice. On the other hand, it would be useful to confirm the practice whereby depositaries use the provisions of treaties expressly prohibiting reservations in order to reject instruments of ratification containing prohibited reservations, as that would be a way of preventing those provisions from being swept away by a very liberal policy on the admissibility of reservations. States had to abide by the text of the treaties to which they were parties. The role of depositaries in refusing reservations could be upheld without amending the 1969 Vienna Convention. In that case, as well as when the reservation was not made in due and proper form, the depositary should bring the matter to the attention of the State in question, as stipulated in article 77, paragraph 1 (d), of the Convention. In the event of a divergence of opinion, the matter might be brought to the attention of the other States or international organizations. Paragraph 1 of guideline 2.1.7 should therefore be supplemented with the language of the Convention.

20. The Special Rapporteur had proposed that nothing be said about the communication of simple interpretative declarations. A State could give whatever publicity it liked to such declarations. But once a declaration had been communicated to the depositary, it seemed reasonable to give the depositary the same function of communication that it had with respect to other notifications and communications, as stipulated in article 77, paragraph 1 (e), of the 1969 Vienna Convention, because it obviated the need for the depositary at that stage to ascertain whether the declaration was a simple interpretative declaration, a conditional interpretative declaration or a reservation.

21. Mr. PELLET (Special Rapporteur) said that he had two questions to put to Mr. Gaja. Did he wish it to be stated in paragraph 1 of guideline 2.1.7, in the same way as was stipulated in article 77 of the 1969 Vienna Convention, that the depositary should bring any problems that might arise to the attention of the author of the reservation? Before, he had said something different: that the practice of the depositary to refuse a prohibited reservation should be confirmed. Did he want that to be expressly stated in guideline 2.1.7 or referred to in the commentary as an example of a problem that could arise? Secondly, had he understood Mr. Gaja to say that, when a State notified or formulated an interpretative declaration to the depositary, it should be explicitly stated that the depositary must pass the declaration on to the contracting States or those States entitled to become parties? If so, did he want that statement to appear as a formal draft guideline?

22. Mr. GAJA said that in both cases he wished the points to be made in the body of the text. In the first case, if the majority of members agreed, it could be specified that a depositary when faced with a reservation that was expressly prohibited by the treaty itself, should refuse it, which was what depositaries usually, though not always, did. If the majority of the Commission did not agree to going so far, the point should be made in the commentary, and more clearly than it currently was in the report. As for guideline 2.1.8, it was true that one could imagine cases in which States would notify many interpretative declarations to the depositary. In practice that was, however, unlikely, because it was normally at the moment of ratification or signature that such declarations were made. The general principle should be established that any communication that came from a State, especially at such moments, should be transmitted to the other States so that they were in a position to understand what the declaration meant.

23. Mr. PELLET (Special Rapporteur) said that *a priori* he was prepared to think over both Mr. Gaja's proposals, but support from members of the Commission was necessary.

24. Mr. GOCO said that it had to be accepted that in practice the person authorized and able to formulate a reservation could be a country's minister for foreign affairs, and that the reservation could be expressed before the treaty in question was ratified by the country's constitutional body and was thus binding upon the State. In such a case, the constitutional body ratified the treaty containing the reservations that had been made. But in the case of a reservation that was formulated late, after completion of the ratification process, it still had to be

submitted to the ratifying body and had also to be subject to the consent of the other parties to the treaty. He requested clarification from the Special Rapporteur or Mr. Gaja as to which of those two procedures came first.

25. Mr. GAJA said that what happened in practice with a late reservation was that it was assumed to have been made only after it had been given the green light by the constitutional body competent to make it. If there were no objections from the other contracting parties the reservation would stand.

26. Mr. Sreenivasa RAO, referring to the question raised by Mr. Gaja about the role of the depositary in rejecting a prohibited reservation, said the Special Rapporteur had expressed his willingness to look into the matter if there was a general desire on the part of members for him to do so. Personally, he believed that it was a substantive issue. If a treaty stated that reservations must not be made and a reservation was in fact made, the question was straightforward. However, where reservations were allowed, the matter of whether they were prohibited or not in respect of conformity with the object and purpose of the treaty was more difficult, and the guidelines were not the right place to deal with it. It was an area which should not be entered. If it was the intention of the Special Rapporteur and Mr. Gaja to deal in guidelines with the broader question of all types of prohibited reservation, and the depositary would arrogate to himself the right to reject reservations, he himself would not be happy to endorse such a course.

27. Mr. GAJA explained that his proposal concerned only cases that arose under article 19, subparagraphs (a) and (b), of the 1969 Vienna Convention and not those that arose under article 19, subparagraph (c), where the reservation was incompatible with the object and purpose of the treaty. Those much more contentious matters were not for the depositary to deal with. He fully agreed with Mr. Sreenivasa Rao, and apologized if he had misled him.

28. Mr. SIMMA said he agreed with Mr. Gaja in respect of paragraphs 53 *et seq.*, on competence to formulate a reservation, that a differentiation had to be made between formulation and expression of a reservation vis-à-vis other countries. In paragraph 77, the Special Rapporteur asked for the point of view of the Commission as to whether a rule should be stipulated on the competence to form a reservation at the internal level, and his own answer was firmly in the negative. As to paragraphs 81 and 82, he had been impressed by the comments of Mr. Economides, who had asked why the rule set out in guideline 2.1.4 was needed if a State was free to withdraw a reservation, probably without giving any explanation in the first place. Perhaps the Special Rapporteur could clarify whether the situation would be different and more complicated if a State were to rely on the fact that its reservation had been formulated in violation of internal law not in order to withdraw the reservation, something which would be much simpler to do, but in order to propose a late reservation in the hope that it could be made without fulfilling the conditions established in an earlier guideline.

29. In paragraph 81, the Special Rapporteur stated that it was unlikely that a violation of internal provisions

could be “manifest”, but then drew the conclusion that reference to internal law should never be allowed. The two did not fit together because it was possible to imagine cases where a reservation was declared by a minister for foreign affairs without due regard for internal procedures, for example the participation of Parliament.

30. As for paragraphs 83 *et seq.*, regarding the form of interpretative declarations, he sided with what Mr. Rosenstock had said (2690th meeting), namely, that his silence should not be regarded as agreement to keep the category of conditional interpretative declarations in the final version of the draft. The matter called for further thought. The Special Rapporteur expressed doubts in paragraphs 94 and 95, as to whether it was necessary to draft a guideline on the competence to formulate interpretative declarations at the internal level. His own view was that no such guideline was needed.

31. As to the question of publicity to be given to reservations, paragraphs 100 *et seq.* dealt with the issue of other States and organizations entitled to become parties. The Special Rapporteur had asked (*ibid.*) whether he should go on to draw up further specifications of what the terms State and international organization meant in that context. In his view, the Commission should not go into such matters. As to the range of States that would have to be notified of reservations, the Special Rapporteur had referred to a differentiation that might be useful between restricted multilateral treaties, in which case notification would not be difficult, and treaties which were open to everyone. In that regard, he agreed with the Special Rapporteur’s proposals in guideline 2.1.5, paragraph 1.

32. Paragraphs 115 *et seq.* dealt with the question of whether reservations made to a multilateral treaty establishing an international organization or something similar would have to be accepted also by deliberative organs. Since there would probably be disagreement as to what constituted an international organization, he disagreed with the Special Rapporteur, who had explained (*ibid.*) that the deliberative bodies having a secretariat, created by certain treaties, were legal constructs that did constitute international organizations. He himself did not share that opinion. The footnote in paragraph 125 said that some authors also argued that the International Criminal Court was not, strictly speaking, an international organization. However, its statute contained a provision whereby the Court would have international legal personality, which as far as he was concerned, proved that that particular legal construct was an international organization. In all likelihood, there would never be a consensus as to whether certain organizations—for example, environmental institutions—were or were not international organizations, he very much favoured retaining the reference to deliberative organs in guideline 2.1.5.

33. In paragraph 126 the Special Rapporteur stated his belief that a reservation to a constituent instrument should be communicated not only to the organization concerned but also to all other contracting States and organizations and to those entitled to become members thereof, and he fully agreed with the Special Rapporteur’s proposal in paragraph 2 of guideline 2.1.5.

34. He was unable to answer the question as to whether a reservation made by e-mail should be confirmed by fax and preferred to leave to the experts the question of whether the Special Rapporteur’s proposal about deliberative organs and assemblies of international organizations should also encompass preparatory committees. With regard to the question of whether guidelines 2.1.6 to 2.1.8 should also be applied and crafted for conditional interpretative declarations, in his earlier statement he had said that, for the time being, conditional interpretative declarations should be kept in square brackets.

35. Mr. PELLET (Special Rapporteur), referring to Mr. Rosenstock’s position, which had been mentioned by Mr. Simma, said that the estoppel principle did not apply in the Commission. He understood members’ doubts regarding the usefulness of keeping references to conditional interpretative declarations throughout the draft. He too had doubts, but would like to retain them for the time being.

*The meeting rose at 11.35 a.m.*

## 2692nd MEETING

*Thursday, 19 July 2001, at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Tomka, Mr. Yamada.

**Reservations to treaties<sup>1</sup> (*continued*) (A/CN.4/508 and Add.1–4,<sup>2</sup> A/CN.4/513, sect. D, A/CN.4/518 and Add.1–3,<sup>3</sup> A/CN.4/L.603 and Corr.1 and 2)**

[Agenda item 5]

<sup>1</sup> For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth, fifty-first and fifty-second sessions, see *Yearbook* . . . 2000, vol. II (Part Two), para. 662.

<sup>2</sup> See *Yearbook* . . . 2000, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 2001, vol. II (Part One).

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR  
(continued)

1. Mr. HAFNER said that he would confine his remarks to the two sets of questions put to the Commission by the Special Rapporteur during his introduction of the sixth report (A/CN.4/518 and Add.1–3).

2. With regard to the first question of the first set, relating to guideline 2.1.3 (Competence to formulate a reservation at the international level), he suggested that the text could be considerably simplified by reformulating it to read:

“Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of expressing the consent of a State or an international organization to be bound by a treaty is competent to formulate a reservation on behalf of such State or international organization”.

He could not understand—and the report gave no indication—why the guideline proposed by the Special Rapporteur mentioned persons who were not authorized to bind a State, since that could create problems. The text he had just proposed would address the first three questions put by the Special Rapporteur.

3. With regard to the fourth question, relating to whether there should be guidelines on internal procedures for formulating reservations, he would—for the reasons given by Mr. Simma (2691st meeting)—say that there should not. As for the fifth question, regarding the consequences of a breach of the internal procedure for formulating reservations, the answer was simple: if it were stated that only persons entitled to bind the State could formulate reservations, it followed that reservations made by any other person must be considered null and void, unless the State in question proved that the person making them had the authority to do so. Either way, in practice, the decision on who was entitled to formulate reservations was far less important than the decision on who was entitled to formulate objections to a reservation, the reason being that reservations were usually formulated at the time when the consent to be bound by a treaty was formulated, whereas objections constituted a separate act. The Commission would have to consider the question sooner or later.

4. The first in the second set of questions put by the Special Rapporteur related to the meaning of the expression “international organizations entitled to become parties to the treaty”, which appeared in guideline 2.1.6 (Procedure for communication of reservations). The provision was problematic, in his view, for it was often very difficult to determine precisely whether an international organization had treaty-making powers. A good illustration was provided by the European Economic Community, whose treaty-making power had been progressively extended by the Court of Justice of the European Communities, where the situation was in any case complex, since, in some areas, it had exclusive competence and, in others, concurrent competence with member States. Although, at the practical level, it might be useful to inform international organizations entitled to become parties to a treaty,

there was no legal need to do so. He therefore wondered whether it was appropriate to refer to “[other] international organizations” as well as “other States”.

5. Another question raised by the Special Rapporteur was whether to retain the words “or by facsimile” in square brackets in paragraph 2 of guideline 2.1.6. There, too, he was in agreement with Mr. Simma’s comments: what was important was that communications by electronic mail should be confirmed by some other means.

6. Turning to the question of “deliberative organs”, which he would prefer to the term “treaty organs”, he said that, in practice, it would certainly be useful to inform such organs, too, of reservations that had been made. From the legal point of view, however, the question arose as to whether they were “international organizations” in accordance with article 20 of the 1969 Vienna Convention. Neither doctrine nor practice had yet given a satisfactory answer to that question; such organs did not seem to be covered by article 20 and therefore did not have a separate standing under international law. Mention had been made in that context of the International Criminal Court, on which its statute did in fact confer the status of an international organization. The situation of another body created under the same statute, the Assembly of States Parties, was, from that point of view, far less clear. That applied with even greater force in the case of treaty organs composed of independent experts rather than of States.

7. Guideline 2.1.7 (Functions of depositaries) was rather too general, despite the fact that it was taken straight from article 77 of the 1969 Vienna Convention. A definition should be given—perhaps in the commentary—of the phrase “in due and proper form”, in order not to give the depositary too much power. In that context, he would support Mr. Gaja’s proposal (2691st meeting) that article 77, paragraph 1 (*d*), should also be added to the guideline. Moreover, a depositary should not be entitled to refuse to accept a reservation, unless it was *prima facie* absolutely clear that the reservation in question was not admissible. Thus, for example, article 120 of the Rome Statute of the International Criminal Court explicitly prohibited reservations, so the depositary was entitled to refuse to accept a reservation. The Commission should, however, be very cautious. As to whether preparatory committees should be mentioned in guideline 2.1.5 (Communication of reservations), he was dubious: such bodies were undoubtedly increasingly common, but to inform them of reservations could be risky, if they took up one position, while the international organization whose establishment they were preparing adopted a different approach once it was in existence. Either way, even if informed of a reservation, they should not be entitled to make objections.

8. Lastly, he wished to comment on the question of interpretative declarations. Such declarations did not need to be communicated, but article 31, paragraph 2 (*b*), of the 1969 Vienna Convention, relating to interpretation, stated that the context for the purpose of the interpretation of a treaty included “any instrument which was made by one or more parties in connection with the conclusion of the treaty”. That did not mean, however, that it was necessary to derive from that provision a duty on the declaring State to inform all the other parties to the treaty of



an interpretative declaration before it could be taken into consideration in cases where the treaty needed interpretation. In practice, it was in the declaring State's interest to bring its declaration to the attention of the other States parties and there was therefore no need to spell out the obligation. The Commission could return to the question when it considered the effects of interpretative declarations.

9. Mr. HERDOCIA SACASA began by making a few comments on the matters concerning which the Special Rapporteur had requested members' views, before going on to give a brief presentation of the practice followed by the Inter-American system.

10. With regard to guideline 2.1.5, he endorsed the idea of expressly stating therein that reservations must be communicated "in writing"; although that was not explicitly stated in article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions. In addition, the phrase specifying the recipients of communications, namely, "the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty", should be retained. It remained to be established what States and organizations were so entitled. In his view, they included States that had participated in the negotiations. The Secretary-General, as a depositary, also seemed to interpret the word "entitled" very broadly. Be that as it might, it was better to retain the formulation used in article 23, paragraph 1, of the Conventions.

11. With regard to paragraph 2 of guideline 2.1.5, he considered that the communication must be addressed to the "competent organ" of the international organization concerned, as provided for in article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions, on the understanding that the competent organ could vary from organization to organization. Consideration should perhaps be given to mentioning that point in paragraph 2 of guideline 2.1.5. On the question whether the same rule should apply to "deliberative organs" created by a treaty, there was no clear answer. It was true, however, that some treaties, in areas such as disarmament or environmental protection, created *sui generis* organs, which did not necessarily rank as international organizations, as indeed the Special Rapporteur pointed out in paragraph 125 of his report. The Special Rapporteur had retained the expression "deliberative organ", used by the Secretary-General in connection with the reservation by India to the constituent instrument of the Intergovernmental Maritime Consultative Organization,<sup>4</sup> but if one were to opt for another term such as "entity", it could then be stated at the end of the guideline that the reservation must also be communicated to the "competent organ of such organization or entity".

12. Nor did he see any benefit in mentioning "preparatory committees" in the guideline. Lastly, he considered that reservations to the constituent instrument of an international organization must be communicated both to the organization concerned and to the contracting organizations and States, as well as to States and organizations entitled to become parties to that constituent instrument. It was important that the latter category should be informed

of the reservation, to enable them to object to it if they so wished.

13. Concerning the functions of depositaries (guideline 2.1.7), he endorsed the views of Mr. Gaja and favoured adding a guideline stating that the depositary could express a value judgement regarding the incompatibility of a reservation in cases where reservations were prohibited by the treaty or where the treaty provided that only specified reservations, which did not include the reservation in question, could be made (thus reflecting article 19, subparagraphs (a) and (b), of the 1969 Vienna Convention).

14. As to the effective date of communications relating to reservations (guideline 2.1.8), that date should coincide with the date of receipt of the reservation by the depositary, as provided for in article 78, subparagraph (b), of the 1969 Vienna Convention. The guideline should therefore be amended, by adding, at the end, the words "or, as the case may be, by the depositary".

15. Lastly, he understood and supported the reasons for the Special Rapporteur's proposal to retain conditional interpretative declarations for the moment and to expand guideline 2.4.2 (Formulation of conditional interpretative declarations) on the basis of elements taken from guidelines 2.1.5, 2.1.6, 2.1.7 and 2.1.8. If a complete text were available, it would be easier to compare the effects of conditional interpretative declarations with those of reservations and to take a decision on the question.

16. Further consideration should be given to guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations). Article 46 of the 1969 Vienna Convention provided for cases where the State could invoke a violation of its internal law as invalidating its consent: the violation must have been manifest and must concern a rule of its internal law of fundamental importance. Article 27 provided that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". But care must be taken not simply to reproduce the provisions of the 1969 and 1986 Vienna Conventions verbatim, dissociating them from their general context.

17. He went on to give a brief presentation of OAS practice concerning reservations, having regard to guidelines 2.1.5, 2.1.6, 2.1.7 and 2.1.8.

18. With regard to guideline 2.1.5, reservations were communicated to all OAS member States, whether or not parties to the convention in question, since they might subsequently accede to that convention. On the other hand, reservations were not communicated to observers, although there were some exceptions, for instance, in the field of human rights. Thus, any reservation concerning human rights was communicated to the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights. In the case of conventions open to other States, reservations were not communicated to States not members of OAS, as all States of the international community were affected. States intending to become parties to such conventions would presumably take care first to inquire about the status of signatures, ratifications and reservations.

<sup>4</sup> See 2690th meeting, para. 56.

19. Concerning the content of guideline 2.1.8, the reservation was deemed to be effective on the date on which it was communicated to the depositary of inter-American treaties, namely, the General Secretariat, which was then required to circulate it to the other OAS member States. In general, reservations were made at the moment of signature or of deposit of instruments of ratification.

20. On guideline 2.1.6, OAS worked only with originals, never with facsimiles or electronic messages.

21. On guideline 2.1.7, as a general rule the General Secretariat gave no opinion on reservations, except in cases where the treaty in question expressly prohibited them.

22. Mr. LUKASHUK drew attention to what he considered to be a formal incoherence in guidelines 2.3.1 and 2.3.2. But since the Drafting Committee was already seized of them he would await its report before making any detailed observations.

23. Mr. MELESCANU said that the Special Rapporteur's extremely detailed report was all the more commendable since practice in the area was far from being abundant and in any event was difficult to gain access to.

24. Generally speaking, the approach taken by the Special Rapporteur was welcome in both form and substance. In terms of form, the didactic approach of setting out the problem in its entirety and then proposing a draft text facilitated its consideration by members. In terms of substance, as the Commission had wanted, he had avoided departing from the regime established by the 1969 and 1986 Vienna Conventions by restricting himself to clarifying or supplementing points that were not clear. From the point of view of method, while noting the comments by Mr. Rosenstock and Mr. Simma, he agreed with the Special Rapporteur that the Commission should complete its study of the effects of reservations and conditional interpretative declarations before deciding whether the latter had a place in the Guide to Practice.

25. Turning to more specific comments, he shared the general opinion concerning written form (guideline 2.1.1): all reservations must be formulated in writing apart from non-conditional interpretative declarations. The guideline therefore posed no problem.

26. On the other hand, difficulties could arise regarding competence to formulate a reservation at the international level (guideline 2.1.3). In that connection, Mr. Hafner's proposal was interesting, namely, that those who were competent to engage a State in the framework of international conventions also had competence to formulate reservations; that solution offered the advantage of being simple and of enabling other problems to be solved. Before taking a definite stand, he would nevertheless like to know the Special Rapporteur's reaction. On the other hand, he strongly supported Mr. Hafner's proposal that consideration should be given to the possibility of dealing with the question of competence to formulate objections to reservations. In practice, it was that competence which gave rise to difficulties. Competence to formulate reservations was well defined by the law and practice of ministries of foreign affairs, but that was not the case with the formulation of objections.

27. As for the text of guideline 2.1.3, he preferred the long version, basically for practical reasons. Since the purpose was to draw up a guide, it was better to explain the rule as much as possible so that users did not have to refer to the 1969 and 1986 Vienna Conventions. The safeguard clause with which paragraph 1 began was perfectly acceptable. In paragraph 2, heads of diplomatic missions should be excluded from the list of persons competent to formulate a reservation. Interpretation of the Conventions in fact clearly limited the number of persons who could assume international obligations on behalf of the State. On the other hand, heads of diplomatic missions should be given the possibility of submitting simple interpretative declarations because it was they who had the most direct relations with the international organizations.

28. Guideline 2.1.3 *bis* (Competence to formulate a reservation at the internal level) in its current wording did not say a great deal about competence to formulate a reservation at the internal level. Practice was so diverse that it was difficult to draw up a very detailed guideline. It would, however, be useful to give some indication in the matter to the staff of ministries of foreign affairs who were responsible for treaties, either in a guideline or perhaps in the commentary. The link between guidelines 2.1.3 and 2.1.3 *bis* remained to be defined. Guideline 2.1.4 defined the relationship between "internal" competence and the validity of the reservation, but, if the Commission decided to retain two distinct guidelines relating, in the one case, to "international" competence and to "internal" competence in the other, a link between the two would of necessity have to be established.

29. As to the communication of reservations, he was in favour of the confirmation by post of any communication transmitted by electronic mail or facsimile. Like the Special Rapporteur, he thought that the functions of the depositary should be limited to the role assigned to it by the 1969 and 1986 Vienna Conventions. But what should be specified was the States and international organizations to which the depositary must communicate reservations and objections and, in particular, which States and organizations were entitled to become parties to the treaty. Mention should not, however, be made in guideline 2.1.5 of preparatory committees.

30. As Mr. Gaja had suggested, a recommendation should be added on the competence of the depositary to communicate simple interpretative declarations. There was, however, no reason to be concerned about the competence of the depositary to admit non-authorized reservations, first, because that function went beyond the classic notion of the depositary's role and also because, if the treaty in question prohibited reservations, any reservations were null and void. It would be worth describing the role of the depositary in greater detail in the commentary by stating that the depositary could advise States and contracting organizations, but was not entitled to reject an instrument of ratification on the ground that it was accompanied by a reservation.

31. Mr. GAJA said he did not think that the competence referred to in guideline 2.1.3 could be limited to those who were entitled to express the consent of the State to be bound, as Mr. Hafner was advocating in his proposal. In fact, article 23 of the 1969 Vienna Convention clearly

stated that, even when a treaty was subject to ratification, a reservation could be formulated at the moment of signature subject to being confirmed subsequently. That was the reason for retaining the longer and more complex version, so as to take account of all possibilities, including those envisaged by the Convention.

32. Mr. CANDIOTI asked Mr. Melescanu, who favoured Mr. Gaja's proposal that the depositary should be entitled to communicate simple interpretative declarations, how he thought the depositary should proceed in publicizing a simple interpretative declaration that had been formulated orally.

33. Mr. MELESCANU said that his approach to the system of communicating interpretative declarations was exactly the same as Mr. Gaja's and he had nothing to add to it. In his opinion, the Secretary-General of the United Nations or any other depositary of an international multilateral convention had the obligation, once a simple interpretative declaration had been addressed to him, to communicate it to the other States parties to the treaty. A practical problem arose when simple interpretative declarations were not sent to the depositary. However, no one was required to do the impossible and the depositary could not be obliged to establish a cumbersome system intended to verify whether or not States made oral declarations. In any event, he considered that Mr. Gaja was more qualified than he to answer the question.

34. Mr. ECONOMIDES, completing the statement he had made the day before on the draft guidelines relating to publicity of reservations and interpretative declarations, said that paragraph 1 of guideline 2.1.5, which was based on article 23, paragraph 1, of the 1986 Vienna Convention, contained ambiguous elements which the Special Rapporteur had pointed out, but without clarifying them, thus remaining faithful to the letter of the provisions of the Convention. For his part, he considered that there should be no hesitation in further defining the treaty provisions in force whenever possible. On the other hand, he gave his full approval to paragraph 2.

35. As for guideline 2.1.6, he considered that the wording of paragraph 1 (a) should be simplified, as had been done for paragraph 1 (b) by explaining in the commentary exactly what was meant by the expression "States and organizations for which it is intended". With regard to paragraph 2 of the guideline relating to the confirmation of a communication made by electronic mail, he thought that current practice should be followed, i.e. that of the depositary international organizations.

36. He entirely shared Mr. Gaja's view on guideline 2.1.8 and he supported the idea of encouraging depositaries not to accept reservations that were prohibited under article 19, subparagraphs (a) and (b), of the 1969 and 1986 Vienna Conventions.

37. Mr. LUKASHUK, referring to guideline 2.2.1 (Reservations formulated when signing and formal confirmation), which indicated that a reservation was considered as having been made on the date of its confirmation, asked Mr. Pellet what procedure had been provided for when the reservation was formulated when the treaty had entered provisionally into force.

38. Mr. PELLET said that the elements of an answer to that question had already been communicated to the Drafting Committee and the question was thus no longer within his own competence, but that of the Chairman of the Drafting Committee.

39. Mr. TOMKA said that he would reply to the question when submitting the report of the Drafting Committee. As to the form of reservations and interpretative declarations, he endorsed guideline 2.1.1, which indicated that a reservation must be formulated in writing. The provision was a faithful copy of article 23, paragraph 1, of the 1969 Vienna Convention. Everything relating to treaties—declarations, reservations, objections—must be formulated in writing, if only to avoid potential problems.

40. Guideline 2.1.2 (Form of formal confirmation) had its place in the Guide to Practice. As had already been suggested, the text could be shortened to read: "Formal confirmation must be made in writing".

41. Referring to guideline 2.1.3, he said that he endorsed Mr. Gaja's comment on the *chapeau*. He preferred the second alternative proposed by the Special Rapporteur, except in respect of paragraph 2 (d) since, in his opinion, reservations were tied to the scope of the obligation assumed. Consequently, if a representative could not accept an obligation on behalf of the State he represented, he could also not formulate a reservation. He endorsed the proposal by a number of members of the Commission that the subparagraph should be deleted.

42. He saw no particular reason for including guideline 2.1.3 bis in the Guide to Practice, since the matter came within the context of the internal law of each State. On the other hand, he was in favour of retaining guideline 2.1.4.

43. With regard to interpretative declarations, he pointed out that guideline 2.4.1 (Formulation of interpretative declarations) was largely modelled on guideline 2.1.3, with the exception of the title, and he proposed that it should be called "Competence to formulate interpretative declarations". As to guideline 2.4.1 bis (Competence to formulate an interpretative declaration at the internal level), he thought there was no justification for including it in the Guide to Practice.

44. Mr. KATEKA said that, generally, he had no problem with the draft guidelines.

45. With regard to paragraph 2 of guideline 2.1.6, which provided that "Where a communication relating to a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or facsimile]", he believed that some caution must be exercised with regard to the new technology currently available. Perhaps codes should be used, as in electronic banking, in order to ensure the authenticity of communications concerning reservations transmitted by electronic mail. If that was not possible, such communications must be confirmed by regular mail.

46. Mr. CANDIOTI said that the statement by Mr. Tomka that any instrument relating to a treaty must be formulated in writing was to some extent a reply to the question he himself had asked Mr. Melescanu about the

form in which simple interpretative declarations should be communicated. He wondered if, in the context of a guide intended to advise on practice, there should at least be some indication of the desirability for simple interpretative declarations to be formulated in writing.

47. The question of formal confirmation, as referred to in guideline 2.1.2, was not touched on in the context of competence to formulate or communicate a reservation. It might be useful to specify, within the framework of the Drafting Committee, that for formal confirmation it was also necessary to take into account the rules relating to competence and communication.

48. With regard to the doubts about guideline 2.1.4 expressed by Mr. Hafner, Mr. Herdocia Sacasa and other members of the Commission, which he shared, he thought that perhaps the question related more to the effects of reservations than to the subject under consideration. His own substantive objection derived from the fact that a reservation was an integral part of the consent to be bound of the State that formulated it. On that point, the spirit of article 46 of the 1969 Vienna Convention should be taken into account in order to avoid creating a derogation to that article. As Mr. Herdocia Sacasa had said, further consideration should be given to the inclusion of such a draft guideline.

49. Mr. TOMKA, referring to Mr. Candioti's statement about article 46 of the 1969 Vienna Convention and the breach of internal rules concerning the power to formulate reservations, said that, in principle, reservations were to be made at the moment of signing or of the expression of consent to be bound or, in other words, the moment of ratification or accession. The issue of reservations was thus linked closely to that of expression of consent and to the scope of the obligation that was thereby assumed. The issue should therefore be carefully considered on the basis of the rules concerning the power of constitutional bodies to express the consent of the State to be bound. The only problem in that connection was "late reservations". They had been introduced into practice only in the 1970s, in a specific case when the Legal Counsel of the United Nations had, at the request of a State, indicated the procedure to be followed. In his view, the power to make reservations was linked to the power of the constitutional body to assume an international obligation on behalf of the State.

50. Mr. GALICKI said that he shared the doubts expressed by a number of members of the Commission about guideline 2.1.3. He had doubts as to whether representatives accredited by States to an international organization and heads of permanent missions to international organizations should have the right to formulate a reservation. It must be recalled that, in accordance with article 19 of the 1969 and 1986 Vienna Conventions, a reservation could be formulated "when signing, ratifying, accepting, approving or acceding to a treaty . . .", whereas, under article 7 of the Conventions, the persons mentioned in the draft guideline had the right to represent States for the purpose of "adopting" the text of a treaty. He therefore fully agreed with Mr. Tomka that it should be those bodies that had the competence to formulate reservations to a treaty that had the right to express the consent of the State to be bound by a treaty. He was not in favour of

copying mechanically the articles of the Conventions that dealt with full powers, not, at least, for reservations. Reservations were not included in the text of a convention but were rather included within its context. Since adopting a text and formulating reservations were two different things, those problems should be reconsidered.

51. The CHAIRMAN said that, if he heard no objection, he would take it that the members of the Commission wished to refer guidelines 2.1.1, 2.1.2, 2.1.3, 2.1.3 *bis*, 2.1.4, 2.1.5, 2.1.6, 2.1.7, 2.1.8, 2.4.1, 2.4.1 *bis*, 2.4.2 and 2.4.9 to the Drafting Committee.

*It was so agreed.*

*The meeting rose at 11.40 a.m.*

## 2693rd MEETING

*Friday, 20 July 2001, 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

**Reservations to treaties<sup>1</sup> (*continued*) (A/CN.4/508 and Add.1–4,<sup>2</sup> A/CN.4/513, sect. D, A/CN.4/518 and Add.1–3,<sup>3</sup> A/CN.4/L.603 and Corr.1 and 2)**

[Agenda item 5]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPOREUR  
(*concluded*)

1. Mr. ILLUECA thanked the Special Rapporteur for his extremely valuable sixth report (A/CN.4/518 and

<sup>1</sup> For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth, fifty-first and fifty-second sessions, see *Yearbook* . . . 2000, vol. II (Part Two), para. 662.

<sup>2</sup> See *Yearbook* . . . 2000, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 2001, vol. II (Part One).

Add.1–3) and said with reference to guideline 2.4.1 (Formulation of interpretative declarations) that “simple” interpretative declarations, like conditional declarations, should be formulated in writing.

2. As to guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations) he agreed with Mr. Candioti and Mr. Herdocia Sacasa that it should be brought into line with article 46, paragraph 1, of the 1969 Vienna Convention. That article went further than did guideline 2.1.4 by stating that the violation of a provision of internal law must be manifest and must concern a rule of internal law that was of fundamental importance. The need for the violation to be manifest and to concern a fundamentally important rule of internal law should likewise be mentioned in guideline 2.1.3 *bis* (Competence to formulate a reservation at the internal level).

3. Mr. PELLET (Special Rapporteur), summing up the discussion of his sixth report, thanked the members of the Commission who had made interesting and useful remarks on a topic that was admittedly fairly dry and technical. The Chairman had announced (2692nd meeting) that guidelines 2.1.3 *bis* and 2.4.1 *bis* had been referred to the Drafting Committee, but that was not his own understanding: there had been little enthusiasm for them and the Committee would be best advised not to consider them. Many members had said that a draft guideline on competence to formulate a reservation at the internal level served no purpose and merely stated the obvious. He did not agree: it indicated to States that there were no rules at the international level for determining the competent body and procedure for formulating a reservation at the internal level, and that accordingly it was entirely a matter for internal law. Guideline 2.1.3 *bis* was less anodyne than it seemed, but as there was little support for including it in the Guide to Practice, he would not insist on it.

4. Most members seemed to think what was stated in guideline 2.1.1 (Written form) went without saying, but what went without saying often went even better when it was said. Mr. Tomka had asserted (2692nd meeting) that written form was typical of all declarations regarding treaties, but that was both true and false. It was probably true with respect to the law of treaties as embodied in the 1969 Vienna Convention, but the literature was unanimous in finding that verbal agreements were also possible. At the time of signature and prior to formal confirmation, a reservation could certainly be considered to be formulated in a manner other than in writing. Mr. Economides and Mr. Tomka had proposed a shorter version of guideline 2.1.2 (Form of formal confirmation) which he found quite acceptable and which the Drafting Committee could usefully consider.

5. Most members favoured the longer of the two versions proposed for guideline 2.1.3 (Competence to formulate a reservation at the international level), although Mr. Hafner had suggested amendments to the shorter version. He himself thought the guideline should incorporate the greatest amount of detail possible, to help future users of the Guide to Practice. Some members had suggested drafting changes to the longer version, but such changes would be difficult, since the wording was taken from article 7 of the 1969 Vienna Convention. Few members

had addressed the question of whether paragraph 2 (*d*) should be retained or deleted. He thought it could indeed be deleted, and Mr. Tomka had energetically endorsed that point of view. If that were done, however, the Drafting Committee must bear in mind that it would constitute selective transposition to the guidelines of article 7 of the Convention, which contained a provision similar to paragraph 2 (*d*).

6. Mr. Gaja's comments (2691st meeting) on the terms “competence” and “formulate” in guideline 2.1.3 were extremely interesting, but had not swayed him from his own position. Mr. Gaja had rightly pointed out that the title of the guideline diverged from that of article 7 of the 1969 Vienna Convention in that it used the word “competence”. Even though the word was not used in the Convention, however, the subject was indeed competence. Could one speak of competence to formulate a reservation? He thought one could, in the sense that formulation of a reservation was a preliminary stage in the process that would render the reservation effective. The guideline dealt precisely with that: competence to formulate a reservation. Mr. Gaja objected that it was internal institutions that formulated a reservation, in which case the entire Convention should have used the word “express” instead of “formulate”. At the international level, it was in fact the plenipotentiary who formulated the reservation, in other words, who made an offer to be bound by a treaty as long as a particular article was not applied.

7. Guideline 2.1.4 had attracted the greatest number of comments. Some members had regretted the absence of a reference to competence to object to or accept a reservation, but it was an entirely different matter that would be addressed at the next session. He was beginning to get a little worried, in fact, as it appeared that there would have to be as many draft guidelines on objection to and acceptance of reservations as on formulation thereof. Mr. Gaja had made a provocative comment: that the consequences of a violation of internal rules on the reservation were less important than the consequences of the violation of internal rules on the consent of the State to be bound. The Latin American members of the Commission had supported that view, leading him to wonder if there were precedents from that region of which he was not aware. The problem was not the same for formulation of reservations as for imperfect ratification, however, for the very practical reason that the internal institutions that had the competence to conclude treaties were not identical to those which had the competence to formulate a reservation. A parliament, for example, could have nothing to say in the formulation of reservations, although it was very closely involved in the expression of consent to be bound by a treaty. The notion of substantial, formal, evident violation that was at the root of imperfect ratification was virtually impossible to transpose to the formulation of reservations.

8. He was grateful to Mr. Lukashuk for pointing out problems with the Russian language version of guideline 2.1.5 (Communication of reservations) and encouraged members of the Commission to draw to his attention any additional deficiencies in languages other than French. A number of members had agreed with Mr. Gaja that what was most important for reservations was the date of their communication, not to other States, but to the depositary.

He had grave doubts about the idea of placing the starting point for a very important time period—the one in which a State could react to a reservation by accepting or objecting to it—at the moment of notification of a third party, namely the depositary, which was not necessarily a party to the treaty concerned. It seemed almost shocking, from the standpoint of logic.

9. No clear answer had been given to his question whether the phrase “States . . . entitled to become parties to the treaty” should be clarified, which merely confirmed his inclination not to do so, since it would ultimately entail rewriting the entire law of treaties. Mr. Hafner had asked who would decide whether a State or international organization had become a party to a treaty. It was often international organizations that posed the hardest problem to resolve. In the final analysis, it was the depositary that took the decision, but that was better left unsaid. The commentary should address that issue and the others raised by Mr. Hafner relating to the exclusive or concurrent competence of economic integration organizations and the European Union.

10. Most members had seemed intrigued by the notion of a “deliberative organ” while feeling ill at ease, as he did, with the expression. He had used it because of the precedent in the handling by the Secretary-General of the reservation by India,<sup>4</sup> mentioned in paragraph 120 of his report. Mr. Hafner, he believed, had proposed speaking of a “treaty organ”. The Drafting Committee should give serious consideration to the question.

11. He thanked Mr. Herdocia Sacasa for a very clear response—in the negative—to his question of whether a reservation must be communicated to the head of the secretariat of the organization concerned. He, too, did not think that it was necessary. Mr. Herdocia Sacasa had gone on to say that the reservation must be communicated to the competent organ, but there he was less inclined to agree. It would raise major difficulties, including whether it was for depositaries to determine which organ was competent.

12. Many members of the Commission had misunderstood his question regarding paragraph 2 of guideline 2.1.5. There was no doubt whatsoever that a reservation to a treaty which was the constituent instrument of an international organization must be communicated to the international organization in question. But must it also be communicated to the States parties or States entitled to become parties to the treaty? The answer was by no means self-evident. One could say that it was sufficient to communicate the reservation to the organization, which must then take charge of notifying the States concerned. He would propose a different approach, implicit in the word “also” in paragraph 2 of guideline 2.1.5: reservations to constituent instruments must be communicated to all States concerned in the normal fashion, as if the instrument concerned was an ordinary treaty, as well as to the organization. That approach might prevent an avalanche of communications that would only delay matters. Mr. Herdocia Sacasa had agreed with him and had pro-

vided useful information on Latin American practice in that regard.

13. With regard to Mr. Economides’s remarks, he saw there a reversion to an old theme, namely that the 1969 and 1986 Vienna Conventions were poorly drafted. He did not agree and, in any case, it would be risky to try to make improvements piecemeal. If necessary, the Guide to Practice could include supplementary provisions, but he hoped that such a course would prove unnecessary and the Commission could continue to use the Conventions as a basis, unsatisfactory though they might be.

14. As to guideline 2.1.6 (Procedure for communication of reservations), most members—especially Mr. Kateka and Mr. Melescanu—mistrusted the provision relating to the use of modern technology, although he would prefer to see what the benefits would be of allowing communications relating to reservations to be made by electronic mail or facsimile. He was also uncertain as to whether the Commission considered facsimile to be equivalent to a communication in writing. He was inclined to think it was.

15. In connection with guideline 2.1.7 (Functions of depositaries), Mr. Gaja had made a very concrete suggestion, even if it was limited in scope, that the Commission should give its imprimatur to the usual practice whereby depositaries refused to accept a reservation that was prohibited under the terms of a treaty. The suggestion, which had been supported by Mr. Hafner and Mr. Herdocia Sacasa, seemed straightforward enough. Mr. Sreenivasa Rao also favoured the idea, provided that the scope was limited to that matter alone. Mr. Melescanu’s suggestion was more difficult, since it involved going against the usual practice of refusing to accept such reservations. If the Drafting Committee could find a specific wording that would incorporate Mr. Gaja’s proposal without opening a Pandora’s box and changing the overall thrust of the guideline, he would be well pleased. As for Mr. Hafner’s suggestion that the phrase “due and proper form” should be defined, he concurred but he considered that such a definition should appear in the commentary, not in a guideline.

16. On guideline 2.1.8 (Effective date of communications relating to reservations), Mr. Lukashuk had a problem that he personally was unable to resolve because it concerned the Russian text. As for Mr. Herdocia Sacasa’s comment about the benefits of the depositary acknowledging receipt of a communication relating to a reservation, he could not agree: the crucial time was when the ultimate addressee received the communication, since that was when any reaction might be observed.

17. Mr. Gaja had drawn attention to a point of difficulty concerning interpretative declarations, suggesting that, when a State formally sent such a declaration to the depositary, the latter must notify the States concerned. That would be effective up to a point, but only if it occurred at the time of the expression of consent to be bound or at the time of the authentication of the text. It was hard to envisage that when a State suddenly decided to make an interpretative declaration—even though it could be made at any time—the depositary had to proceed without further ado and send out more paper. Mr. Gaja’s suggestion,

<sup>4</sup> See 2690th meeting, para. 56.

which had been supported by several members, including Mr. Economides and Mr. Melescanu, should be referred to the Drafting Committee, but he was afraid that any amendments might lay a further burden on the depositary or encourage the formulation of interpretative declarations. As for Mr. Candioti's question about how the guideline would work, he confessed himself uncertain on that point. It was a complicated subject. In answer to Mr. Tomka's pertinent question about why guideline 2.4.1 was not entitled "Competence to formulate interpretative declarations", in consonance with guideline 2.1.3, he would have to give further thought to the matter. He had taken note of Mr. Illueca's comment, that simple interpretative declarations should be formulated in writing, but it was surely not in conformity with the position so far adopted by the Commission.

18. He was most unwilling to consider any changes to guideline 2.4.2 (Formulation of conditional interpretative declarations). Although conditional interpretative declarations were clearly different from reservations in terms of definition, they operated identically and the same rules should apply to both. It would be a waste of the Commission's time to contemplate new provisions, although changes might be necessary later if it was found that the effects of the two differed substantially. The Drafting Committee would, of course, scrutinize the text, and he would welcome any suggestions for editing changes in versions other than the French.

19. Mr. ECONOMIDES said that the aim of the Guide to Practice was to perform a useful function. It should therefore supply any necessary clarifications or explanations of the 1969 and 1986 Vienna Conventions; otherwise it would leave doubts in the mind of the user. Indeed, if possible without betraying the letter and the spirit of the Conventions, supplementary provisions should be provided. Thus, for example, as the Special Rapporteur himself had pointed out, there were no criteria on how to identify which States were entitled to become party to a treaty. Such uncertainties should be eliminated. The Commission would be failing in its duty if it did not seek solutions to any ambiguities, even though within the framework of the Conventions.

20. Mr. TOMKA, referring to the Special Rapporteur's feeling of a lack of support over the use of facsimile or electronic mail, as referred to in guideline 2.1.6, said that in fact States hardly ever availed themselves of either practice. Full powers electronically mailed to the United Nations were accepted only provisionally and had to be confirmed later in writing. The same applied to the treaty bodies and ICJ. Paragraph 2 of the draft guideline should be amended to read: "Where a communication relating to a reservation to a treaty is made by electronic mail or facsimile, it must be confirmed by regular mail." Diplomatic channels, of course, were another possibility.

21. Mr. HAFNER asked, in connection with guideline 2.1.3, about which he was in any case uncertain, whether it would not be appropriate for the Guide to Practice to contain a provision on the competence to confirm a reservation, for in some cases confirmation was required under the 1969 and 1986 Vienna Conventions.

22. Mr. GAJA said he feared that he had not expressed himself clearly enough in defence of the 1969 Vienna Convention. Guideline 2.1.8 was, he believed, not in conformity with article 78, subparagraph (b), of the Convention. The answer to the problem mentioned by the Special Rapporteur regarding the time limit for objections could be found in article 20, paragraph 5, of the Convention. It was important not to confuse the two issues. If the existing wording of guideline 2.1.8 were retained, there was a risk of derogation from the Convention on a point that was not important enough to merit such a course of action.

### Unilateral acts of States (A/CN.4/513, sect. C, A/CN.4/519<sup>5</sup>)

[Agenda item 4]

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR

23. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), introducing his fourth report (A/CN.4/519), drew attention to two questions that, in his view, were fundamental to the work of the Commission. The first was the classification of unilateral acts, for which he had sought first to establish a criterion on how to group the rules governing the operation of the various unilateral acts. The second question discussed in the fourth report, in the context of the rules applicable to all unilateral acts, regardless of their material content, related to interpretation, on which he had tried to clarify whether the rules of the 1969 and 1986 Vienna Conventions should be followed to the letter or whether specific rules applicable to unilateral acts should be established. The report also considered whether the rules on interpretation applied to all acts, regardless of their content.

24. In preparing the report, he had considered a wide range of literature, comments by members of the Commission and by Governments, a certain amount of case law and also some State practice. He stressed the importance of the opinions of Governments, which, after an initial period of scepticism, had largely come to be in favour of the work. That was due to the way the discussions in the Commission had developed and the progress made in harmonizing moderate yet sound criteria, which also confirmed that the topic was ripe for codification and progressive development, as the Commission had decided at its forty-eighth session.<sup>6</sup> Paragraph 8 of the report, for example, quoted the views of several representatives in the Sixth Committee of the General Assembly, as well as an important statement of doctrine that gave grounds for believing in the possibility of developing international law on unilateral acts.

25. Admittedly, the progress made had been relative, the basic reason being that until substantial agreement was reached on the general part of the draft—the structure, in particular—it would be neither possible nor appropriate to move forward on other fronts. One way forward was to decide what general rules were applicable to all acts,

<sup>5</sup> See footnote 3 above.

<sup>6</sup> See *Yearbook* . . . 1996, vol. II (Part Two), annex II, para. 2 (e).

in other words, the rules applicable to the formulation of all such acts, whatever their material content. At its fifty-second session, the Commission had made progress on the definition of unilateral acts, the capacity of the State, of persons authorized to formulate such acts on behalf of the State, as well as subsequent confirmation of an act formulated by a person not authorized to do so. Those draft articles were currently with the Drafting Committee. The Commission had also, at its previous session, discussed a draft article on invalidity, or, more precisely, defects of consent, which had been transmitted to an open-ended working group due to meet the following week.

26. Paragraph 19 of the report stated that he would take up in a preliminary way a study of the causes of invalidity, an issue which was closely related to the conditions of validity, but unfortunately the pace of the work of the Commission had prevented him from including the study in the fourth report, since he had intended to develop the question on the basis of the results of the discussions in the working group. The group could perhaps consider a number of questions, such as whether the regime of invalidity was applicable to all acts, whether the work should be restricted to rules relating to defects of consent or whether, as some had suggested, a provision should be drafted on the conditions of validity. It should also consider whether or not to include other provisions applicable to treaties under the Vienna regime, without necessarily applying those rules unchanged to unilateral acts. Such provisions would include those relating to the validity and continuity of an international act, the obligations imposed by international law regardless of the unilateral act, the divisibility of the act and the loss of the right to claim a cause of invalidity, which were all recognized and applicable under the 1969 and 1986 Vienna Conventions.

27. Before turning to his two main topics, he drew attention to a number of other factors. Paragraph 18 contained some thoughts on an issue that would need further consideration and on which he sought the comments and guidance of the Commission, namely the determination of the moment when the legal effects of a unilateral act came into being. That in turn would lead to determining the moment at which it was opposable or enforceable. It was a fundamental question, particularly when it came to dealing with the revocation, suspension or amendment of the unilateral act: all those procedures could differ, depending on the material unilateral act in question, in accordance with the classification attempted in the report. It was important to distinguish the moment at which the act came into being, producing legal effects while still retaining its unilateral nature, and the moment at which it materialized, thereby taking on a bilateral element though never losing its strictly unilateral nature.

28. States generally pursued their international relations through unilateral acts which were frequently more akin to conduct, attitudes, or even reactions like silence. The study of legal acts had made it possible to identify the kind of unilateral act of interest to the Commission, namely a unilateral act that produced legal effects. A legal act was not simply a process designed to give rise to rights and obligations, but was also an express manifestation of the will to produce legal effects. Although will certainly had to be manifest, it did not necessarily have

to be couched in a declaration, and consequently silence was an implicit manifestation of will.

29. Writers were not unanimously agreed whether silence was a legal act or simply conduct producing legal effects. Some maintained that, without an express declaration, there was no legal act, while others contended that express manifestation was not essential in determining the existence of a legal act. The active and passive conduct of States had been carefully examined by international courts on several occasions, for example in the *Grisbadarna* case or the *Temple of Preah Vihear* case.

30. Silence was of relevance to the material unilateral acts being considered by the Commission. Absence of protest in the form of silence was passive conduct that definitely produced legal effects; the findings of the arbitrator, Max Huber, in the *Island of Palmas* case had confirmed that. Yet while protest, the undertaking of an obligation or recognition might be unspoken, it was difficult to see how waiver and still less a promise could be tacit. As the report pointed out, serious doubts had been raised as to whether silence could be treated as a legal act, let alone as the sort of unilateral legal act which was to be covered in the draft articles. It had to be emphasized that silence was always a reaction and, as such, came within the scope of treaty relations. Moreover, in practice many international disputes brought before courts or tribunals had arisen because neither silence nor active conduct consistently reflected the real or presumed will of a State. Accordingly, it was very difficult to treat silence as a manifestation of the will of a State and, as paragraph 31 noted, that meant that it did not come within the general definition of a legal act contained in the draft articles currently before the Drafting Committee.

31. In paragraphs 33 to 43 of the report he examined interpretative declarations and unilateral acts related to international responsibility. Interpretative declarations were indisputably unilateral acts from a formal standpoint. They were generally linked to a pre-existing text connected with a previous manifestation of will and logically came within the framework of treaty relations. The situation was, however, different in the case of interpretative declarations that went beyond the stipulations of the treaty and became independent acts under which the State could accept international obligations. Similarly, the report examined acts related to the international responsibility of States, and countermeasures in particular, but did not propose any definitive answers. The conclusion reached in paragraph 43 was that, while interpretative declarations that went beyond the terms of a treaty might be among the unilateral acts of interest to the Commission, unilateral acts involving countermeasures had to be placed outside the context of the current topic.

32. The classification and the interpretation of unilateral acts were two questions of fundamental importance. The two draft articles on interpretation that had been proposed at the preceding session would serve as a basis for deliberations by the Commission. The classification of unilateral acts was not just an academic exercise and, as Mr. Economides and Mr. Herdocia Sacasa had suggested, it should take account of the diversity of such acts. One of the criticisms voiced by Governments and members of the Commission was that no distinction had been



drawn between the various material acts. It had further been pointed out that it was impossible to apply the same rules to promise, waiver, recognition and protest which, from a formal standpoint, were all unilateral acts but, in practice, had different legal effects.

33. It had proved impossible to group together the rules applying to the diverse acts and legal writers tended to give the same act different names and even include action like notification, which was not generally considered to be a unilateral act, or declarations, which were the means by which most unilateral acts, regardless of their content, were formulated.

34. If acts were to be classified in groups with specific rules for each group, it would first be necessary to establish a criterion and doctrine would have to be studied to that end. The material criterion had to be discarded, since it was inconclusive. For example, as the report showed, in the *Legal Status of Eastern Greenland* case, the Ihlen Declaration [see pages 69 and 70 of the judgment], which some considered to come within the realm of treaty relations, although for the majority it was a unilateral act as understood by the Commission, could be seen as containing a promise, a waiver or recognition. In some cases, declarations were clear and contained an international promise to follow a particular line of conduct in the future and hence they were obviously a unilateral act.

35. The most appropriate criterion for classification was that of legal effects, according to which acts could be placed into two groups: acts whereby States assumed obligations and acts whereby States reaffirmed their rights or legal claims. The many and various unilateral acts fell into one or other of those categories. That classification made it possible to draw up two separate sets of rules. If the Commission so wished, the general part of the draft containing the rules applicable to all acts and relating to the formulation of the act and the rules for acts whereby States accepted obligations to third parties could be completed at the next session.

36. Paragraphs 101 *et seq.* were about the interpretation of unilateral acts. The first question in that context was whether the rules of the 1969 and 1986 Vienna Conventions were applicable *mutatis mutandis* to unilateral acts. Some Government representatives had thought they were, while others had rightly taken the view that no such transposition was possible, given the obvious differences between a conventional act and a unilateral act which, moreover, justified the formulation of two sets of rules. In short, a conventional act resulted from concerted wills, whereas a unilateral act was the expression of the will of one or more States, in individual, collective or even concerted form, but in the "elaboration" of which third States took no part. In fact, a unilateral act created rules or produced legal effects on subjects other than the author State, whereas a conventional act produced effects among the parties that took part in elaborating it.

37. The second question was whether those rules applied to all unilateral acts irrespective of their content. The answer was that the rules of interpretation on the expression of consent and the will of the State generally applied. A unilateral act whereby a State assumed an obligation or

reaffirmed a right or claim could be interpreted according to the same rules, since interpretation was an operation through which the interpreter endeavoured to determine the will of the State, as expressed in the unilateral act. He wondered whether those rules should be placed in the general part or repeated each time in the section dealing with the particular category of acts.

38. As far as the very complex operation of interpreting unilateral acts was concerned, reference should naturally be made to the 1969 and 1986 Vienna Conventions, but an attempt must be made to adapt them to the specific features of unilateral acts. Paragraphs 114 *et seq.* had explained that articles 31 and 32 of the Conventions referred to the principle of declared will, which took priority when interpreting an act. Nevertheless, in the event of any uncertainty, the context, object and purpose of the treaty would be taken into consideration, together with supplementary agreements and subsequent practices, preparatory work and the circumstances in which the treaty had been concluded. A semantic interpretation of a unilateral act was of course an essential part of the operation and he had demonstrated its importance by a reference to the *Aegean Sea Continental Shelf* case, where ICJ had scrupulously examined even the grammar of a conventional act in order to determine the will of the parties.

39. As for doubts whether declarations accepting the jurisdiction of ICJ formulated under article 36 of its Statute were conventional or unilateral, although formally speaking they were obviously unilateral, the Court had determined that the restrictive criterion had to be applied and that such declarations were material unilateral acts. Like promise, they came within the scope of the current study by the Commission. Paragraphs 118 to 120 mentioned several cases in which the Court had analysed and interpreted a number of unilateral declarations.

40. Paragraph 123 of the report also noted that the rules laid down in the Vienna Conventions had also been applied when interpreting arbitral awards and the *Laguna del Desierto* case pointed out that under international law there were rules which were used "for the interpretation of any legal instrument, whether it be a treaty, a unilateral act, an arbitral award or a resolution of an international organization" [p. 44, para. 72]. The Court had maintained that the rules of interpretation applied in general to legal acts irrespective of whether the parties to the dispute were parties to the 1969 Vienna Convention. The restrictive criterion applied in the interpretation of a unilateral act, because of the way the act was formulated, even if it was unilateral solely from a formal standpoint.

41. All the Vienna rules had to be considered carefully and transposed to unilateral acts where necessary. For example, if a treaty had to be interpreted in good faith, that was equally true of a unilateral act. International case law had constantly upheld that position and paragraph 132 of the report quoted the findings of ICJ in the *Nuclear Tests (Australia v. France)* case in that respect. In the sphere of conventional acts and unilateral acts, interpretation included consideration of the context, since in the *Anglo-Iranian Oil Co.* case and more particularly the *Fisheries Jurisdiction* case the Court had taken the view that intention could be deduced not only from the terms of a

declaration, but also from the context in which it was to be read.

42. In contrast, the Vienna rules on object and purpose could not be transposed to the interpretation of unilateral acts because, in his opinion, they were terms specifically applicable to treaty relations.

43. A further interesting question was whether reference to any preamble or annexes was possible in the context of unilateral acts. Personally, he saw no reason why a unilateral declaration should not be accompanied by a preamble and annexes, which could be clearly identified in written declarations. Broader consideration might also be given to the introductory or preambular sections of successive or simultaneous oral declarations like those made by France and considered by ICJ in the *Nuclear Tests* case. The report also spoke in paragraph 141 of the Declaration on the Suez Canal made by Egypt.<sup>7</sup> Subsequent conduct could also be a useful guide in interpreting a unilateral legal act, but no mention had been made of subsequent agreements in the draft articles in paragraph 154 of the report, as they were essentially of a treaty nature.

44. Two further aspects reflected in the draft articles were supplementary means of interpretation, in particular preparatory work and the circumstances in which a unilateral declaration was formulated which, as Mr. Pambou-Tchivounda had explained, came into play only at a later stage when the interpreter wished to confirm the results of the interpretation or his efforts to make a determination on the basis of priority elements had led to a result that was uncertain or manifestly absurd or unreasonable. Resort to preparatory work was certainly a difficult task. Could notes, internal memorandums and other forms of internal communication be regarded as preparatory work? In that connection he cited in paragraph 148 an interesting statement by the arbitral tribunal in the *Eritrea/Yemen* case. As for circumstances, paragraph 149 mentioned two decisions of ICJ that had dealt with that subject.

45. In his opinion, any doubt as to whether the rules on interpretation applied to all unilateral acts were dispelled in paragraph 152, which concluded that, irrespective of the material content of an act, those rules always applied. Paragraph 153 went on to explain the reason for the wording of the draft articles contained in paragraph 154. He looked forward to hearing the comments by the members of the Commission on his report.

*The meeting rose at 12.45 p.m.*

<sup>7</sup> 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.

## 2694th MEETING

*Tuesday, 24 July 2001, at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosestock, Mr. Simma, Mr. Tomka, Mr. Yamada.

### Reservations to treaties<sup>1</sup> (*concluded*) (A/CN.4/508 and Add.1–4,<sup>2</sup> A/CN.4/513, sect. D, A/CN.4/518 and Add.1–3,<sup>3</sup> A/CN.4/L.603 and Corr.1 and 2)

[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 adopted by the Drafting Committee (A/CN.4/L.603 and Corr.1 and 2), the titles and texts of which read:

##### 2.2.1 *Formal confirmation of reservations formulated when signing a treaty*

**If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.**

##### 2.2.2 [2.2.3]\* *Instances of non-requirement of confirmation of reservations formulated when signing a treaty*

**A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.**

\* The number between square brackets indicates the number of the draft guideline in the report of the Special Rapporteur. Guideline 2.2.2 proposed by the Special Rapporteur was deleted.

<sup>1</sup> For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth, fifty-first and fifty-second sessions, see *Yearbook . . . 2000*, vol. II (Part Two), para. 662.

<sup>2</sup> See *Yearbook . . . 2000*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

### 2.2.3 [2.2.4] *Reservations formulated upon signature when a treaty expressly so provides*

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

#### 2.3.1 *Late formulation of a reservation*

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.

#### 2.3.2 *Acceptance of late formulation of a reservation*

Unless the treaty provides otherwise or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

#### 2.3.3 *Objection to late formulation of a reservation*

If a Contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

#### 2.3.4 *Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations*

A Contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

- (a) interpretation of a reservation made earlier; or
- (b) a unilateral statement made subsequently under an optional clause.

#### 2.4.3 *Time at which an interpretative declaration may be formulated*

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7] and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

#### 2.4.4 [2.4.5] *Non-requirement of confirmation of interpretative declarations made when signing a treaty*

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

#### 2.4.5 [2.4.4] *Formal confirmation of conditional interpretative declarations formulated when signing a treaty*

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case the interpretative declaration shall be considered as having been made on the date of its confirmation.

#### 2.4.6 [2.4.7]\*\* *Late formulation of an interpretative declaration*

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international

organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation of the interpretative declaration.

#### 2.4.7 [2.4.8] *Late formulation of a conditional interpretative declaration*

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration.

2. Mr. TOMKA (Chairman of the Drafting Committee), introducing the report of the Drafting Committee, said that the Committee had devoted six meetings to the consideration of the topic, from 28 May to 1 June and on 12 July 2001. The Committee had considered 14 draft guidelines that the Commission had referred to it at the current session. He thanked the Special Rapporteur for his guidance and cooperation and the members of the Committee for their constructive comments and active participation in its work.

3. The draft guidelines before the Commission dealt with three matters: reservations formulated when signing a treaty, late reservations and interpretative declarations. Chapter I of the Guide to Practice (Definitions) had already been completed and the Drafting Committee was currently working on chapter II (Procedure), in which the draft guidelines all began with the number 2. The second number related to the section within chapter II in which the draft guidelines were to be found: section 2 (Confirmation of reservations made when signing), section 3 (Reservations formulated late) or section 4 (Procedure regarding interpretative declarations). The draft guidelines in section 1 (Form and notification of reservations) were to be found in the annex to the Special Rapporteur's sixth report (A/CN.4/518 and Add.1–3). The last number referred to the order of the draft guidelines within a section.

4. Guideline 2.2.1 was entitled "Formal confirmation of reservations formulated when signing a treaty". During the discussion in the Commission, some interest had been expressed in combining it with guideline 2.2.2 and it had been suggested that the wording could be streamlined. After a productive exchange of views, the Drafting Committee had decided not to combine the two draft guidelines. It considered that guideline 2.2.1 constituted a separate provision, one which was in the 1969 and 1986 Vienna Conventions and which, for the sake of clarity, deserved separate treatment. Guideline 2.2.2 was, however, more problematic. Combining them would result in a provision that was so vague and general that it would not serve much purpose. In the end, the Committee had decided that any attempt to streamline the wording would mean departing from the wording of the Conventions. In keeping with what had been done for other draft guidelines, the Committee had thus decided to retain the initial wording, which was identical to that of article 23, paragraph 2, of the Conventions. That was why the words "by the treaty" had been added at the end, after the word "bound". The title had been redrafted to reflect the content more faithfully and currently read: "Formal confirmation of reservations formulated when signing a treaty".

\*\* Guideline 2.4.6 proposed by the Special Rapporteur was deleted.

5. The Drafting Committee was of the opinion that guideline 2.2.2 should be deleted. Many members of the Commission had already expressed doubts in plenary about whether reservations formulated when negotiating a treaty actually existed. The Committee had also feared that the retention of the draft guideline might give the impression that there was a new category of reservations made when adopting or authenticating the text of a treaty, i.e. “premature” reservations, which did not entirely correspond to the definition already adopted (guideline 1.1.1). Declarations which were made when negotiating, adopting or authenticating the text of a treaty, and which expressed an intention to make a reservation should be dealt with in the commentary (probably to guideline 2.2.1). They could be mentioned in the context of the pedagogical purpose of the Guide to Practice without being the subject of a separate draft guideline, which might create more problems than it would solve.

6. There had been few comments or disagreements in the Commission on guideline 2.2.2 [2.2.3], except for the clear preference expressed by several members for the retention of the second bracketed phrase in guideline 2.2.3 proposed by the Special Rapporteur: “a treaty that enters into force solely by being signed”. During the discussion in the Drafting Committee, it had been pointed out that the first bracketed phrase, “an agreement in simplified form”, could refer to several different types of agreements, depending on individual countries and legal traditions, such as agreements concluded by exchange of notes or by the executive branch without reference to a legislative body. Other examples given were agreements applied provisionally following signature and entering into force later through ratification, as well as agreements providing for provisional application. The Committee had thought that all such cases of mixed agreements to which guidelines 2.2.1 and 2.2.3 might apply should be mentioned in the commentary. Since a treaty did not actually enter into force by the mere fact of signature, but when certain additional conditions had been met (a certain number of signatures), it had been thought preferable to replace the phrase “a treaty that enters into force solely by being signed” by “when a State or international organization expresses by its signature the consent to be bound by the treaty”. The title was changed to read: “Instances of non-requirement of confirmation of reservations formulated when signing a treaty” in order to draw attention to the specificity of such instances and to differentiate guideline 2.2.2 [2.2.3] from the next one.

7. Guideline 2.2.3 [2.2.4] (Reservations formulated upon signature when a treaty expressly so provides) was intended to cover cases when the possibility of making a reservation was provided for in a treaty. The Special Rapporteur’s proposal had been to indicate that reservations made in such cases did not require formal confirmation. The Drafting Committee had had a lengthy discussion in which two trends had taken shape. A small majority of members had supported the position of the Special Rapporteur, whereas others had thought that, even when a treaty expressly so provided, reservations made when signing should be confirmed when expressing consent to be bound. Having checked State practice, which proved to be contradictory and somewhat confusing, the Committee had concluded that the best course of action would

be to draft a guideline to give guidance to States and practitioners, all the more so in that treaties were silent on whether reservations whose formulation upon signature was provided for had to be confirmed.

8. The wording of the draft guideline was flexible and it had not been substantially changed. It did not say that reservations made when signing did not have to be confirmed when expressing consent to be bound, but rather, that such reservations did not require confirmation. States were therefore free to continue as before: nothing prevented them from confirming such reservations, but there was no uncertainty about the fate of reservations that had not been confirmed. The Drafting Committee had replaced the words “to formulate a reservation” by the words “may make such a reservation”, since that was more appropriate with reference to the distinction between the verbs “to make” and “to formulate”. The purpose of the draft guideline, like that of the entire Guide to Practice, was to provide clarification and certainty in cases that might seem borderline. How States would make use of it and what its long-term consequences were remained to be seen.

9. Guideline 2.3.1 (Late formulation of a reservation) was the first of three concerning the definition and legal effects of reservations formulated late. It focused on two main issues. The first was how States acted in practice to ensure that no party to a treaty could make a reservation after having expressed consent to be bound if one of the contracting parties objected to the reservation. The second was reflected in the words “Unless the treaty provides otherwise,” and was meant to highlight the exceptional nature of such reservations, i.e. the fact that they were not part of “normal” treaty-making practice.

10. The Drafting Committee had looked into whether late reservations were not actually an attempt by States to renegotiate the treaty and, if so, whether they should be considered true reservations. It had concluded, however, that, if the other contracting parties did not oppose the procedure, there was no reason for such declarations not to be considered reservations. Although the draft guideline might seem incompatible with the definition of reservations in guideline 1.1 (Definition of reservations), the Committee had decided not to ignore something that was tolerated under certain circumstances, but remained an exceptional practice.

11. The commentary would indicate that the draft guideline was without prejudice to the implementation of the relevant provisions of the 1969 Vienna Convention, specifically those on reservations to the constituent instrument of an international organization. In practice, the word “objection” was used to refer to two types of disagreement: with the procedure used to make a late reservation and with the content or substance of the reservation. “Objection” was an accepted term and should be retained to avoid inventing new terminology, although it could be explained in the commentary that it covered two types of opposition. The title and text of the draft guideline proposed by the Special Rapporteur had thus been retained with minor drafting changes. One member had reserved his position on the draft guideline.

12. Guideline 2.3.2 (Acceptance of late formulation of a reservation) was the logical consequence of the preceding provision. It had been welcomed in the Commission and found to be compatible with State practice. It dealt with the time period within which a contracting party must object to a late reservation unless it was to be considered as having accepted it. That time period, 12 months, came into play only if the treaty did not provide otherwise, in which case the period envisaged by the treaty obviously applied, and if the well-established practice of the depositary did not differ, in which case that practice prevailed. The Drafting Committee had not changed the title and text as proposed by the Special Rapporteur but for the replacement of the words “usual practice” by the words “[well] established practice”, which were used in article 1, paragraph 1 (34), of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

13. With regard to guideline 2.3.3 (Objection to late formulation of a reservation), the main concern of the Drafting Committee had been to ensure that only one objection would suffice for a late reservation not to be established. In such a case, it could be said that the late reservation did not exist or that it was not established *erga omnes*. That was why the wording chosen was that of the Special Rapporteur: “the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established”. The word “established” had been incorporated because it was used in article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions and the English text had thus been brought into line with the French text.

14. The Drafting Committee had also decided that the inclusion of the words “Unless the treaty provides otherwise”, as in the two preceding guidelines, was unnecessary because treaty provisions on objections to the late formulation of a reservation were virtually non-existent and, where they did exist, late reservations were covered in the treaty itself and objections to them therefore came within the category of “normal” objections.

15. Guideline 2.3.4 dealt with the late exclusion or modification of the legal effects of a treaty by means other than reservations or, in other words, with the various means by which a State or international organization might seek retroactively to alter or exclude the legal effects of a treaty or of one of its provisions. In paragraphs 279 to 287 of his fifth report (A/CN.4/508 and Add.1–4), the Special Rapporteur cited many instances of such practices, which were often, but not exclusively, to be found in human rights treaties. Guideline 2.3.4 did not presuppose the existence of a court or other institution empowered to apply it, meaning that any State or international organization could do so.

16. The Drafting Committee had thought that the draft guideline was somewhat complicated and should perhaps be placed in a future part of the Guide to Practice on the interpretation of reservations. In the end, however, it had concluded that the means used “subsequently” in the life of a treaty should be mentioned in the context of the formulation of reservations in order to distinguish them from late reservations. The Committee had removed the words “Unless otherwise provided in the treaty”, since

they were unnecessary in that particular context, and had added the word “subsequent” in subparagraph (b) to make the meaning clearer. Similarly, in the title, the word “late” had been replaced by “subsequent”, which was a much more appropriate way of referring to declarations that were not reservations.

17. Guideline 2.4.3 (Time at which an interpretative declaration may be formulated) was the counterpart to guideline 2.3.1. The discussion in the Drafting Committee had brought up two questions: whether to mention the time—normally that of the adoption or authentication of the text of the treaty—after which an interpretative declaration could be formulated and whether to delete the two bracketed phrases, “unless otherwise provided by an express provision of the treaty” and “the treaty states that it may be made only at specified times”. They had been deemed unnecessary for the reasons just given for the deletion of a similar phrase in guideline 2.3.4. No overall decision had been taken on whether to include such phrases, however, and during the consideration of the draft guidelines on second reading, some thought would have to be given to that question. The first word of the title was changed from the plural to the singular.

18. The deletion of guideline 2.4.4 was the logical consequence of the decision to delete guideline 2.2.2, and was based on the same reasons.

19. Guideline 2.4.4 [2.4.5] (Non-requirement of confirmation of interpretative declarations made when signing a treaty) related to the question whether interpretative declarations made when signing a treaty had to be confirmed. Originally, drafted as applicable only to the non-confirmation of formal interpretative declarations made when signing an agreement in simplified form, i.e. one that entered into force when signed by a certain number of States or international organizations, it had been re-worked to make it broader in scope. It currently covered simple interpretative declarations, whether provided for in a treaty or not, and all types of treaties (agreements in simplified form and multilateral treaties submitted for ratification, approval or accession). No confirmation was to be required for interpretative declarations made when signing a treaty, in accordance with practice and in order to keep the procedure for formulating interpretative declarations relatively straightforward. Nothing prevented a State or international organization from confirming an interpretative declaration if it so wished, however. The title had also been amended accordingly.

20. Having deleted guideline 2.4.4 proposed by the Special Rapporteur, the Drafting Committee had realized that there was nothing in the text about the formal confirmation of conditional interpretative declarations, which by their nature were closer to reservations than to interpretative declarations made when signing a treaty and were covered in guideline 2.4.4 [2.4.5]. When a State or international organization made its participation in a treaty conditional on a certain interpretation of the treaty, the other parties to the treaty had to be aware of that interpretation. Hence the need for the confirmation of such conditional interpretative declarations at the time of expression of consent to be bound by a treaty. Guideline 2.4.5 [2.4.4] (Formal confirmation of conditional interpretative declarations formulated when signing a treaty)

was thus based on guideline 2.4.4 proposed by the Special Rapporteur.

21. The logical outcome of the adoption of guideline 2.4.5 [2.4.4] was the deletion of guideline 2.4.6 (Interpretative declarations formulated when signing for which the treaty makes express provision). Given that interpretative declarations did not require formal confirmation, there was no need to have a separate category for interpretative declarations made when signing and expressly provided for in a treaty.

22. Guideline 2.4.6 [2.4.7] was to some extent the counterpart to guideline 2.3.1 and had given rise to little discussion in the Drafting Committee. Clearly, when a treaty provided that an interpretative declaration could be made only at specified times, the late or subsequent formulation of an interpretative declaration must be consented to by all the contracting parties. That was the approach followed, for example, by the Secretary-General when acting as depositary. Guideline 2.4.6 [2.4.7] had remained basically unchanged, with some drafting amendments simply to clarify the meaning and bring it into line with guideline 2.3.1. The title was changed to read: "Late formulation of an interpretative declaration" in order to clarify the scope.

23. Guideline 2.4.7 [2.4.8] was largely unchanged except for minor amendments to bring it into line with guidelines 2.3.1 and 2.4.5 [2.4.4] and the consequent rewording of the title. It dealt with the special situation of the late formulation of conditional interpretative declarations. Since the regime for such declarations seemed closer to that of reservations than to that of simple interpretative declarations, the Drafting Committee had agreed with the inclusion by the Special Rapporteur of a provision similar to the one on the late formulation of reservations. Late formulation must be accepted, if only tacitly, by all of the other contracting parties. A single objection would suffice for the conditional interpretative declaration to be considered null and void.

24. In conclusion, he thanked the members of the secretariat who had assisted the Drafting Committee, which recommended the draft guidelines to the Commission for adoption.

25. The CHAIRMAN welcomed to the meeting Mr. Mahiou, former member and Chairman of the Commission, and invited the members to comment on the report by the Chairman of the Drafting Committee.

26. Mr. PAMBOU-TCHIVOUNDA, referring to the second sentences of guidelines 2.2.1 and 2.4.5 [2.4.4], said he was not sure that the words "In such a case" were necessary, but would not press for their deletion.

27. Mr. TOMKA (Chairman of the Drafting Committee) said that the possible deletion suggested by Mr. Pambou-Tchivounda could be studied during the consideration of the draft guidelines on second reading, although the words "In such a case" were used in the second sentence of article 23, paragraph 2, of the 1969 Vienna Convention.

28. Mr. HAFNER, confirming that he had expressed a reservation about guideline 2.3.1, in the Drafting Com-

mittee, said that he could not reconcile the late formulation of reservations with the definition of reservations already adopted and saw no convincing reason to depart from that definition. His assessment might have been different, however, if the entire regime applicable to reservations had been available, and that was why he would not object to the adoption of the draft guideline. If a vote had been taken on it, however, he would have abstained.

29. Mr. AL-BAHARNA suggested that, in the title of guideline 2.3.2, the words "Period required for" should be inserted before the word "Acceptance" and, in the title of guideline 2.3.3, the words "Effect of" should be inserted before the word "Objection", in order to reflect better the content of those draft guidelines. The *chapeau* of guideline 2.3.4 should be brought into line with the title and should read: "legal effects", not "legal effect". In subparagraph (a), the word "subsequent" should be inserted before the word "interpretation" to parallel the use of the word "subsequently" in subparagraph (b). In guideline 2.4.3, the number "2.3.4" should be inserted after the number "1.2.1", since guideline 2.3.4 was also relevant.

30. Mr. TOMKA (Chairman of the Drafting Committee) said that the title of guideline 2.3.2 in English was incorrect: the word "late" should be inserted before the word "formulation", in line with the French text, which was the one on which the Drafting Committee had worked. In guideline 2.3.4, subparagraph (a), the insertion of the word "subsequent" would be superfluous, since any interpretation was always done after the time when a reservation was formulated. He reserved the right to refer at a later stage to the other suggestions made by Mr. Al-Baharna.

31. Mr. SIMMA, referring to guidelines 2.4.5 [2.4.4], 2.4.6 [2.4.7] and 2.4.7 [2.4.8], said he hoped that the last word had not been spoken on whether the final product of the Commission would deal with conditional interpretative declarations. His problem with guideline 2.3.1 was slightly different from Mr. Hafner's. He thought that late reservations were undesirable and should not be condoned by devoting a guideline to them. The fairly tortuous wording of the provision showed that the authors themselves had some misgivings. Guidelines should have some normative content, but, in guideline 2.3.1, it was minimal.

32. Mr. KATEKA said that he had strong objections to the inclusion of guidelines on late reservations, which appeared to indicate some tolerance of the practice by the Commission. There was nothing about late reservations in the Vienna regime. Like Mr. Simma, he thought that the stance taken by the Commission was unfortunate.

33. Mr. ROSENSTOCK said that he had serious difficulties with the inclusion of guidelines on conditional interpretative declarations, which merely complicated the rules on reservations. The text could be fully evaluated only when it had become available in its entirety. Passing judgement on individual components of a very interesting, but incomplete, exercise was extremely difficult. He was also concerned about the extremely detailed nature of some of the provisions.

34. Mr. LUKASHUK said that he fully endorsed the comments made by Mr. Kateka.

35. Mr. MOMTAZ said that he did not agree with Mr. Al-Baharna's proposal that the *chapeau* of guideline 2.3.4 should be brought into line with the title by amending the words "legal effect" to read "legal effects". The phrase in the title was in the plural because it covered two separate actions, those described in subparagraphs (a) and (b), whereas the *chapeau* referred to a single action. He fully agreed with Mr. Kateka's comments.

36. Mr. GALICKI said that he wished to join the club of members who had problems with the late formulation of reservations. He agreed with Mr. Hafner that guideline 2.3.1 contradicted the definition of reservations already adopted. The fact that no time limits were set for such modifications created a dangerous practice and deprived treaty relations of stability. The job of the Commission was not to codify rare practices that were not suitable for the development of international law and he fully agreed with Mr. Simma that such practices should not be tolerated, even tacitly. Guideline 2.3.1 should be reconsidered in conjunction with guidelines 2.3.2 and 2.3.3. If the late formulation of reservations was to have a place in treaty relations, it could be dealt with in guideline 2.3.4. On the whole, however, he was against mentioning the late formulation of reservations in a set of guidelines that were intended to describe model practices to be followed by States.

37. Mr. ELARABY said that he still had difficulties with the topic of reservations to treaties and particularly with the late formulation of reservations and conditional interpretative declarations, the concept of which was hard to grasp. He associated himself with the members who had expressed misgivings on those points.

38. Mr. MELESCANU said that he also agreed with those members. For him, late reservations were an element of uncertainty in international law. The concept itself was at variance with the concept of reservations as embodied in the 1969 and 1986 Vienna Conventions. But much depended on how one looked at public international law and, in his opinion, the will of States was its fundamental component and indeed the very source of legal obligations. Mr. Galicki was wrong in thinking the Commission was encouraging a dangerous practice. It was simply being realistic by taking account of what States actually did. If the practice was deemed to be contrary to the idea of reservations, that could be made clear, but it would be wrong to close one's eyes to it. Regarding Mr. Simma's interesting argument about the lack of normative content, he said the Guide to Practice was not a work of codification and did not set strict and precise standards. The purpose of the exercise was, by drawing on State practice, to form the basis for recommendations that might help those who dealt with late reservations, particularly in foreign ministries. He certainly did not approve of late reservations, but, since they existed, they should be acknowledged and an attempt should be made to limit their adverse effects.

39. Mr. YAMADA said that he also had difficulty with the concept of conditional interpretative declarations and hoped that the Commission would come back to it dur-

ing the consideration of the draft guidelines on second reading. He shared the misgivings expressed by many members about the late formulation of reservations and thought that the practice should not be encouraged, but, if a contracting party that had accepted a treaty without any reservations later found itself unable to implement a certain provision of the treaty, what could it do? It could make a late reservation or withdraw from the treaty. The whole purpose of a reservation was to provide flexibility in the interests of universality. A balance had to be struck between the unity and the universality of a treaty.

40. Mr. SIMMA, referring to his point that guideline 2.3.1 lacked normative content, said the "sandwich" technique of placing a prohibition between an "Unless" clause and an exception had the cumulative effect of saying very little. He was not suggesting that the Commission should overlook the practice of making late reservations, however deplorable it might be, but, rather, that more thought should be given to the whole matter and to the wording of any draft guideline that might relate to it.

41. Mr. CANDIOTI said that the Spanish text of the draft guidelines needed polishing. He shared the doubts expressed about including provisions on late reservations in the Guide to Practice and thought that more consideration should be given to the matter. In its report to the General Assembly, the Commission should request the views of States. He welcomed Mr. Yamada's remarks on how provisions on late reservations might affect the necessary balance between the unity and universality of a treaty. Like others, he had doubts about whether a guide to practice should simply reflect reality. It was not a phenomenological investigation, but an attempt to put order and provide guidance in a field where practice was fairly confused.

42. Mr. GALICKI said that Mr. Melescanu appeared to have misconstrued his earlier statement. He agreed, of course, that the Commission was not creating norms, but simply reflecting certain practices in the draft guidelines. In so doing, however, it was "ennobling" those practices to some extent. What was said in guideline 2.3.1 about late formulation of a reservation indirectly created the impression that the draft guidelines contained some rules on that subject. He was fearful of giving that impression and therefore reaffirmed his objection to the inclusion of guideline 2.3.1 in its current form. Consideration should be given to his earlier suggestion that the phenomenon should be mentioned somewhere else in the text. The Commission was not closing its eyes to reality, but keeping a balance between certain phenomena and the definitions and rules that it had already adopted. He was very much in favour of Mr. Candiotti's suggestion that more information should be requested on the practice of States.

43. Mr. ECONOMIDES said that he was among those who had difficulty with the question of conditional interpretative declarations. He had understood that it was to be reconsidered at the close of the work of the Commission and that the relevant provisions had been accepted only provisionally. On late reservations, he entirely agreed with Mr. Melescanu. The practice ran counter to the 1969 Vienna Convention and should be discouraged, but it existed, had long existed in fact and had been applied by major international organizations serving as depositar-

ies. A guide to practice could not simply ignore it. In the commentary to the relevant draft guideline, however, the Commission should express its disapproval of the practice and say that it must be treated as an exception. The rules envisaged were extremely strict, since, in order for a late reservation to be accepted, the unanimous agreement of all the other States concerned was required. Adequate guarantees and precautions thus had to be provided for.

44. Mr. KAMTO said that he had a question of principle relating to the legal basis for the work of the Commission. Many members had argued that the Commission could not ignore practice. But neither could it mechanically go along with practice, especially if it was contrary to the principles of international law. The important thing was to determine whether the practice in question was in harmony with international law. It was true that the will of States was the cornerstone of international law, but it was equally true that, in certain cases, such as bilateral relations, it could be contrary to certain international legal principles and rules. As a member of the Drafting Committee, he had seen the efforts made to avoid a fundamental contradiction between the draft guidelines and the 1969 Vienna Convention. If such a contradiction existed, however, the duty of the Commission was to draw attention to it, if only by noting in the commentary that the practice was contrary to the established rules of international law.

45. Mr. AL-BAHARNA said that, although many misgivings had been expressed about guideline 2.3.1, he thought that it was well balanced, particularly in the way it reflected State practice. The main question was whether the rule it embodied was compatible with the 1969 Vienna Convention and he thought that it was, even though the Convention did not specifically state such a rule. The draft guideline established certain conditions, one of which was reflected in the phrase “Unless the treaty provides otherwise”. That phrase had been questioned, but it was generally accepted and commonly found in treaty texts. The guidelines would be of little use if they failed to include rules that had been consolidated by State practice and did not contradict the Convention.

46. Mr. GAJA said the original discussion in the Commission had not revealed the strong opposition to guideline 2.3.1 that was becoming apparent. The argument that late reservations were not a widely known phenomenon overlooked the fact that they had been accepted by major depositaries of treaties, including the Secretaries-General of the United Nations, IMO and the Council of Europe. Everyone agreed that it was an undesirable phenomenon, although in some cases it met certain needs on the part of States. With regard to Mr. Simma’s objection to the “sandwich” technique, he said that double negatives were frequently used for precisely the purpose intended in the current case, namely, to show that certain acts should not be encouraged, but simpler, more positive wording, such as “... may only formulate a reservation if none of the other Contracting Parties objects . . .”, could easily be used. It had been argued that the draft guideline conflicted with the 1969 Vienna Convention, but that was not true. It did not say that late reservations were reservations from the time they were made, but that they were treated as reservations once they had been seen to give rise to

absolutely no objection. That point could be clarified in the commentary.

47. Mr. HERDOCIA SACASA said his understanding from the very start had been that the controversial elements in the draft guidelines would be reconsidered at the end of the exercise. He agreed with Mr. Rosenstock that the overall picture had to be visible before the unity of treaties could be properly balanced with their universality. It was true that the late formulation of reservations and conditional interpretative declarations could pave the way for legal uncertainty and other problems. He therefore endorsed the suggestion by Mr. Candioti that States should be asked to comment on those two issues, after which the Commission would have a fuller perspective on the matter.

48. Mr. RODRÍGUEZ CEDEÑO said that many doubts had been expressed as to whether draft guidelines on late reservations and conditional interpretative declarations should be included, particularly because of the possible destabilizing effect on treaty relations. That was a valid argument, but equally valid was the point that the Commission could not afford to ignore an existing practice. The wording of guideline 2.3.1 left the door wide open to the expression of opposition to a late reservation, since all the parties to a treaty had to agree to it. Different wording might help to dispel doubts and offset any disadvantages the practice might have. The Commission should follow Mr. Candioti’s suggestion and ask the General Assembly whether the two draft guidelines should be included, but some attention should be paid to how the question was phrased.

49. Mr. HE said that a heated debate had already taken place on late reservations and it was obvious that many difficulties still had to be resolved. On the one hand, the Commission should not encourage the use of late reservations, but, on the other, it needed to recognize that it was part of State practice. A number of countries, as well as the Secretary-General, had already accepted it. In such circumstances, he suggested that the draft guidelines on late reservations should be retained through the first reading and that guidance from the Sixth Committee and written comments by Governments should be requested with a view to arriving at more satisfactory wording of the draft guidelines for consideration on second reading.

50. Mr. BROWNLIE said that he had a certain preference for the views expressed by Mr. Al-Baharna and Mr. Gaja, as opposed to those of Mr. Simma and others, but, ultimately, he agreed with Mr. Rosenstock that no appropriate solution to the problem could be found until the overall purpose and rationale of the project was revisited. There had always been a strong element of exposition, and therefore a certain neutrality, in the draft guidelines. Thanks to the Special Rapporteur, the Commission was involved in a cartographic exercise, but it had not said whether or not it liked the terrain.

51. Mr. LUKASHUK said the fact that the Commission had not reached a consensus and that two opposing positions prevailed had to be acknowledged. He proposed that the provisions on late reservations should be placed in square brackets and submitted to the Sixth Committee in order to ascertain the views of States. In the meantime,



the Special Rapporteur could be asked to draft a compromise solution that was not at variance with the Vienna regime.

52. Mr. ADDO said that guideline 2.3.1 must be retained. The fact that some States made late reservations and some States did not object to them could not be gainsaid. The business of the Commission was not to do away with the practice, but to draft provisions on it while indicating how deplorable it was. The decision as to whether the practice should be abolished should be left up to the Sixth Committee. On that score, he was inclined to endorse the views of Mr. Al-Baharna and Mr. Gaja.

53. Mr. SIMMA said that he supported Mr. Candioti's suggestion, which Mr. Galicki seemed to have interpreted as being to gather more information about State practice. That was not what was needed, however, because such information was already plentiful and, unfortunately, it was not good news. The Sixth Committee should be asked whether it wanted the Commission to codify the practice of late reservations and establish rules like those proposed in the draft guidelines. A compromise solution as suggested by Mr. Lukashuk would be hard to achieve. Late reservations had to be accepted as a fact of life and an appropriate regime for them developed. Otherwise, they had to be rejected and done away with.

54. Mr. TOMKA (Chairman of the Drafting Committee) said that the Drafting Committee had worked on the basis of the Commission decision to refer the draft guidelines to it. Clearly, the Commission was currently in the first stage of the drafting of the text and could reconsider some provisions later, on the basis of comments to be made by Governments.

55. The CHAIRMAN, summing up the discussion, said that there were opposing views on two issues: late reservations and conditional interpretative declarations. Those views had to be reconciled; square brackets were not an option. States could, however, be asked for their opinions. It could be argued that the draft guidelines that had been questioned should be deleted, but he would prefer to see them adopted, on the understanding that the Commission would discuss the two problematic issues later. After all, the debate in the Commission had shown that there was support for the referral of the provisions to the Drafting Committee, which had approved them, subject to a reservation by one member. Even the members who strongly objected to the inclusion of draft guidelines on the two issues had acknowledged that the practices existed. He therefore suggested that States should be asked to give their reaction and that the Commission should come back to the issues at a later stage, perhaps during its consideration of the text on second reading.

56. Mr. ROSENSTOCK said that a more appropriate reflection of the centre of gravity of the Commission might be to simply take note of the report of the Drafting Committee. There was no need to take a position at the current time because the first reading had not even been completed. He did not think it useful to ask the Sixth Committee for its opinion on guideline 2.3.1. It could not be said to be wrong in law, but how it fit in to the draft could be perceived only in the context of the wider exercise.

57. The CHAIRMAN pointed out that, if the Commission simply took note of the report of the Drafting Committee, the draft guidelines would not be incorporated in the report of the Commission to the General Assembly and States would not have an opportunity to react to them. In addition, such a procedure had no precedent in the past practice of the Commission.

58. Mr. ROSENSTOCK said that the Commission had not yet concluded its own consideration of the draft guidelines, so there was nothing wrong with keeping the discussion *en famille* at the current early stage. If it strongly wished to share the news about where it stood so far, however, it could take note of the report of the Drafting Committee and include it in its own report to the General Assembly, as it had done in similar situations in the past.

59. Mr. KATEKA said that the course of action suggested by Mr. Rosenstock could be combined with the compromise solution proposed by Mr. Candioti. The Commission could thus request the views of the Sixth Committee on whether the contents of guideline 2.3.1 were suitable for codification and, at the same time, take note of the report of the Drafting Committee. He saw no reason why it should hesitate to consult the Sixth Committee or adopt something on which there was clearly no agreement.

60. Mr. PAMBOU-TCHIVOUNDA, referring to the suggestion by Mr. Rosenstock, asked when the consideration of the Commission of the draft guidelines on first reading could go forward if it simply took note of the report on them.

61. Mr. TOMKA (Chairman of the Drafting Committee) said that the Commission might be adopting an undesirable course of action. Its established practice was to adopt texts on first reading, add commentaries to them and then submit them to Governments for comments. That practice had prevailed for more than 50 years, even when there had been a clear division of views on individual articles and they were put to a vote. The only exception had been made recently for the draft articles on State responsibility. He urged the members of the Commission to go along with the adoption of the draft guidelines in order to allow the Special Rapporteur to add commentaries to them in the context of the first reading. Once that had been done, the Commission could ask Governments, through the General Assembly, to submit written comments and, on that basis, begin the second reading.

62. Mr. GALICKI said that, in view of the need to reach a compromise, perhaps the draft guidelines could be adopted on the understanding that the list of questions to be addressed to Governments would be accompanied by an account of the difficulties and doubts the Commission had experienced during its work.

63. The CHAIRMAN confirmed that that would be done in chapter III of the report of the Commission to the General Assembly (Specific issues on which comments would be of particular interest to the Commission). He said that, if he heard no objection, he would take it that the Commission wished to take note of the draft guidelines as contained in the report of the Drafting Committee.

*It was so agreed.*

64. Mr. PELLET (Special Rapporteur) said that he had remained silent throughout a discussion that he had found shocking. During the adoption of the report of the Drafting Committee, it was perfectly natural for its members to outline the positions they had taken. On the other hand, it was not at all acceptable for the discussion to be re-opened after the Commission had unanimously referred a text to the Committee. The draft guidelines had emerged intact from the work of the Committee, but, when they had been referred back to the Commission in plenary, they had been treated much differently than during their initial consideration. To take revenge at the current stage for an earlier failure of minority views showed a lack of fair play.

65. For reasons he had given in detail, he believed that the Commission should exercise caution and not decide once and for all that conditional interpretative declarations came under the legal regime of reservations. It was wrong to affirm, as some members did, that the Commission had not accepted the idea of conditional interpretative declarations. They were the subject of a draft guideline that had been adopted with no objection.

66. It might come as a surprise to the members of the Commission to hear that he entirely agreed with those who thought that the late formulation of reservations was a deplorable practice. He was also not fully convinced that, because the practice existed, it should be accepted. But that position was at variance with the very clearly stated policy of the Secretary-General, to which no country had objected. He would be surprised if, when the Sixth Committee was asked what it thought about guideline 2.3.1, many States would object to the established practice of the Secretary-General.

67. In his report, he stated not that the late formulation of reservations was a practice, but that it was a new procedure, which was in keeping with the law because no one could dispute the fact that the States parties to a multilateral treaty were entitled to derogate from the Vienna definition. That meant that, in some specific cases, States agreed to consider that a reservation could be formulated late, even though that was normally prohibited. The only valid point raised during the discussion was that it was open to question whether the late formulation of reservations should be included in the Guide to Practice. He considered that the Commission should not bury its head in the sand, but should firmly state that the practice should be subject to certain limitations. He disagreed with Mr. Simma about the lack of normative content in guideline 2.3.1. A double negative had been used precisely to show that the practice must not be considered as anything more than an exception and to indicate that the Commission was not at all happy about it.

68. In any event, the draft guidelines were only at the stage of the first reading and a different approach could be adopted at the next stage. It was rather irritating to hear that a position could not be taken until the entire text had been made available because the entire text was never available on first reading, by definition. It was unreasonable to say that the Special Rapporteur, who himself was discovering more about reservations as he went along, should hand over the entire text right away.

69. He thanked the Chairman of the Drafting Committee for his excellent report, which accurately reflected the discussions of the Committee.

70. Mr. SIMMA, noting that the Special Rapporteur had disagreed with his earlier comments, recalled that what he had said about conditional interpretative declarations had simply been that the last word had not yet been spoken, something with which the Special Rapporteur would surely agree.

71. Mr. LUKASHUK said that he could not fail to take up the accusation of the lack of fair play on the part of the critics of some of the draft guidelines. There was no impropriety in the way the Commission had proceeded. During the discussion in the Commission in plenary, some provisions in the draft guidelines had been criticized. The draft guidelines had been referred to the Drafting Committee, which had failed to take account of those criticisms and had returned the draft guidelines to the Commission virtually unchanged. The fact that members who had made critical remarks earlier had repeated them at the current time was in no way an instance of improper procedure.

72. Mr. TOMKA (Chairman of the Drafting Committee) pointed out that the opinions expressed by the members of the Commission during the discussions of the Special Rapporteur's fifth and sixth reports and of the report of the Drafting Committee would be reflected in the report of the Commission to the General Assembly, in accordance with the usual practice.

*The meeting rose at 1 p.m.*

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## 2695th MEETING

*Wednesday, 25 July 2001, at 10 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

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**Unilateral acts of States (*continued*)\* (A/CN.4/513, sect. C, A/CN.4/519<sup>1</sup>)**

[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)\*

1. Mr. PELLET said that he would confine his comments to problems of the interpretation of unilateral acts of States. Unfortunately, he was not sure that he had properly understood the object of the developments covered by the Special Rapporteur's observations contained in chapter II of the fourth report (A/CN.4/519). The Special Rapporteur seemed to be sticking stubbornly to a distinction between unilateral acts that were autonomous and those that were not and, surprisingly, excluded the latter from his study. Indeed, at the previous session the Special Rapporteur appeared to have said that the distinction could be set aside. Personally, he had mixed feelings about the proposed classification of unilateral acts. The Special Rapporteur envisaged a dualist differentiation between acts whereby the State undertook obligations and acts whereby the State reaffirmed a right or a legal position or claim. That seemed to him to be rational and intellectually satisfactory, but on condition the study was not limited to autonomous unilateral acts because the second category of acts would then be in danger of being reduced to very little. Also, why should one limit oneself to reaffirmation when it very frequently happened that a State attempted unilaterally to affirm or seek to have a right or legal claim recognized? Those were what were usually called hetero-normative acts, but the category was of little interest if consideration was given only to autonomous acts. When a State affirmed a right it was generally because a fairly precise norm of empowerment existed which authorized it to claim the right unilaterally. Either the draft should limit itself to autonomous acts and therefore also to auto-normative acts or the distinction suggested by the Special Rapporteur in paragraph 98 of his report must be adopted, but that would mean renouncing the exclusion of non-autonomous unilateral acts.

2. As for problems of the interpretation of unilateral acts, he wished to make three observations in order of increasing importance. First, he was rather concerned by the frequent mention of the "authors" rather than the "author" of a unilateral act. It was quite possible for unilateral acts to have multiple authors, but it was a marginal phenomenon and there would be a case for treating them separately. Unilateral acts could have several States as authors but there was a danger of confusion and unnecessary complication when the singular and plural forms were dotted around in the text. The notion of a unilateral act with multiple authors was not easy to define and there was a danger that it would frequently be very difficult to distinguish them from treaties creating non-reciprocal obligations.

3. Secondly, he was rather troubled by the fact that the Special Rapporteur referred, in paragraphs 105, 127 and

136, to the warning of ICJ in the *Fisheries Jurisdiction* case but drew no firm conclusions from it in the proposed draft articles.

4. Thirdly, and most seriously, he was concerned about the entire chapter of the report on interpretation. The Special Rapporteur dealt with two quite distinct aspects. On the one hand, he discussed the question of the determination of the existence of a unilateral act, and on the other hand he referred to interpretation *stricto sensu*. He did not distinguish between the two, and largely amalgamated them. With determination of the nature of unilateral act, it was a matter of determining whether a given instrument met the definition, and in particular whether the author had the intention of being bound by it. Interpretation in the strict sense was about clarifying the meaning of a provision, for example, determining whether articles 31 and 32 of the 1969 Vienna Convention were transposable to unilateral acts. There was a case for clearly introducing that distinction in the draft articles and devoting a specific provision or provisions to the determination of unilateral acts. How was one to determine the fact that a unilateral act met the definition that the author had the intention of producing legal effects? Articles (a) and (b) concerned the problems of interpretation *stricto sensu* once the determination had been made but there were many examples in the report itself which concerned determination rather than interpretation. The two aspects were so interwoven in the report that it was very difficult to sort them out.

5. As to the draft articles themselves, he did not consider the expression "the terms of the declaration" in article (a), paragraph 1, to be particularly useful. In his view, it would be sufficient to refer to "its terms", all the more so because a large number of members had expressed concern in the past at the idea that unilateral acts were necessarily "unilateral declarations". There should also be a paragraph 1 bis that should spell out the principle of restrictive interpretation that applied not only to auto-normative acts but also *a fortiori* to hetero-normative acts if they were included in the draft. As for paragraph 2, he remained unpersuaded, despite the Special Rapporteur's efforts in paragraphs 139 to 141 of the report, that it was legitimate to transpose to unilateral acts the notion of a "preamble". On the other hand, the context must be understood in a broader way in the case of unilateral acts than in the case of treaties. He himself was convinced that in the *Nuclear Tests* cases it was in reality not one declaration by the French authorities that had led ICJ to consider that France was legally committed, but a bundle of declarations. The Special Rapporteur was silent regarding the serious question of the relevance of the notion of a bundle of declarations, which seemed to him to be relevant both for determining the existence of a unilateral act and for its interpretation in the strict sense. In paragraph 3, the words "or States" should be deleted, and one or more provisions should be inserted elsewhere concerning unilateral acts with multiple authors.

6. As for article (b), he had serious doubts about the value of speaking of "the preparatory work" in connection with the interpretation of unilateral acts. In the case of treaties it was difficult to judge the exact role of preparatory work in the interpretation and the impossibility of access to some such work often meant that in practice

\* Resumed from the 2693rd meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 2001, vol. II (Part One).

it had to be disregarded. That was even more true with regard to unilateral acts, not only because the preparatory work did not always exist, or was not accessible, but also and chiefly because when it was accessible it was unequally accessible. In the case of treaties all the States which took part in their negotiation or adoption had an equal opportunity to have recourse to the preparatory work, but that was not the case with the preparatory work of a unilateral act, which only the author and not the addressee could in general know about. If one insisted on the role of preparatory work, one was introducing an inequality in the event of divergent interpretation between author and addressee. Express mention of it in a draft article concerning the interpretation of unilateral acts was excessive and could lead to flagrant inequalities between interested States. It would be best to speak only of circumstances in which the act had been formulated, even if that meant stating in the commentary that preparatory work could be taken into consideration.

7. Lastly, he continued to regard the topic as important and interesting, and since the Drafting Committee had not yet considered any of the draft articles there was still time for the Special Rapporteur to present a consolidated draft at the next session in the light of discussions held in the Commission in plenary and in the open-ended working group.

8. Mr. GOCO, congratulating the Special Rapporteur on a thoroughly researched, impressively logical and imaginative fourth report, said that he could not but sympathize with him about the difficulties he had been encountering in developing such a complex topic. Since the first report<sup>2</sup> it had been clear that the process of identifying and harnessing the various acts of States and bringing them within the confines of the present study was a great challenge. Several Governments had in fact expressed doubts as to whether rules could be adopted that would be generally applicable to them. While there was recognition of the important role unilateral acts played in international relations, the objective of crafting rules to regulate them was no easy undertaking. At the beginning of the study the Commission had had difficulty in distinguishing what constituted political acts and what constituted legal acts: what was political and what was legal escaped clear delineation.

9. Certainly there were rulings that were pertinent to the subject of unilateral acts, but they were not cut and dried rulings and offered no useful guide. What was evident in all those rulings was the intention of the States concerned, although, as the Special Rapporteur pointed out in his report, it was difficult to ascertain true intention. Determination of intention and the structure of that intention involved careful scrutiny of all the facts of a case. That was apparent from the *Nuclear Tests* cases.

10. The fourth report was a vast improvement on its predecessors in terms of presentation, coherence and understanding. He welcomed the proposed draft articles and regarded the suggested rule of interpretation as cogent and valid for it highlighted the need for observance of good faith.

11. Mr. GAJA congratulated the Special Rapporteur on his efforts to work out the classification of unilateral acts and to establish general rules on their interpretation. One might not always agree with his conclusions, but his analysis was helpful and interesting.

12. If one wished to state, with regard to unilateral acts, a rule analogous to the basic rule established for treaties by article 31, paragraph 1, of the 1969 Vienna Convention, one would have to say that an act should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the act in that context and in the light of its object and purpose. That rule could be expressed irrespective of the role to be played by intention.

13. In paragraphs 131 and 137 of the report, the Special Rapporteur revealed mixed feelings about the object and purpose criterion, first approving, then disapproving of it, and ultimately not including it in article (a). That criterion was admittedly an elusive one that had a slightly subjective flavour when applied to treaties, and even more so when applied to unilateral acts. If, for unilateral acts, some role was to be attributed to intention that went beyond the role of intention for treaties, a reference to object and purpose should not be omitted. He himself could not see any decisive reason for such an omission. As Mr. Pellet had recalled, a State's intention when engaging in a unilateral act was relevant in two situations: in determining the existence of a unilateral act, a question that had been central to the *Nuclear Tests* cases, and in determining how the act was to be interpreted, although ICJ had not always made a clear distinction between the two questions.

14. In the *Fisheries Jurisdiction* case, ICJ had held that "due regard" should be given to intention for the purposes of interpretation of a unilateral act, but that was not the same as saying that a unilateral act should be interpreted in the light of intention, as the Special Rapporteur proposed to do in article (a), paragraph 1. The draft article was somewhat contradictory in that it posed intention as a primary criterion yet placed among the supplementary means of interpretation the main ways in which intention could be ascertained, namely, preparatory work and the circumstances at the time of the act's formulation. He would hesitate to give paramount importance to intention and agreed with the Court that, while due regard should be given to it, unilateral acts did not have to be interpreted in the light of intention. The intention of an author was difficult to deduce from objective elements. In the event of a dispute, a State was likely to give selective evidence of what its intention had been. States other than the author of the unilateral act were entitled to rely on the act in many situations, for instance, in order to carry out a certain action for which consent was required. It was therefore necessary to reconcile the importance to be given to intention with the need to protect other States.

15. The circumstances in which the act had been carried out had been given great weight in the interpretation by ICJ of the Canadian declaration of acceptance of the Court's jurisdiction in the *Fisheries Jurisdiction* case. When referring to the circumstances, the Court had quoted Canadian ministerial statements, parliamentary debates, legislative proposals and press communiqués. Some of those could be qualified as preparatory work

<sup>2</sup> *Yearbook* . . . 1998, vol. II (Part One), document A/CN.4/486.

more than as circumstances, however, and it would be extremely difficult for a State to consult all those sources to find out how a unilateral act should be interpreted. The Court had also made reference to all the factual circumstances in which the act had occurred in its determination of the existence of a unilateral act in the *Frontier Dispute* case between Burkina Faso and Mali.

16. A more direct way of establishing intention would be to resort to preparatory work. With treaties, preparatory work generally involved all the negotiating States, while some protection of non-negotiating States had been elaborated in the case law. Preparatory work for unilateral acts mainly consisted of unilateral materials of which only the author of the act could have knowledge. When other States were entitled to rely on unilateral acts, it would seem logical to limit the relevance of preparatory work to materials that were reasonably accessible to the other States, as Mr. Pellet had suggested.

17. To sum up, he would prefer to consider the circumstances in which the act had occurred as elements to be taken into account when applying the basic rule corresponding to article 31, paragraph 1, of the 1969 Vienna Convention. Preparatory work could likewise be taken into account, with the proviso that they were reasonably accessible to the States entitled to rely on the act.

18. Mr. MOMTAZ congratulated the Special Rapporteur on the impressive work he had done to highlight the role of doctrine and judicial decisions, including those of ICJ, in the classification of unilateral acts.

19. He wished to address three issues raised by the Special Rapporteur in his report: the scope of the definition of unilateral acts, their classification and their interpretation. In paragraph 38, the Special Rapporteur stated that unilateral acts should be those expressly formulated with the specific intention of producing legal effects in a non-dependent manner on the international plane. He was thus proposing two criteria that should be applied in a cumulative or simultaneous manner, namely that the author of the act should have the intention of producing legal effects and that the act should take place independently of any treaty relations. The second criterion raised a number of difficulties.

20. The Special Rapporteur stated in paragraph 42 that unilateral acts whereby a State applied countermeasures must be placed outside the context of treaty relations. Personally, he could not see why countermeasures, which were considered unilateral acts in the context of treaty relations, should not be so considered if they were adopted in response to a breach of a rule of customary international law. Did the Special Rapporteur intend not to consider countermeasures in the context of unilateral acts? The same question could be raised with regard to interpretative declarations: should those adopted prior to the entry into force of the treaty or convention to which the unilateral act was a response be considered unilateral acts? As for declarations in which States undertook commitments that went beyond those provided for in a treaty, he agreed with the Special Rapporteur that they must be included because they were independent.

21. As to the classification of unilateral acts, on the basis of a detailed analysis of the literature the Special Rapporteur had concluded that none of the definitions proposed so far were adequate. He wondered, however, to what extent the authors in question had truly wished to provide examples to fit into the categories they had defined: most of the classifications mentioned in the report were unsupported by examples. It was likewise unclear whether additional authors had supported the classifications reviewed in the report. In the final analysis, unilateral acts appeared to be generally unamenable to classification. Did that mean any attempt at classification should be abandoned? He was inclined to think so, but bowed to the tenacity of the Special Rapporteur, especially in view of the very appropriate proposal in paragraph 97 of his report and the fact that classification could facilitate compilation of the applicable rules.

22. The proposal was to classify unilateral acts according to their legal effects either as acts whereby the State undertook obligations or acts whereby the State reaffirmed a right. He could support that proposal, except that in some cases unilateral acts did not lend themselves to such a distinction. A declaration of neutrality was considered by the Special Rapporteur to be a unilateral act *par excellence*, but in those made in recent years, the authors had assumed obligations while also reaffirming rights under international humanitarian law. Similarly, a declaration of war could not always be placed in only one of the two categories proposed by the Special Rapporteur.

23. In regard to interpretation, he wished to emphasize the distinction drawn in paragraph 114 of the report between the declared will and the true will of the State. The Special Rapporteur explained that the 1969 and 1986 Vienna Conventions, judicial decisions and the literature all militated in favour of the criterion of declared will. Personally, he thought that the true will of the author should be the decisive factor in interpreting unilateral acts. States often undertook commitments by adopting unilateral acts under pressure by other States or international public opinion. The circumstances in which the unilateral act was adopted therefore played an extremely important role. In many cases, the contents of the unilateral act did not correspond to the State's true will, since it was adopted under strong pressure and committed the State in a manner that went beyond what it might really consider necessary. The preparatory work could, of course, shed light on the subject, but unfortunately it was often very difficult to gain access to it, especially when a State had adopted a unilateral act for political reasons. There was thus a dichotomy between the true will and the declared will of the State which would make it difficult to transpose to unilateral acts the rules in the Conventions concerning reliance on preparatory work.

24. Mr. KAMTO asked how a distinction was to be drawn between a State's declared will and its true will if access to the preparatory work was so difficult. It was normally through the preparatory work that a State's intentions were determined and, when pressure by other States induced the State to express only its declared will, as in the example suggested by Mr. Momtaz, that will alone was accessible to those to whom the unilateral act was addressed.

25. Mr. MONTAZ said he shared those concerns about how the true will of the author of a unilateral act could be discovered and interpreted when the preparatory work was inaccessible. The circumstances surrounding the act remained the sole means of discovering the author's true will. That was precisely why he thought a restrictive interpretation should be given to the unilateral act, as there was a dichotomy between the State's true will and its declared will in terms of the legal commitment undertaken.

26. Mr. SIMMA said he strongly endorsed the comments by Mr. Momtaz. Comparison of the true will of the State with its declared will was far more important for unilateral acts than for international treaties, and the preparatory work alone would not suffice for that purpose. The whole context must be taken into account; for instance, what degree of pressure had been exercised on a State to induce it to make a unilateral statement or promise? The circumstances of the formulation of the act was a much broader notion than the preparatory work and that was really what had to be taken into account.

27. Mr. ELARABY said that Mr. Momtaz's statement had been thought-provoking, but his own feeling was that the declared will of the State must be used for the interpretation of unilateral acts, for it was to the declared will that other States would react. There was a difference with treaty interpretation, where the preparatory work was available for consideration. Any unilateral act was the product of a set of circumstances, and those circumstances were more relevant to the interpretation of unilateral acts than was the preparatory work.

28. Mr. HERDOCIA SACASA congratulated the Special Rapporteur on the wealth of documentation mentioned in his report. With so many authors cited, including members of the Commission, one would have hoped to see common denominators, but unfortunately that was not the case, and it demonstrated the complexity of the topic.

29. In response to the Special Rapporteur's inquiries about the structure to be adopted for the draft articles, he recalled that, in the Sixth Committee of the General Assembly at its fifty-fourth session, he himself had advocated using as a basis general rules applicable to all unilateral acts and specific rules based on the features and legal effects of unilateral acts. The classification of unilateral acts was also a challenge. As Mr. Pellet pointed out in his published work, the spectacular growth of such acts was linked to the proliferation of subjects of international law. Major progress had been made, however, with the application of a distinction between form and content, substance and instrument, notification and written procedure, which, as Combacau pointed out, could have any type of content.<sup>3</sup>

30. What criteria should be the basis for the classification of unilateral acts? After reviewing the literature, the Special Rapporteur concluded that the basis should be the legal effects of the act. There was certainly much justification for such a classification, which reverted to

the very definition of the unilateral act as being formulated with the intention of producing legal effects, which themselves varied. The Special Rapporteur proposed two types of legal effects, acts whereby the State undertook obligations and acts whereby the State reaffirmed a right or a legal position or claim. It was not only promises that established duties: other unilateral acts, with the exception of protests, did so also. The structure proposed at the current time had been built up patiently on land that remained largely uncharted, even though some ground had been developed and some tracks laid down.

31. The Special Rapporteur also asked the question "When did the legal act come into being?" In the *Nuclear Tests (Australia v. France)* case, in relation to unilateral acts, ICJ had indicated that "nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act [by which the pronouncement by the State was made]" [p. 267, para. 43]. It had further indicated that "to have legal effect, there was no need for [these statements] to be addressed to a particular State, nor was acceptance by any other State required" [p. 269, para. 50]. Everything thus seemed to confirm what the Special Rapporteur said in paragraph 112 of his report, namely that a unilateral act produced effects at the time when it was formulated.

32. The definition in article 1 at the previous session spoke of a unilateral act as being known to a State or international organization. Such knowledge could be other than immediate, however, which raised an interesting issue that could be examined by the Special Rapporteur. One possible answer was given in paragraph 112 by the assertion that the act was opposable to the author State and enforceable by the addressee State. At all events it seemed correct to say that the bilateral nature of the relationship did not affect the unilateral character of the act. The time when the act began was thus of great importance with regard to the revocation, modification or revision of a unilateral act and might form the basis of new provisions.

33. Another complex problem was the interpretation of unilateral acts in relation to the 1969 Vienna Convention. In the *Fisheries Jurisdiction* case, ICJ referred to "a declaration of acceptance of the compulsory jurisdiction of the Court" as "a unilateral act of State sovereignty" [p. 453, para. 46]. That statement recalled Mr. Pellet's question of whether only those unilateral acts characterized as autonomous, strictly unilateral or acts derived from a conventional source should be covered by the topic. The Court had accorded acts derived from a conventional source such as its Statute full and distinct validity in comparison with the regime applicable under the Convention by stating in its judgment that "The regime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties" and that "the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction" [ibid.]. That seemed to justify the Special Rapporteur's desire expressed in paragraph

<sup>3</sup> J. Combacau and S. Sur, *Droit international public* (Paris, Montchrestien, 1993), p. 94.

108 of the report to determine whether the Vienna rules could be transposed to the interpretation of unilateral acts based on a flexible parallel approach, whether they were applicable *mutatis mutandis* or could be taken as a valid reference for elaborating rules in that area, as stated in paragraph 102.

34. In the *Nuclear Tests (Australia v. France)* case, ICJ had attributed an intrinsic value to intention by stating that “When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound . . . is binding” [p. 267, para. 43]. As the Government of Austria had pointed out in its reply to the questionnaire on unilateral acts of States,<sup>4</sup> the Court attaches much higher interpretative significance to the subjective element than would be permissible under the rules of “objective” treaty interpretation.

35. In the *Temple of Preah Vihear* case, ICJ had stated that the only relevant question was whether the wording of a given declaration clearly revealed an intention. Another important rule of interpretation, which arose out of the *Nuclear Tests* cases, was that when States made declarations that limited their future freedom of action, a restrictive interpretation was required. Mr. Pellet had made much the same point. In the “*Lotus*” case, PCIJ had stated that “restrictions upon the independence of States cannot be presumed” [p. 18]; and in 1995, after the resumption of underground nuclear tests on Mururoa, the Court had repeated its decision, in the *Nuclear Tests (New Zealand v. France)* case, in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, concluding that New Zealand had no basis for invoking a violation of the commitment made by France, since the new tests had not taken place above ground. Thus, although a State was bound by its unilateral declaration, there could be no presumption of restrictions on its freedom of action. It was important to establish a text reflecting that approach.

36. He welcomed the fact that the proposed draft articles on interpretation paid due attention to intention, thus reflecting the recent developments in international law. The element of good faith was also fundamental, as ICJ had indicated when it had said, in the *Nuclear Tests (New Zealand v. France)* case, that the binding nature of an international commitment assumed by a unilateral declaration was based on good faith. On the other hand, as Mr. Elaraby and Mr. Momtaz had said, the “circumstances” factor was not simply supplementary. In the *Free Zones of Upper Savoy and the District of Gex* case, the Court had stated that, given the circumstances in which the declaration had been made, it was binding on Switzerland. Whether a declaration was made in the course of negotiations or not had considerable relevance in the *Nuclear Tests* and the *Minquiers and Ecrehos* cases. Article (a), paragraph 2, would, however, be clarified by adding the words “if any” after the word “annexes”. He also com-

mended the suggestion of taking into account any subsequent practice followed in the application of the act. The relevance of that was pointed up by the case concerning *Military and Paramilitary Activities in and against Nicaragua*, in which the Court had stated that, as Mr. Brownlie had said, Nicaragua’s constant acquiescence in various public statements, showed that it was bound by its 1929 declaration of acceptance of the Court’s jurisdiction.

37. With regard to context, in the *Fisheries Jurisdiction* case ICJ had said that the intention of a State could be concluded not only from the text of the relevant clause but also from the context in which the clause might be read.

38. He could not agree with the omission of the phrase “in light of the object and purpose”, appearing in article 31, paragraph 1, of the 1969 and 1986 Vienna Conventions. On that point, he agreed with Mr. Gaja. The ruling just quoted stated that the intention of a State could be concluded from the purpose that was to be served. In the *Nuclear Tests* cases, reference was made to the specific object of the obligation assumed by France. Although the reference to preparatory work did not seem appropriate, in the *Fisheries Jurisdiction* case ICJ had stated that the State’s intention could be concluded from an examination of the evidence relating to the circumstances of its preparations, referring in particular to diplomatic exchanges, public statements and other relevant evidence.

39. With regard to countermeasures, the Special Rapporteur had raised the question of whether they could be conventional acts or whether they constituted unilateral acts subject to a specific regime. The Special Rapporteur cited the case of Law No. 325<sup>5</sup> adopted by Nicaragua in response to the ratification of the Maritime Delimitation Treaty between Colombia and Honduras, of 2 August 1986. Nicaragua had requested the Central American Court of Justice to declare that the treaty violated the obligation to safeguard the patrimonial interests of Central America under the Framework Treaty on Democratic Security in Central America. The Court had ruled that the ratification procedure should be suspended. In that case Nicaragua had applied a countermeasure. As for the statement, in paragraph 42 of the report, that countermeasures should be excluded from the scope of the study of unilateral acts, he would point out that in the *Fisheries Jurisdiction* case ICJ had ruled that a unilateral act could be far more than simply an autonomous act and was thus the expression of the right not to be injured by an unlawful act and to require its cessation.

40. Mr. SIMMA said that, while he was deeply impressed by the Special Rapporteur’s heroic efforts to cope with a subject which was surely unfit for codification, he was sometimes left with the impression that the Special Rapporteur was tilting at windmills. The Commission had had considerable difficulty in reaching the necessary degree of agreement on what the subject matter of the topic should be and what the research should concentrate on. If the same highly theoretical issues were taken up

<sup>4</sup> *Yearbook . . . 2000*, vol. II (Part One), document A/CN.4/511.

<sup>5</sup> See *La Gaceta* (official journal of the Republic of Nicaragua), No. 237, 13 December 1999.

time and again, the relative and fragile clarity achieved might be lost.

41. Among the issues that had no place in the report were interpretative declarations and countermeasures. It was understandable, in view of the lengthy debates on those topics at the fifty-second session of the Commission that the Special Rapporteur should have seen some relevance to his own topic but any such apparent relevance was misleading. In that context, he had found it difficult to understand the sense of the long last sentence of paragraph 39 of the report. As for the action taken by Nicaragua *vis-à-vis* Colombia and Honduras, he agreed with Mr. Herdocia Sacasa that it was more in the nature of a countermeasure than a unilateral act. In that regard, the jurisprudence of the Central American Court of Justice, as indicated in the footnote to paragraph 41, was most interesting and he requested a detailed reference to the judgement quoted.

42. As to the question of classification of unilateral legal acts, he doubted whether the distinction drawn in paragraph 97 of the report was as clear-cut as suggested. States often wanted to do more than merely reaffirm a right, as Mr. Pellet had said. In many cases, they wanted to establish rights. Mr. Momtaz had rightly pointed out that it was important to distinguish between different types of unilateral legal acts. When the Government of Austria had made its declaration of neutrality,<sup>6</sup> it had wished to establish not only obligations but also the rights that accrued to a permanently neutral State under international law. The distinction offered by the Special Rapporteur was not helpful. When he came across words like “hetero-normative” or “auto-normative”, he felt all the more need for a simpler, more pragmatic approach. Unilateral promises, waivers, protest, recognition and the like were obviously central to the topic, but the distinction made in the report simply led to a reduction in its scope.

43. With regard to chapter II, the word “interpretation” was used in two ways, both as signifying the methodology of inquiring into whether a given act was unilateral and only secondarily in its usual sense. The Special Rapporteur had, however, come up with an extraordinarily impressive range of case law on the topic. It was surprising how many judicial pronouncements there had been on unilateral acts. Nonetheless, the assertion in paragraph 129 that the rules of interpretation on unilateral acts must be based on the consolidated rules laid down in the 1969 and 1986 Vienna Conventions went too far. There was no reason why article 31 of the Conventions should not be used as a starting point, but, on the other hand, its provisions were almost too general to be of use.

44. The Special Rapporteur had drawn attention, albeit in varying degrees, to the features of the interpretation of unilateral acts. First, they must be strictly interpreted, with no presumption of any limitations on freedom, an approach that was confirmed by the jurisprudence. If that maxim were not accepted, the unfortunate consequence would be that diplomats would need to be muzzled. Secondly, the subjective element assumed greater significance. The interpretation of international treaties, like the

best literary works, took on a life of its own, transcending the author’s intent, and therefore objective interpretation carried great weight. The objective approach must nonetheless be used with great caution in the case of unilateral acts. As other members had observed, there should be greater emphasis on the true will of the State concerned, not just what was disclosed. In that respect, it was unnecessary to devote a separate provision to preambles and annexes, as article (a), paragraph 2, sought to do. Very few unilateral acts were so comprehensive that even their preambles and annexes were significant. Thirdly, unlike Mr. Elaraby, he considered that extraneous elements had particular significance in the formulation of a unilateral act; they might even be more important than the actual terms of the act. The practical difficulty of locating *travaux préparatoires* and other sources did not justify the low priority given to extraneous elements in article (b). Hence there should be some reshuffling in articles (a) and (b). As Mr. Gaja had said, supplementary means of interpretation and, perhaps, some other elements should be included in the basic rule on interpretation.

45. The topic, although simple in some respects, led to the interesting question of the relationship between the pragmatic and the semantic levels of language, as linguists said, or between the textual and the contextual approach to interpretation, as the lawyers had it. The Commission would need to balance carefully the various considerations of good faith as against the subjective or contextual element that played such a prominent role in the interpretation of unilateral acts.

46. Mr. AL-BAHARNA said that, although the Special Rapporteur stated that the fourth report would take up various issues, giving due weight to the comments made by members of the Commission and by the delegations of States in the Sixth Committee, it lacked clarity and organization in respect of the issues on which common or general rules might be formulated. For example, the Special Rapporteur proposed to undertake the classification of unilateral acts, yet that principle had already been recommended by the Working Group,<sup>7</sup> approved by the Commission in the report on the work of its fifty-second session<sup>8</sup> and supported by the majority of States in the Sixth Committee. In paragraphs 97 and 98, the Special Rapporteur set out the basis on which he had determined that there were two major categories and the form the draft articles would take, adding in paragraph 99 that he would begin by concentrating on the first part, which would relate to acts whereby the State undertook obligations. However, it was disappointing that, even at the present late stage of the topic, chapter I of the report dealt only with the principle of classification and the extent to which general rules of international law were applicable to unilateral acts, without proposing any draft articles to embody that principle. Instead, the Special Rapporteur dashed the hopes raised by chapter I and moved on to the unrelated issue of the interpretation of unilateral acts, culminating in proposed articles (a) and (b).

47. In paragraph 48 of the report, the Special Rapporteur commented on the impossibility of establishing rules

<sup>6</sup> See Federal Constitutional Law of 26 October 1955 on the Neutrality of Austria.

<sup>7</sup> See *Yearbook . . . 2000*, vol. II (Part Two), para. 621.

<sup>8</sup> *Ibid.*, para. 622.



common to all material unilateral acts. In fact, however, his analysis and conclusions in chapter I were such as to suggest, on the contrary, that it was indeed possible to establish rules applicable to all unilateral acts or, at least, to a specific category of such acts. Drawing on doctrine, State practice and international case law, the Special Rapporteur examined various groups of unilateral acts, before stating, in paragraph 78, that other manifestations of will could produce legal effects but were outside the scope of the current study. They included such topics as silence, acquiescence, estoppel and declarations made in connection with the acceptance of the optional clause under Article 36 of the Statute of ICJ, when made within the context of treaty law. The unilateral act of reservation might also be added to that category. He could not, however, share the view expressed in paragraph 71 that it was impossible to draw up a restrictive list of unilateral acts from a material point of view and that the grouping of rules was thereby complicated; he would revert to the matter later. Indeed, to the “classic” acts, the Special Rapporteur added what appeared to be a third group, comprising unilateral declarations of neutrality and of war and negative security guarantees in the context of nuclear disarmament. The Special Rapporteur’s difficulties in classifying the various categories were understandable, but he could have been expected to find a way through and to put forward draft articles along the lines suggested in paragraph 98 of the report. The time had been ripe for such draft articles, following the comprehensive analysis carried out. Yet the Special Rapporteur confined himself to a mere recommendation for future work on the issue.

48. The reply to the questionnaire on unilateral acts of States by the Government of Italy,<sup>9</sup> contained in paragraph 63 of the report, would be extremely valuable for the Special Rapporteur’s further consideration of the topic. The Governments of El Salvador and Georgia, quoted in paragraph 65, listed a number of different unilateral acts as the ones they considered the most important. Indeed, examples were not lacking throughout the report.

49. The Special Rapporteur had before him abundant material relating to the various forms and categories of unilateral acts, which could be classified and properly formulated in draft articles. He thus disagreed with the Special Rapporteur’s conclusion in paragraph 71 of the report that the diversity referred to earlier made it impossible to draw up a restrictive list of unilateral acts. In his view, that task was feasible. To take the example of a declaration, there were many different types of declarations, whether relating to a unilateral promise, within the context of the *Nuclear Tests* cases, or of the optional clause under Article 36 of the Statute of ICJ. Those various declarations, as revealed in State practice or in international case law, could be classified and grouped under one or more categories to which a general or a specific rule might apply, within the broader framework of the first category of acts referred to in paragraph 97 of the report, whereby the State undertook obligations.

50. In paragraph 81, the Special Rapporteur rightly referred to the *Nuclear Tests (Australia v. France)* case, in which ICJ had indicated that a promise could bind its au-

thor on condition that it was given publicly and that its intention was clear. The Court had also specified that a promise that gave rise to a legal obligation would constitute a strictly unilateral act without any form of *quid pro quo*, acceptance, reply or reaction. Consequently, it was his view that, on the basis of decisions of the Court, international arbitration awards, State practice and doctrine, the Special Rapporteur could provide the Commission with a set of draft articles dealing with a specific category of unilateral acts to which general rules might be applicable, in accordance with chapter I of the report.

51. A prominent example of such acts was a unilateral promise. Other specific categories of unilateral acts as classified in the fourth report, including those categories referred to in paragraph 63, could also be elaborated in the form of draft articles along those lines. On the other hand, acts such as silence, acquiescence, estoppel, acts involving countermeasures, interpretative declarations and declarations in respect of the application of the optional clause under Article 36 of the Statute of ICJ, which, for various cogent reasons, were considered to be outside the context of the topic could also be drafted, defined and classified in a separate category of their own, and the reasons for their exclusion from the scope of the study stated.

52. What was perhaps needed was an exercise similar to the one relating to the draft guidelines on reservations to treaties. Consequently, each specific example of a unilateral act to which reference had been made in chapter I of the fourth report needed to be specifically defined within the separate category to which it belonged. Accordingly, the Special Rapporteur might wish to give serious consideration to drafting separate guidelines defining the regime of the various unilateral acts, showing specifically to which category of acts a general rule might be applicable, and to which category a specific rule might be applicable. The category of formal unilateral acts considered to be outside the context of the topic should be separately mentioned in the guidelines. The Special Rapporteur should seriously consider drawing up a restrictive list of unilateral acts along the lines suggested.

53. As for the two proposed draft articles on the rules of interpretation of unilateral acts, the approach they involved was premature, since the Commission still had no clear idea of the form that the draft articles relating to the two categories of unilateral acts referred to in paragraph 97 of the report would take. The drafting of articles on general rules of interpretation applicable to unilateral acts should be undertaken only at a later stage, perhaps after the drafting of the substantive and procedural articles had been completed. However, notwithstanding those general reservations concerning chapter II of the report, he hoped to be able to comment on the proposed draft articles later in the current session.

54. In conclusion, unlike Mr. Simma, he was optimistic as to the possibility of producing a set of draft articles on the topic. In short, the best way forward would be to classify the topic according to three categories: a first and a second category, to which general and specific rules might be applicable respectively; and a third category, of unilateral acts which for various reasons, including their relationship to treaty texts, could not be dealt

<sup>9</sup> See footnote 4 above.

with in the context of the topic. Within the framework of that classification, the Special Rapporteur could deal with the category referred to in paragraph 97 of his report that was supported both by the Commission and by the Sixth Committee, namely, acts whereby the State undertook obligations. As to rules relating to interpretation, the 1969 Vienna Convention did not apply *stricto sensu*, and even articles 31 and 32 should be applied cautiously, on the basis of deduction and analogy only.

55. Mr. BROWNIE said that, having listened carefully to the interesting debate stimulated by the Special Rapporteur's comprehensive but somewhat ill-organized fourth report, he was moved to make a few preliminary remarks on the problem of classifications. If the Commission was to make progress on the topic, it must first solve that problem. The response of Mr. Al-Baharna and others to the problem was to call for more and better classification. He could not concur with that view.

56. The classification problem had two aspects. First, it was extremely important to segregate discrete subjects that had only a superficial resemblance to unilateral acts of the types that were to be covered. Examples were unilateral acceptances of the optional clause under the Statute of ICJ, and countermeasures.

57. Secondly, the Commission should in any case eschew classification. It was a striking fact that ICJ and courts of arbitration never classified unilateral acts into protests, promises and the like, but only, if at all, into binding and non-binding unilateral declarations. That had been the point at issue for ICJ in the *Nuclear Tests* cases.

58. Mr. ILLUECA said that unilateral acts of States were indisputably a source of international law and as such constituted a prime candidate for progressive development and codification. *Pace* Mr. Simma, while acknowledging that the topic was a labyrinth, he was confident that the Special Rapporteur would eventually reach his goal, having emerged unscathed from the maze.

59. The fact that the unilateral declaration might be oral or in writing was an important point that needed to be stressed. In the *Eastern Greenland* case, for example, it had been accepted that an oral declaration had the characteristics of an international obligation. Furthermore, in interpreting a unilateral act, account must be taken, not only of the words or text used, but also of the intention, determination of which was a highly subjective matter. Meanwhile, once consolidated, the contents of the Special Rapporteur's fourth report would provide a sound basis for deciding on the form the draft articles might ultimately take.

#### **Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/513, sect. F)**

[Agenda item 7]

#### **REPORT OF THE PLANNING GROUP**

60. Mr. HAFNER (Chairman of the Planning Group), introducing the report of the Planning Group, said that the Group had held three meetings. It had had before it

section F of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fifth session (A/CN.4/513), entitled: "Other decisions and conclusions of the Commission", and Assembly resolution 55/152 of 12 December 2000, on the report of the Commission on the work of its fifty-second session.

61. The Planning Group had had three items on its agenda: the date and place of the fifty-fourth session of the Commission; a proposal by Mr. Pellet concerning elections to the Commission; and other matters, including a report on the International Law Seminar.

62. The Planning Group had considered that the possible dates for the fifty-fourth session of the Commission would be 6 May to 7 June and 8 July to 9 August 2002. They seemed to be the most appropriate, in view of the organizational arrangements for other meetings and the schedule of conference services, and the Planning Group had decided to recommend them to the Commission.

63. The proposal by Mr. Pellet contained in document ILC(LII)/PG/WP.1 had been formulated at the end of the fifty-second session but had not been considered, owing to the lack of time. It had consisted of three parts: the first aimed at establishing a rotating election system; the second concerned the non-eligibility for re-election of members who, over the period of their term of office, had not attended at least half the plenary meetings; while the third concerned measures to be taken to secure representation of women in the Commission. The debate had focused mainly on the first of those matters.

64. The Planning Group had considered the possible advantages and disadvantages, especially from the viewpoint of the implications for the work of the Commission. For those reasons, after a useful discussion, the Group had taken the view that it was not advisable to take a decision in an election year, and that the matter required further careful consideration. It might be taken up at a subsequent session, after a thorough review.

65. Under the item "Other matters", the Planning Group had expressed an interest in being informed in detail about the International Law Seminar taking place during the current session of the Commission. The information had been duly provided. The Group had also noted that the Commission had made efforts to implement cost-saving measures by organizing its work plan so as to be able to allocate the first week of the second part of the session to the Working Group on the commentaries to the draft articles on State responsibility. The Working Group was composed of only 12 members of the Commission. The Commission had therefore complied with the request of the General Assembly contained in paragraph 13 of its resolution 55/152.

66. Regarding the long-term programme of work, the Planning Group had taken note of paragraph 8 of General Assembly resolution 55/152 and, with a view to the efficient use of time, suggested that the Commission give priority, during the first week of its fifty-fourth session, to the appointment of two special rapporteurs on two of the five topics that the Commission had decided to include in its long-term programme of work.<sup>10</sup> The Group

<sup>10</sup> See *Yearbook . . . 2000*, vol. II (Part Two), para. 729.

had been of the view that one of those topics should be “Responsibility of international organizations”, while the other should be decided as early as possible during the first week of the fifty-fourth session. That last element did not need to be reflected in the report of the Commission to the General Assembly.

67. After a procedural discussion in which Mr. HAFNER (Chairman of the Planning Group), Mr. KAMTO, Mr. KATEKA, Mr. PELLET, Mr. SIMMA and Mr. TOMKA took part, the CHAIRMAN said that it would be for the incoming membership to select an additional topic or topics to be taken up by the Commission at the next session. Accordingly, he took it that the Commission wished merely to take note of the report of the Planning Group.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

## 2696th MEETING

*Thursday, 26 July 2001, at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*later:* Mr. Gerhard HAFNER

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

### Unilateral acts of States (*continued*) (A/CN.4/513, sect. C, A/CN.4/519<sup>1</sup>)

[Agenda item 4]

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. LUKASHUK congratulated the Special Rapporteur on his detailed fourth report (A/CN.4/519) on the

complex topic of unilateral acts of States. He welcomed his intention, expressed in paragraph 38 of the report, to limit the scope of the draft to acts expressly formulated with the specific intention of producing legal effects in a non-dependent manner on the international plane. Such acts included, as the Special Rapporteur rightly pointed out, promise, waiver, recognition and protest; estoppel was also to be given due consideration. Estoppel had basically entered international law from the Anglo-Saxon legal system and had yet to be clearly delineated or properly regulated. Hence the great practical and theoretical value of the intended study of that institution.

2. He had some doubts about certain ideas put forward by the Special Rapporteur. The first was that interpretative declarations in respect of a treaty that included commitments going beyond those provided for in that treaty came under the regime of unilateral acts. Such declarations certainly were in the nature of a unilateral act and gave rise to additional obligations on the part of States, but they were linked to a treaty and therefore differed from purely unilateral acts. Without a treaty, they did not exist. In that context, many aspects of the judgment handed down by ICJ in the *South West Africa* case were relevant. Unlike the third report,<sup>2</sup> the fourth did not pay enough attention to the crucial issue of unilateral acts that gave rise not to legal undertakings (obligations), but to moral or political undertakings (commitments).

3. In considering the question of interpretation contained in paragraph 116 of the fourth report, the Special Rapporteur rightly emphasized the importance of the subjective element, the intention, but that did not appear to have been adequately reflected in the draft articles. Under the 1969 Vienna Convention, the interpretation of a treaty did not in any way require the legal validity of a text to be established. It was a treaty, and that was that. But the situation with unilateral acts was entirely different and the first task in interpreting them was to establish the legal validity of the text.

4. The Special Rapporteur's idea of not including the object and purpose of the treaty among the factors used for interpretation, in paragraphs 137 and 153, did not appear to be sufficiently well grounded. Object and purpose played a leading role in the interpretation of any legal act in its entirety and in its individual provisions. They were the basis for effectiveness, which was one of the main rules of interpretation and whose importance had repeatedly been emphasized by ICJ. According to that rule, the furtherance of the purpose of a legal act or provision must be an element of its interpretation.

5. Article (a), paragraph 2, contradicted the 1969 Vienna Convention, article 31, paragraph 2 of which stipulated that the text of a treaty included its preamble. The preamble was indeed an integral part of any treaty and as such had major legal significance and force. It was of particular importance to interpretation, since it usually set out the purpose of the instrument. Such general legal provisions were also of real significance for unilateral acts.

<sup>1</sup> Reproduced in *Yearbook* . . . 2001, vol. II (Part One).

<sup>2</sup> *Yearbook* . . . 2000, vol. II (Part One), document A/CN.4/505.

6. Article (b) referred to preparatory work, but, in the context of a unilateral act, that was hardly expedient, since such material differed fundamentally from analogous material for a treaty. It would be sufficient simply to mention the circumstances of the formulation of an act, something which generally covered preparatory work.

7. On the whole, however, he thought articles (a) and (b) were ready to be referred to the Drafting Committee.

8. Mr. Sreenivasa RAO said that unilateral acts differed from treaties or customary law in terms of how far they could go towards conclusively establishing a legal obligation. An autonomous unilateral act without reference to acceptance, acquiescence, prescription or behaviour that sustained the initial expression of will did not give rise to rights and obligations. Unilateral acts certainly took place and their study was useful and valuable, but they lacked the specificity of other, more recognizable and tangible products of bilateral and multilateral relations. States often made joint statements, most of which were policy statements. When did such a statement become an autonomous act that was binding on the State? A unilateral act did not have to be written down and confirmed, but what happened when minutes were taken of meetings and signed by the participants?

9. More factual background was needed in order to understand how a unilateral act could be seen as the basis for an international obligation. In the *Nuclear Tests* cases, the French Government had refrained from testing, not as a reaction to a problem raised by other countries, but as part of a policy implemented at a particular time and after the achievement of certain goals. It was difficult to know whether that policy had been chosen to forestall the consideration of the case by ICJ or as part of an overall assessment of the need for continued nuclear testing. Such questions could not be analysed without knowing the context, the circumstances and the clarity of the statement made and the continuity of the policy adopted.

10. Many speakers had already drawn attention to the importance of context in the study of unilateral acts and to the need to determine the legal validity of such acts, something that was unnecessary for other legal acts. The text of a treaty was normally unambiguous enough so that the preparatory work did not need to be consulted for its interpretation, except where there were doubts or diverging opinions. Since unilateral acts were autonomous in nature and sometimes made in informal settings, however, context played a greater role than for treaties and more factual data had to be obtained. Promise, recognition and waiver were classic examples of unilateral acts and should be examined with reference to the specific conditions in which they could give rise to legal obligations. Establishing title by effective occupation, for example, was a unilateral act, not single, but multiple or repeated, but the report seemed to deal primarily with single unilateral acts, which did not always produce the necessary legal effect.

11. A unilateral act had been defined as being autonomous, but how autonomous? Once it entered the stream of international obligations, there were reactions and responses. If a unilateral act was entirely dependent on the will of the State, the view could be taken that it could

not truly be called an international obligation because the State could always negate it. According to both domestic and international law, once an obligation arose, the party affected had no great autonomy to rescind it. Certain other objective conditions had to be met for it to be invalidated. A unilateral act could, however, both be created and rescinded with the same autonomy. At what point did autonomy cease to be relevant? The Special Rapporteur rightly pointed out that the validity of a unilateral act had to be studied in the context of its invalidity, a matter being considered by the open-ended working group established at the preceding meeting.

12. Unilateral acts were among the weights that could be placed in a balance to evaluate obligations, but they could not give rise to the same type of obligation as a treaty or custom. The circumstances in which they occurred should be characterized, but they should be seen as one element in a continuum of unilateral interactions of States that gave rise to enduring legal consequences. States were extremely formal entities and any serious matter involving territorial sovereignty or long-standing disputes, for example, would not be settled by a unilateral act, no matter how well articulated it might be. It was therefore necessary to recognize the light weight of unilateral acts and assess them accordingly.

13. The interpretation of unilateral acts should be given less priority at the current time than the nature, character, circumstances and effects of such acts. Unilateral acts created not only obligations, but also rights, as in the case of protest, which the Special Rapporteur had rightly indicated was a way of ensuring the preservation of rights vis-à-vis others. Unilateral acts had been described as a source of obligations, but that raised them to the same level as treaties and custom. In his view, they were lighter, less long-range vehicles, gliders to be flown in mild weather conditions, but unable to carry passengers all the way across the Atlantic unless combined with some other conveyance.

14. Mr. YAMADA said that, although he recognized the importance of the role played by unilateral acts in international relations and the desirability of drawing up precise rules to regulate such acts, which were not easy to define or characterize, he was increasingly inclined to think that their codification might be premature. Perhaps the Commission had organized its discussion in unduly abstract and conceptual terms and would make more substantial progress if it approached the subject in a more focused way. He therefore called on the Special Rapporteur to produce as many draft articles as possible, as Mr. Pellet had suggested.

15. The Special Rapporteur concluded that unilateral acts could be placed in two major categories based on their legal effects: acts whereby a State undertook obligations and acts whereby a State reaffirmed rights. The division of the draft articles into two corresponding categories and a general section was perhaps not the best approach, but he would reserve judgement until the draft had been further elaborated. He welcomed the detailed study of the rules relating to the interpretation of unilateral acts. Many of the cases cited were very helpful.

16. He agreed with the Special Rapporteur that articles 31 and 32 of the 1969 Vienna Convention could serve as the point of departure for the interpretation of unilateral acts. He failed, however, to understand the logic behind the deletion of the reference in article (a) to the "object and purpose" of a treaty. The Special Rapporteur said that it was an inherent concept in treaty law and was not applicable to unilateral acts, but he himself would prefer to see the phrase retained.

17. The 1969 Vienna Convention dealt with international agreements in written form, as stated in article 2. The rules of interpretation in articles 31 and 32 of the Convention were therefore rules of interpretation of a written text. Unilateral acts took the form of written statements or declarations in most cases, but, according to the definition in article 1,<sup>3</sup> they were not limited to written statements. When proposing the article, the Special Rapporteur said that it was usually by means of a written or oral declaration that States expressed their will and the term "declaration" had initially appeared to be a common denominator. He had subsequently concluded that the approach was too restrictive, however, and had decided to use the term "act" in his revised article 1, which was more general and had the advantage of not excluding a priori any material act. If that definition of unilateral acts was maintained, the rules of interpretation should be tailored to cover all instances of unilateral acts.

18. Mr. HE said that, notwithstanding the complexity of the topic, the Special Rapporteur had made tremendous efforts to move along the road charted by the Working Group on unilateral acts of States at the fifty-second session and endorsed by the Sixth Committee. After extensive study, the Special Rapporteur arrived, in his fourth report, at the conclusion that unilateral acts could be grouped into two major categories according to their legal effects, namely, obligations undertaken by States and rights affirmed or reaffirmed by States.

19. Of the four classic or traditional kinds of unilateral acts, namely, promise, waiver, recognition and protest, the first three had been placed in the first category and protest in the second. Promise did indeed fall into the first category, as through it, a State assumed an obligation, but the inclusion of waiver and recognition required further consideration. Waiver meant that one dispensed with a right. It was simply the exercise of a prerogative and did not entail an obligation. Recognition could hardly be considered as the undertaking of an obligation. It was an act that affected the mutual rights and obligations of States or, in other words, inter-State relations. Protest could also not be classified as the exercise of a right. Its purpose was to manifest the intention of a State not to consider certain State affairs as legal. It was mainly for making it known that the protesting State did not recognize certain acts, but it was not the exercise of a right in the true sense.

20. The characteristics of unilateral acts should therefore not be divided into only two groups. As the Government of Argentina had stated in its reply to the questionnaire on unilateral acts of States,<sup>4</sup> promise, waiver, recognition and protest obviously had elements in com-

mon, but each of them also had its own characteristics that ought to be properly identified and studied. Mr. Al-Baharna had rightly drawn attention (2695th meeting) to the reply of the Government of Italy in which it identified three categories of unilateral acts: those referring to the possibility of invoking a legal situation (recognition, protest and waiver); those that created legal obligations (promise); and those through which a right was exercised (delimitation of territorial waters or of an exclusive economic zone). In view of the diversity of unilateral acts, the Italian classification, and particularly the inclusion of the first category, might be more suitable than the division into only two groups.

21. In addition to the traditional unilateral acts already discussed, there were unilateral declarations of neutrality, negative guarantees in nuclear disarmament and attribution of nationality, among others, all of which had their own characteristics. In the view of many, they could not be divided into only two categories and might be better grouped into three, in line with the Italian classification.

22. Mr. HAFNER said that, in paragraph 83 of the report, the Special Rapporteur referred to certain declarations formulated by European States under the common foreign security policy of the European Union that raised an issue that had long intrigued him. Since the European Union was not considered a subject of international law for the purposes of the second pillar of the common foreign security policy, acts formulated in that framework could not be attributed to the European Union itself. Common positions, joint actions and strategies were considered unilateral acts of the European States members of the European Union. What were the legal effects of such common positions, however? They represented the foreign policy of the European Union towards third States and accordingly could have an effect on third States. On the other hand, they also had an effect on relations among member States themselves, which were bound by joint actions. Were they bound in their relations only with other member States or also with third States? Such cases represented a sort of simplified agreement. If a treaty had effects for third States, did that amount to something like a unilateral act? Were the effects similar to those of unilateral acts?

23. Paragraph 75 of the report described the Austrian declaration of neutrality in terms that did not correspond to the current thinking about it. The Memorandum on the Results of Negotiations between Government Delegations of Austria and the Soviet Union, of 15 April 1955<sup>5</sup> was considered to constitute a commitment solely of the delegations of Austria and the Soviet Union, not of the States themselves, since neither of the two delegations was entitled by their Constitutions to enter into such obligations. As a consequence of the commitment, Austria had enacted legislation on neutrality on 26 October 1955.<sup>6</sup> That legislative act had been notified to all States with which Austria had had diplomatic relations at the time, with the request that they should recognize it.

<sup>4</sup> See 2695th meeting, footnote 4.

<sup>5</sup> Council on Foreign Relations, *Documents on American Foreign Relations, 1955*, P. E. Zinner, ed. (New York, Harper, 1956), pp. 121-124.

<sup>6</sup> See 2695th meeting, footnote 6.

<sup>3</sup> *Ibid.*, vol. II (Part Two), footnote 165.

Some States had done so explicitly. The four signatory Powers to the State Treaty for the Re-establishment of an Independent and Democratic Austria had thus issued virtually identical notes on 6 December 1955,<sup>7</sup> which had given certain authors reason to consider the act as a quasi-contractual situation in which two unilateral acts came together to create an international obligation. One issue that had not been taken into account was whether there had been an intention on the part of Austria to commit itself to retaining such legislation. In the view of the Austrian Government, that intention had not existed at the time of the issuance of the notification. In the 1960s and 1970s, Austrian policy had been to consider the notification as having binding effect, but a discussion was currently taking place as to whether or not that was true and views were divided. He himself thought it did not have binding effect, due to the lack of intention to be bound. The coverage of that subject in paragraph 75 of the fourth report should be corrected in the fifth report.

24. With regard to the classification of the various unilateral acts, he said that he favoured the approach proposed by Mr. Brownlie, namely to look at the category of the declaration as a starting point, keeping in mind that the categories might need to be clarified. Articles (a) and (b) were heading in the right direction, but he had doubts as to whether the system set out in articles 31 and 32 of the 1969 Vienna Convention was applicable. Those provisions gave priority to objective interpretation and allowed for subjective interpretation only under exceptional circumstances that were explicitly spelled out. The situation was slightly different in the case of unilateral declarations, where there was much more emphasis on the subjective element. The linkage between articles (a) and (b), which corresponded to that between articles 31 and 32, was not appropriate in the context of unilateral acts.

25. Mr. BROWNLIE said that he still had considerable reservations about the foundations of the topic, especially as envisaged thus far by the Special Rapporteur. He had already referred briefly to classifications and he remained of the view that those established in the doctrine were completely unimportant analytically, but they existed and therefore created an enormous amount of confusion. In the context of the law of treaties, the term used by a State on a given occasion was not conclusive as to the legal nature of the phenomenon referred to. Many speakers, however, had been entirely seduced by the idea that there were such things as promises, protests, waiver and recognition. He did not see how any progress could be made if that type of facile classification was taken as the basis for the work of the Commission. When ICJ faced certain difficult, real situations, it did not proceed on the basis of those classifications. It was an area of law where the doctrine was completely unhelpful and created unnecessary obstacles.

26. But classification was not the main problem. At the fifty-second session, he had spoken of the emphasis in the third report on the independence or autonomy of the acts of States. That continued to be a major source of diffi-

culty, as was the very concept of acts. Many of the situations addressed in the fourth report were not acts, but a matrix of State conduct, and not just the conduct of one State, but the conduct of several States. Such so-called “unilateral acts” could not be legally effective in the absence of a reaction on the part of other States, even if that reaction was only silence. A precipitating event and State conduct had to occur, followed by a reaction, which could take the form of acceptance, either express or by implication, or rejection. Estoppel also necessarily involved the reaction of other States to the original unilateral act or conduct. In the *Temple of Preah Vihear* case, Thailand had been held, by its conduct over a 50-year period, to have adopted a certain boundary line. While the episode undoubtedly involved a unilateral act or conduct on the part of Thailand, its conduct had been held to create rights in favour of Cambodia. There had been a legal framework of relations between the two States.

27. Those considerations led to a general point concerning the definition of the topic, in particular the nature of the precipitating conduct or connecting factor. The concept of declarations had been discarded by the Special Rapporteur, but the concept of unilateral acts had been retained, and he personally thought it was too narrow. Everything depended on the conduct, both of the precipitating State and of other States. The legal situation could not be seen simply in terms of a single act because the context and the antecedents of the so-called “unilateral act” were legally significant. The references to the effect of silence also involved a failure to classify the problem efficiently, for what had to be evaluated was silence in a particular context and in relation to a certain precipitating act, not silence per se or in isolation.

28. The general distinction between unilateral acts and the law of treaties highlighted the problems the Special Rapporteur faced in dealing with the topic. In the case of treaties, there was a reasonably clear distinction between the precipitating conduct—the making of the treaty—and the analysis of the legal consequences. In the case of unilateral acts or conduct, it was very difficult to separate the precipitating act or conduct from the process of constructing the legal consequences. The approach to specific problems such as interpretation could accordingly not be based on a simple analogy with the law of treaties. In the law of treaties, it was relatively easy to identify the preparatory work, whereas, for unilateral acts, the analogue to preparatory work might go back 50 years.

29. He rejected the idea that there was an Anglo-Saxon approach to the topic. There had been very little Anglo-Saxon influence in the case concerning the *Arbitral Award made by the King of Spain on 23 December 1906* regarding the determination of the frontier between Honduras and Nicaragua; the case had essentially been about the interpretation of an award. In the *Nuclear Tests* cases, Manfred Lachs, the intellectual progenitor of the rather nice solution that had allowed ICJ to get away from a very embarrassing issue, had not by any means been Anglo-Saxon.

30. The Commission must refrain from bringing into the discussion every conceivable act in the law. Looking into the establishment of exclusive economic zones, grants of nationality, declarations of neutrality and so forth would

<sup>7</sup> See, for example, the reply from the British Secretary of State for Foreign Affairs, Royal Institute of International Affairs, *Documents on International Affairs, 1955* (London, Oxford University Press, 1958), p. 239.

be very interesting, but the Commission would never finish its work. The intellectual focus of the exercise should be on the creation of a legal undertaking by the conduct of a State that did not come under the concept of treaty making. Referring to Mr. Sreenivasa Rao's comments about the incidence of unilateral acts in diplomatic life, he said the importance of the problem might well be exaggerated by the extent to which courts constructed unilateral acts in order to find a basis for decisions in cases that were otherwise very difficult to decide. The *Nuclear Tests* and *Temple of Preah Vihear* cases were cases in point.

31. Lastly, he did not deny the validity of the distinction between the creation of obligations and the reaffirmation of rights, but he had serious doubts about the wisdom of including the reaffirmation of rights in the topic under consideration because it was not clear what that would entail. Would it include the various types of State conduct in the context of the acquisition of title to territory, for example?

32. Mr. PAMBOU-TCHIVOUNDA said that the introduction to the fourth report made for heavy reading, but the pace picked up in the paragraphs dealing with silence and estoppel. The Special Rapporteur explained that he wanted to put some order in what might be called the "Black Forest" of unilateral acts, based on a relevant criterion that he nevertheless had difficulty in formulating. Even though the writings of the most eminent authors had been brought to bear on the classification of unilateral acts, the Special Rapporteur himself admitted the futility of the exercise by stating, in paragraph 62 of his report, that valid criteria for a system of classification could not be established on the basis of doctrine alone. Classification in the current context actually meant distinguishing between the various classic unilateral acts on the basis of their continuity, object and purpose. The three criteria were interrelated and made it possible to identify, qualify and, ultimately, determine the meaning of a given unilateral act or, in other words, to interpret it. From paragraph 79, on promise, to paragraph 96, on protest, the distinction made on the basis of the three criteria provided a justification for the methodological option chosen by the Special Rapporteur in his first report,<sup>8</sup> namely, to see whether the law of treaties could be transposed for the purpose of elaborating the legal regime for unilateral acts of States.

33. The fourth report had greatly dispelled his earlier doubts about the topic because the Commission currently had before it a catalogue of classic unilateral acts about which classic issues could be raised, as had been done for treaties. Such issues related to formulation, competence, validity, relationship to other international legal acts or sources of international law, application and withdrawal. What remained to be decided was how the draft articles should be structured internally in order to highlight the specific features of recognition, notification, protest, renunciation, etc. The saving clauses that were common in law-making ("unless", "excepting", "insofar as") could be helpful in that regard.

34. He was currently of the view that the Vienna regime could indeed be transposed by adapting it to unilateral acts, as shown by articles (a) and (b) proposed by the Special Rapporteur and based on articles 31 and 32 of the 1969 and 1986 Vienna Conventions. He agreed with the criticism that those provisions had both missing and superfluous elements. No one had, however, objected to the idea of borrowing from the rules of interpretation laid down in the Conventions. In further elaborating articles (a) and (b), the Special Rapporteur should give some consideration to whether those rules could be applied uniformly to all types of unilateral acts.

35. Mr. KAMTO said the topic was intellectually stimulating and served a practical purpose in the lives of States, but it was extremely difficult and complex. The fourth report looked into the issue in detail on the basis of wide-ranging references to doctrine and case law, as well as practice. Although the topic was not a new one, it had entered into the literature fairly recently. He welcomed the fact that the Special Rapporteur had not included the concepts of silence and acquiescence in the introduction, which he could easily have called "The concept of a unilateral act". That would have enabled him to arrive at a definition of a unilateral act by gradually eliminating things that were not unilateral acts or not to be considered as such. Acquiescence, estoppel and related or derivative unilateral acts could also have been systematically ruled out. He did not agree with the statement in paragraph 26 of the report that silence was a reaction. It could more accurately be described as the absence of reaction. Nor was it true, as stated in paragraph 27, that, in some legal systems, silence was not considered a legal act. In appeals to a higher administrative authority in Cameroon and France, for example, silence on the part of the administrative authority lasting a certain period of time was taken to mean that the appeal was rejected. Conversely, a request for an administrative measure was considered granted if the administrative authority remained silent for a certain time. In paragraph 32, the Special Rapporteur said that continued consideration might be given to estoppel and it would be interesting to see how that might be done.

36. On the definition of a unilateral act, the Special Rapporteur identified the two mutually reinforcing criteria of the intention of producing legal effects and the autonomous nature of the act. A more detailed analysis of case law to see just what criteria had been used by international courts would have been useful, however. Decisions were cited, but not analysed in depth and arguments by the parties had not been gone over thoroughly. Using the autonomy of the act as a criterion for definition would significantly restrict the scope of the study, and possibly its usefulness, as it would leave out a great many unilateral acts. The reference to autonomy created the false impression that a unilateral act could be sufficient in and of itself and stand alone in the international legal system. Even if that was so, a unilateral act nevertheless produced legal effects *vis-à-vis* its author or an internal legal system. Perhaps the Special Rapporteur was using the term to differentiate unilateral acts from others, for example, conventional acts. In fact, however, there was no such thing as a completely autonomous legal act.

37. He endorsed the comments already made about the problem of classification. A case in point was the submis-

<sup>8</sup> See 2695th meeting, footnote 2.

sion of a dispute to an international court by agreement. That might appear to be a bilateral agreement between the parties to a dispute, but, from the standpoint of the court, it was a unilateral act. Perhaps it could be termed a mixed agreement. Some discussion of that point might be useful.

38. Article (a), paragraph 1, indicated that a unilateral act must be interpreted in the light of the intention of the author State. Determining intention was not the same for conventional acts and for unilateral acts, however, because, in the first case, it became apparent from an examination of texts and context, whereas in the second, real intention might differ from expressed intention. It was the declared or expressed will of the author State that was taken into account by other subjects of international law in their legal dealings with it. Any disagreement between two subjects of international law resulted in a dispute about interpretation. It was in the context of such a dispute that an attempt was made to determine real intention and, since the act in question was unilateral in nature, it was for the author to prove what that had been. Undue emphasis should therefore not be placed on intention because it came into play only in the context of a dispute.

39. It had been said that the emphasis on the real intention of the State was aimed at taking account of possible pressure on the State. If an act was formulated under duress, the provisions on invalidity in the 1969 Vienna Convention should be used as a model. If the pressure could not be characterized as constraint within the meaning of the Convention, then it could not be considered to attenuate intention or provide grounds for seeking the supposedly real intention behind the expressed intention. Perhaps article (a), paragraph 1, could be amended in accordance with the wording of the Convention to read: “in the light of the object and purpose of the act”. In article (b), the reference to preparatory work should be moved to the commentary, for the reasons already given during the discussion.

40. In conclusion, he endorsed Mr. Pellet’s suggestion that the various provisions on the topic should be consolidated so that the Commission could form an overall opinion before deciding whether or not to refer them to the Drafting Committee.

41. Mr. PELLET said that he categorically opposed the curious idea put forward by Mr. Kamto that the submission of a dispute to an international court by agreement bore any resemblance whatsoever to a unilateral act. It was the very antithesis of a unilateral act, the diametrical opposite of the submission of a dispute to an international court by application. If Mr. Kamto’s idea was taken to its logical conclusion, then practically all accords through which States agreed to do something jointly—the Gabčíkovo-Nagymaros Project, for example—were unilateral acts. It might, however, be worth discussing Mr. Kamto’s less unorthodox point that a joint application by two or more States was an example of a complex or multiparty unilateral act.

42. Mr. KAMTO said that he did not want to enter into a bilateral debate with Mr. Pellet, but would like to clarify his comment, which had been about joint agreements, not unilateral acts. He maintained his position that the

particular feature of the submission of a dispute to an international court by agreement was that, once two parties had decided to do so, the proceedings in their entirety and in their individual parts would be addressed to the court. That could thus be termed a joint or mixed act because there was an agreement between the two parties, on the one hand, and they were submitting it to an outside institution, on the other.

43. Mr. MELESCANU said that he had had a definite feeling of *déjà vu* in listening to the discussion over the past few days. The Special Rapporteur’s proposals differed every year, but the Commission kept repeating past arguments and making very general points. The pessimists who thought that the topic was not suitable for codification were still opposed by the optimists who thought that general rules for unilateral acts could be discovered. If the Commission did not trade in its general, ideologically oriented approach for a more practical one, it would simply be treading water, with little hope of moving towards its goal. He had brought that point up in the open-ended working group and, if others so agreed, a draft decision could be prepared with a view to entering a more advanced and practical stage of the debate at the next session.

44. The Commission thus had to focus on two major objectives that had so far been neglected, namely, delineating in greater detail the main types of unilateral acts in State practice and analysing such acts in greater depth. On the second point, he strongly supported the arguments put forward by Mr. Gaja. The debate so far on the interpretation, definition and classification of unilateral acts and their legal effects, validity and invalidity could be used as a basis for defining and delimiting acts such as declaration, recognition, protest, waiver and promise as a prelude to the conclusive settlement of the general issues that had already been discussed so extensively.

45. The autonomy of unilateral acts, considered in paragraphs 60 to 69 of the third report, had been accepted but, at the current session, a number of members had given reasons for reconsidering that position. A country’s declaration of neutrality, the autonomous act *par excellence*, had been shown to be not as autonomous as it seemed. It had been demonstrated that even unlawful acts were unilateral acts that created obligations, i.e. those deriving from the international responsibility of States. It had rightly been suggested that the degree of autonomy inherent in a unilateral act had to be determined. The Commission should therefore agree to keep the definition of unilateral acts fairly general for the time being, on the understanding that a final decision on autonomy would be taken after a number of typical unilateral acts had been analysed. Criteria had been put forward for the classification of unilateral acts and the Commission should reflect on them, as well as on the advisability of entering into an in-depth discussion on classification.

46. Interpretation had been discussed exhaustively and he had a strong preference for basing it on the declared will of the State, i.e. the content of the official unilateral act formulated by the State. That was what was done in practice. Uncovering the real will of States hidden behind the declared will was a dangerous enterprise in which the Commission should not become involved because it



might introduce an element of instability. He welcomed the comment by Mr. Kamto that, if any constraint was brought to bear on a State, invalidity should be invoked. In addition to the declared will of the State, however, recourse could be had to supplementary means of interpretation, such as the context or circumstances in which the unilateral act was formulated. He did not go along with the idea of using the preparatory work, however. The analogy between the 1969 Vienna Convention and unilateral acts was a forced one in that context, first, because only the State or group of States that had prepared the unilateral act actually had access to the preparatory work and, secondly, because, in any administrative system, decisions were prepared using a whole series of internal documents, such as memorandums, departmental decisions, etc. That did not mean, however, that the unilateral act reflected the ideas contained in those documents. In all too many cases, the political decision differed greatly from the content of the preparatory work done by specialized bodies, including Ministries of Foreign Affairs.

47. Silence and estoppel were two subjects of great interest that should be further studied by the Special Rapporteur. A principle of Roman law stated that silence could be taken as acceptance of a certain act and the Commission should look into whether, under public international law, silence could be something other than a reaction to the act of another State. Estoppel had been touched on only lightly in the fourth report, but he would like to see further consideration given to it and particularly to its relationship to waiver.

*Mr. Hafner took the Chair.*

48. Mr. ECONOMIDES, referring to paragraph 8 of the fourth report, pointed out that it was primarily the unilateral acts of international organizations that contributed to the development of international law by creating "soft" law, while the normative role of the unilateral acts of States was limited. Since they created rights and obligations of a subjective nature, such acts had only an indirect and relatively weak effect on general international law, mainly through the formation of customary rules.

49. He agreed that silence, as discussed in paragraph 30 of the report, could not be equivalent to recognition. It could not legitimize, much less constitute acceptance of, an internationally wrongful act. He shared the Special Rapporteur's view, expressed in paragraph 38, that the definition of unilateral acts should be limited in scope. He had always thought that the draft articles should cover only the unilateral acts of States that were a source of international law or, in other words, those that autonomously created binding rights and obligations for States. Such acts, which played a role comparable to that of treaties, custom and the decisions of international organizations, should be the primary focus of the attention of the Commission at the current time. They were not very numerous and the Commission could move on later to other categories of unilateral acts.

50. He could not condone the references to the State "allegedly" responsible and the "allegedly" injured State in the discussion of countermeasures in paragraphs 39 *et*

*seq.* Countermeasures in themselves were unlawful acts and could not be taken on the basis of assumption. Well-founded evidence was necessary. Article 49 of the draft articles on responsibility of States for internationally wrongful acts adopted at the current session spoke only of the injured State and the responsible State and the word "alleged" should accordingly be deleted from the report under consideration.

51. Referring to paragraphs 79 *et seq.* of the report, he said that unilateral acts by which States, especially weak or small ones, assumed obligations at the international level with nothing in exchange should be viewed with some suspicion by lawmakers. Such was the case with waiver and promise. Hence the need to elaborate strict and clear-cut rules on the validity of such acts.

52. Referring to paragraphs 98 and 99 of the report, he said he agreed with the Special Rapporteur that the work of the Commission should be based on the preparation of a general part containing rules applicable to all unilateral acts. He endorsed the suggestion that all the existing provisions on unilateral acts should be consolidated in one document to facilitate the work of the Drafting Committee at the start of the next session.

53. Contrary to what was stated in paragraph 116 of the report on the *Aegean Sea Continental Shelf* case, the exaggerated interpretation by ICJ of the words *et notamment* (and in particular) in the reservation by the Government of Greece departed from the principle that a text must be interpreted, first, according to the ordinary meaning of the terms it contained and, secondly, according to the context in which the terms were used.

54. Referring to paragraph 114 of the report, he said that the declared will of the State should be construed in all cases as coinciding with its real will. If, however, it could be conclusively demonstrated that real will was something other than what had been declared, then absolute priority must be given to real will.

55. As to the draft articles, he said that, although the 1969 Vienna Convention could serve as an inspiration, an effort should be made to borrow as little as possible from its wording. Before a unilateral act could be interpreted, it must be identified as a legal act that created rights and obligations on the international plane. That essential precondition was not expressly envisaged in the two draft articles proposed. The draft articles should more strongly highlight the predominant role of the intention of the State formulating the unilateral act, both in the identification of the unilateral act and in the interpretation of its content. It should be stated explicitly that any unilateral declaration that limited the sovereignty, sovereign rights or jurisdiction of a State had to be interpreted in a restrictive manner. Terminology more appropriate to unilateral acts should be substituted for the words "preamble" and "preparatory work".

56. Mr. KUSUMA-ATMADJA said that he, too, had a feeling of déjà vu about the discussion. It had been suggested that a description of practical instances when unilateral acts had created new and generally recognized facts or situations might help the Commission stop going around in circles. Some helpful examples had already

been given, shedding light on particular aspects of the problem, but the overall issue remained a difficult one.

57. The delimitation of territorial boundaries with his country's neighbours had been a challenging endeavour. The Timor Gap Treaty<sup>9</sup> had brought discussions to a successful conclusion at the time, although current events in East Timor had effectively overwritten it. At the request of the Secretary-General, he had taken on the task of demarcating the boundary between Iraq and Kuwait, as Chairman of the United Nations Iraq-Kuwait Boundary Demarcation Commission,<sup>10</sup> an exercise in which the placement of a 12-metre marker had established the acceptance by Iraq of a very controversial boundary. When the hole had been dug for the marker, a water main had been hit and the nearest municipal water works department, located in Basra, had been called in. A practical fact had thus been shown to be capable of establishing agreement. The fact that silence could be taken as acquiescence had been clearly demonstrated by the *Temple of Preah Vihear* case.

58. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), replying to points made during the discussion, thanked the members of the Commission for all the comments made in criticism as well as in praise of his work. The debate reflected the topic's complexity, but the confusion surrounding it actually had a positive effect, since it forced the Commission to systematize its study of unilateral acts. Most members had found the topic to be difficult but important and thought that progress could be made on the basis of various approaches and additional elements, all of which would be mentioned in his next report, as would the other points that had been made. The progress achieved so far, including through the open-ended working group, would also be detailed. The lack of information about State practice had been mentioned and it was to be hoped that the working group could look into the matter.

59. The comments made about interpretative declarations and countermeasures had been extremely interesting. The lack of references to estoppel in the report could be rectified when the invalidity regime was discussed and in the context of the analysis of article 45 of the 1969 Vienna Convention, which referred to estoppel without mentioning it expressly. Silence remained an important element, not as a legal act, but as part of the sphere of, or reactions to, unilateral acts.

60. Comments had been made about whether establishing a classification was possible, impossible or desirable, but most speakers had concluded that it was possible on the basis of the information from case law contained in the report. That did not rule out the possibility of looking once again at classic unilateral acts with reference to their definition, consequences and legal effects. Attention had been drawn to the difficulty of fitting in to the clas-

sification mixed acts, such as declarations of neutrality, in which States not only assumed obligations, but also affirmed rights. Much had been said about autonomous acts. The term should perhaps be reconsidered, but the phenomenon should be defined as acts which occurred outside treaty relations and whose effects were generated unilaterally and therefore required no acceptance or other subsequent conduct on the part of the addressee State.

61. Important comments had been made on whether the rules of interpretation could be applied to all unilateral acts. The report said that they could and that such rules could be included in a general part of the draft because all unilateral acts were characterized by the manifestation of will, on which all legal interpretation focused. There seemed to be a need to strike a balance between declared will, which some thought of as having the greatest legal validity, and real will, which, in the view of others, was predominant. Much had been said about whether preparatory work should be excluded or assimilated to surrounding circumstances. He thought that it should be considered as a supplementary means of interpretation when a text was not sufficient for that purpose. It had been suggested that the draft articles should stipulate that interpretation had to be restrictive and wording to that effect could be incorporated. With regard to the opinion that the word "declaration" was ambiguous and should be replaced, he said he had always maintained that it referred to something different from unilateral acts and that it was an instrument through which most, if not all, unilateral acts were expressed. Such terminology problems could account for at least some of the circling around the topic that had been mentioned.

62. In conclusion, he said that he had found the debate enriching and would comply with the request for a document describing the progress made on the topic, setting out the draft articles already referred to the Drafting Committee and the working group and outlining the views expressed to date.

*The meeting rose at 1.10 p.m.*

## 2697th MEETING

*Friday, 27 July 2001, at 10.05 a.m.*

*Chairman: Mr. Peter KABATSI*

<sup>9</sup> 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).

<sup>10</sup> See Security Council resolutions 687 (1991) of 3 April 1991 and 773 (1992) of 26 August 1992.

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr.

Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

### Draft report of the Commission on the work of its fifty-third session

1. The CHAIRMAN invited the Commission to consider the draft report on the work of its fifty-third session, beginning with chapter IV, on the topic of international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), the second reading of which had been completed. Sections C and D of the chapter, relating to the recommendation of the Commission with regard to the topic and the tribute to its Special Rapporteur, were still to be completed and would be taken up at a later stage. He invited the Commission to consider chapter IV paragraph by paragraph.

**CHAPTER IV. 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.607 and Add.1 and Add.1/Corr.1)**

#### A. Introduction (A/CN.4/L.607)

*Section A was adopted.*

#### B. Consideration of the topic at the present session

*Section B was adopted.*

2. The Chairman reminded the Commission that it would return to sections C and D at a later stage. Section E.1 would contain the text of the articles already adopted by the Commission.

#### E. Draft articles on prevention of transboundary harm from hazardous activities (A/CN.4/L.607 and Add.1 and Add.1/Corr.1)

#### 2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (A/CN.4/L.607/Add.1 and Corr.1)

##### General commentary

##### Paragraph (1)

3. Mr. PELLET and Mr. CANDIOTI noted inconsistencies in the use of the expressions *projets d'article* and *projets d'articles* in the French version of the text, and of the expressions "articles" and "draft articles" in the English version.

4. Mr. TOMKA (Chairman of the Drafting Committee) said that the usual practice was to refer to the set of articles to be submitted to the General Assembly as "draft articles", and to individual draft articles simply as "articles". The word "draft" would thus appear once only, in the title, and would be omitted in the main body of the text.

*Paragraph (1) was adopted.*

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted.*

Paragraph (4)

5. Mr. PELLET, referring to footnotes, said that, throughout the commentaries, they frequently cited *International Legal Materials* as a source. While thoroughly worthy, that source had the disadvantage of being published only in English. A decision of principle should be taken to refer, wherever possible, to the United Nations *Treaty Series* in citations.

6. Mr. SIMMA said that the solution adopted would depend to some extent on the prospective readership. The average academic reader could gain access to the United Nations *Treaty Series* and other official United Nations sources only with difficulty and at considerable expense. *International Legal Materials* had the advantage of being easily accessible.

7. Mr. CRAWFORD said that, as a matter of principle, if a treaty was in force it should be cited in the United Nations *Treaty Series*, which was currently available on the Internet. Some materials, however, including treaties not yet in force, were not published in the United Nations *Treaty Series*. In such cases, *International Legal Materials* should be cited as a second source.

8. Mr. ROSENSTOCK suggested that, while the official citation should come first and the *International Legal Materials* citation second, both should appear in the footnote, in order to give the reader the opportunity to choose the most convenient means of access.

9. Mr. KAMTO supported Mr. Rosenstock's suggestion.

10. Mr. TOMKA (Chairman of the Drafting Committee) agreed that the reference should be to the official publication of the United Nations. The problem was that *International Legal Materials* contained texts only in English. Tracing additional citations in other languages would place a further burden on special rapporteurs.

11. Mr. Sreenivasa RAO (Special Rapporteur) said he was prepared to comply with the general view of the Commission on the question.

12. Mr. MELESCANU said that, in spite of the linguistic drawback of citing *International Legal Materials*, Mr. Rosenstock's proposal was clearly the most realistic solution in what was admittedly an imperfect world.

13. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to accept the policy decision suggested by Mr. Rosenstock.

*It was so agreed.*

*Paragraph (4) was adopted.*

## Paragraph (5)

14. Mr. PELLET said that the citations in the footnote to the paragraph and in other footnotes should be organized according to a consistent system, either in alphabetical or in chronological order.

*Paragraph (5) was adopted.*

*The general commentary was adopted.*

## Preamble

15. Mr. GAJA said it was an unusual feature of the draft articles that they included a preamble. Some brief explanation of the preamble should thus be given in the commentary.

16. Mr. PAMBOU-TCHIVOUNDA agreed that some mention of the preamble should be made in the commentary, perhaps as a footnote. In the third paragraph of the preamble, the word *précis* should be replaced by *placés* in the French version, bringing it into line with the wording of article 2, subparagraph (c).

17. Mr. Sreenivasa RAO (Special Rapporteur) said that the preamble represented a delicate compromise and a discreet acknowledgement of the unfulfilled wishes of some States with regard to the draft. Quite apart from the fact that it was not usual practice to provide commentaries to preambular texts, and that such an exercise would be time-consuming, any discussion of the preamble would in any case run the risk of reopening the debate in the General Assembly, thereby diverting attention from the main thrust of the articles. His own view was that no commentary to the preamble should be provided.

18. Mr. MELESCANU said that both Mr. Gaja and the Special Rapporteur had made very valid points. What was needed was simply a brief two- or three-line explanation of why the Commission had decided to draft a preamble.

19. Mr. ADDO, Mr. AL-BAHARNA, Mr. ECONOMIDES and Mr. GOCO were of the view that no commentary was necessary, and that the preamble was self-explanatory.

20. Mr. TOMKA (Chairman of the Drafting Committee) said that for the Commission to draft a preamble was the exception that proved the rule. It should be easy to provide a brief explanation, thereby avoiding the need for a conference or the Sixth Committee to take the matter up again.

21. Mr. PELLET said that, while he would not break with the emerging consensus that there should be no commentary to the preamble, he still felt that every provision ought to be the subject of a commentary. It was simply not true to say that the preamble was “self-explanatory” and the Commission should guard against setting an undesirable precedent.

22. Mr. SIMMA suggested that the Commission should ascertain what course it had adopted in the case of the preamble to the draft articles on nationality of natural persons in relation to the succession of States.<sup>1</sup> Regard-

less of the findings, Mr. Gaja’s suggestion remained a good one.

23. Further to a proposal by Mr. Sreenivasa RAO (Special Rapporteur), the CHAIRMAN suggested that the Commission should suspend its consideration of the preamble, to enable the Special Rapporteur to come up with an appropriate wording on the basis, *inter alia*, of the report of the Drafting Committee.

*It was so agreed.*

## Commentary to article 1 (Scope)

## Paragraph (1)

24. Mr. YAMADA said that the reference to subparagraph (c) in the second sentence should be to subparagraph (d).

25. Mr. CRAWFORD said there was a clear discrepancy between the statement, in paragraph (1), that article 1 limited the scope of the articles to activities not prohibited by international law, and the statement, in paragraph (6), that the State could raise issues whether the activity was or was not prohibited by international law. Either the articles applied only to activities not prohibited by international law, or they applied to activities of a certain description, whether or not prohibited by international law, by virtue of the fact that they caused certain levels of harm.

26. Mr. Sreenivasa RAO (Special Rapporteur) said that the answer might be to delete the words “not prohibited by international law and” from paragraph (1).

27. Mr. CRAWFORD said that it seemed rather odd to be changing the scope of the subject by deleting from the first sentence of the commentary to article 1 the phrase which appeared in the text of the article itself, and thereby in effect to state that what article 1 meant was that the draft articles applied to activities which produced those effects whether or not they were prohibited by international law. The scope of the subject had been a fundamental problem lurking behind the conceptual trap, which Special Rapporteur Ago had set for the Commission when the topic was first established and from which the Commission had never managed to escape. It must stick to the terms of the topic and retain the words “not prohibited by international law and”, working on the assumption that States when they were dealing within the framework of prevention would leave that question to one side, so that there would be a *de facto* extension of application of those draft articles on a “without prejudice” basis.

28. Mr. TOMKA (Chairman of the Drafting Committee) agreed, noting that the problem had been discussed at length in the Drafting Committee, where the decision had not been an easy one. However, paragraph (1) should be kept as it was, because paragraph (6) correctly reflected that invocation of the article by a State likely to be affected was not a bar to a later claim by that State that the activity in question was a prohibited activity. It might be better to rework the previous sentence in paragraph (6), but that could be tackled at the time the paragraph was discussed.

<sup>1</sup> *Yearbook* . . . 1997, vol. II (Part Two), pp. 14 *et seq.*

29. The CHAIRMAN said that he would take it that the Commission wished to adopt paragraph (1), with the amendment to the second sentence.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

30. Mr. ECONOMIDES said that non-hazardous activities could also involve a risk of causing significant transboundary harm and hence there was an apparent contradiction between the title of the articles and the scope of the draft. In his view, the two should be harmonized. Paragraph (2) referred to “different types of activities” that could be envisaged under the category, and then cited hazardous and ultra-hazardous activities. But they were only one type of activity. Was the Special Rapporteur able to explain the apparent contradiction?

31. Mr. PAMBOU-TCHIVOUNDA in agreement, said that it was the duty of the Commission to specify what hazardous activities were.

32. Mr. Sreenivasa RAO (Special Rapporteur) said that the emphasis was on any activity with a risk of inherent danger, and the fact that certain activities were highlighted did not exclude others. The point was surely covered by the fourth sentence of paragraph (2).

33. Mr. ECONOMIDES said that he would have preferred it to be stated in paragraph (2) that any activity that involved a risk of causing significant transboundary harm was *a priori* a hazardous activity, and that therefore *a fortiori* some activities were more hazardous than others. However, although he was not entirely satisfied, he accepted the Special Rapporteur’s explanation and would not press the point.

34. Mr. CANDIOTI asked what the phrase “risk of inherent danger” really meant. Did “inherent” apply to “risk” or to “danger”?

35. Mr. MELESCANU, supported by Mr. SIMMA, said that “inherent” qualified “risk”.

36. Mr. Sreenivasa RAO (Special Rapporteur) said he agreed.

37. Mr. SIMMA wondered whether one might not be over-egging the pudding by speaking of a risk of danger. Would it not be sufficient to refer to “inherent risk” or “inherent danger”?

38. Mr. Sreenivasa RAO (Special Rapporteur) said the point he had been trying to make was that the risk had to be inherent and productive of danger. He proposed that the text might make reference to “any activity with an inherent risk of causing significant harm”.

39. Mr. CRAWFORD said that the word “inherent” involved a serious problem and should be deleted. If in practice one was dealing with a situation, one would ask whether the particular activity involved a risk of causing transboundary harm as a result of the physical consequences, and the fact that other activities of that general description might or might not carry such a risk had no bearing on the matter. The question was whether the par-

ticular activity was covered by article 1. The problem with the word “inherent” was that it either tended to distract one’s attention towards the general category of activities of which the particular activity was one, which was not the point, or it tended to draw a distinction between “inherent” and “extraneous”, which again was not the point.

40. Mr. KAMTO said that it was not entirely clear whether “inherent danger” and “an exceptionally high level of danger” in the fourth sentence were alternative ideas or whether the idea of gradation was being introduced. The Special Rapporteur had explained that all activities with an inherent risk of danger were covered, so that idea might be better reflected if “*a fortiori*” were inserted after “even”.

41. Mr. PELLET said that “risk” and “danger” were roughly the same and it was absurd to speak of the risk of danger. What was meant was the risk of harm. The Special Rapporteur had made a sensible proposal that should be accepted.

42. Mr. CANDIOTI agreed, saying that it was a question of a risk of causing harm and not of risk leading to danger. The notions were distinct.

43. Mr. GOCO said the language was entirely satisfactory. The phrase should be “risk of inherent danger”, as it appeared in the text, since “inherent danger” was amplified by the rest of the sentence.

44. Mr. SIMMA said that if “danger” was replaced by “harm” the change would have to be made throughout.

45. Mr. AL-BAHARNA said that the word “inherent” was not needed and should be deleted. Reference should be made to “risk of harm” and “an exceptionally high level of harm”.

46. Mr. HAFNER said that paragraph (2) of the commentary to article 6 referred to “activities with a possible risk of significant transboundary harm”. In his view it would be wise to use that phrase throughout the commentary for the activities addressed by the draft articles.

47. Mr. ECONOMIDES said that he considered the word “inherent” useful; it was the second part of the sentence that needed to be corrected. It should refer to “even an exceptionally high level of harm”, rather than “danger”.

48. The CHAIRMAN said he agreed: “inherent” was a very useful word in the context.

49. Mr. PELLET said that “inherent” was indispensable to the sense of the sentence. The word “danger” should be replaced by “harm”, and “even” should be replaced by “*a fortiori*”.

50. Mr. Sreenivasa RAO (Special Rapporteur) said that the word “inherent” could not be deleted, but “even” could. In any event, due to a drafting error the phrase “risk or inherent danger”—to be replaced by “harm”—had appeared as “risk of inherent danger”. He would come back to the Commission with a definitive formulation of the sentence.

Paragraphs (3) to (5)

*Paragraphs (3) to (5) were adopted.*

Paragraph (6)

51. Mr. PELLET said that footnotes 7, 8, 9 and 11 posed a problem of principle. It was not a good method in a commentary on draft articles on first reading, and even worse on second reading, for the Commission to cite itself, and worse still to cite its special rapporteurs. It was normal to repeat in the commentary that which had already been written, but it was not good to cross-refer to previous commentaries and previous proposals. All the cross-references in the footnotes should be deleted. If the Special Rapporteur considered that by doing so something important would be missing, the text to which reference was made could be reintroduced. He was very insistent on the point.

52. Mr. Sreenivasa RAO (Special Rapporteur) said it was the first time that he had heard a policy statement on footnotes, but if colleagues agreed, so would he. It would be helpful to all special rapporteurs.

53. Mr. BROWNLIE said that it clearly did not help the progress of the exposition if there was heavy historical back-referencing to previous reports and proposals, but he could not see that there was any need for an extreme general policy justifying an absolute prohibition on references to previous work.

54. Mr. PELLET said that the Special Rapporteur had not heard such a policy statement before, because commentaries on second reading had never before made reference to previous work. Such reference could be made in the introduction. The commentaries were the property of the Commission, which could repeat what it had said but could not make cross-references.

55. The CHAIRMAN said it was not the first time commentaries adopted on second reading had made reference to previous work: it had been done in the case of the topic of nationality in relation to the succession of States.

56. Mr. SIMMA said that the simple quotation in footnote 7 could be moved into the body of the text if it was considered important. In his opinion, where a special rapporteur had made a very comprehensive point it would be helpful for the commentary, which was very compact, to include a reference so that the reader could find more material.

57. Mr. PELLET said that special rapporteurs should not be encouraged to cite themselves and develop a personality cult. It should be avoided at all costs, and there was no need for the Commission to cite itself. Important matters should be stated; unimportant matters should not. Citing special rapporteurs was poor form.

58. Mr. TOMKA (Chairman of the Drafting Committee) said that he was not averse to references to the previous work of the Commission when necessary and within reasonable limits. Such references had been included in the commentary to the draft articles on nationality of natural persons in relation to the succession of States. He was in favour of keeping footnote 7 and deleting footnote 8.

59. Mr. HE suggested that the sources simply be cited and not quoted at length.

60. Mr. Sreenivasa RAO (Special Rapporteur) said he would not press for retention of the material in footnote 7. He had nevertheless thought it useful and a contribution to the historical record on the commentaries.

61. Mr. PELLET said that his proposal for footnote 7 appeared to have been misunderstood. The usefulness of the material therein was not in dispute. The problem was merely with the form. To improve it, he proposed that in the first sentence, the words “concluded that [it]” be deleted and the quotation marks removed. Similarly, in the second sentence, the phrase “The Special Rapporteur . . . liability as” should be deleted, replaced by “Moreover,” and the quotation marks then removed. The Commission could thus incorporate material from its earlier works without designating itself as the source.

62. Regarding footnote 9, if the contents of paragraphs 35 to 37 of the second report<sup>2</sup> were deemed to be essential, they must be placed in the commentary; if not, they should not be mentioned in the footnote. Not to include substantive material did a disservice to the reader and possibly to members of the Commission, who did not have an encyclopaedic memory of what was in the paragraphs.

63. Mr. KATEKA said that references to reports by special rapporteurs were of use, especially to future students of the topics, and should not be prohibited. It would be tantamount to barring references to any of the authors in the literature unless their works were cited *in extenso*.

64. Mr. PELLET said that not all works mentioned could or should be cited *in extenso*, but there was a fundamental difference between quoting an author and quoting a special rapporteur: the Commission was the proprietor of its own work and of that of the special rapporteurs. It accordingly did not have to cite such work as a source. It was, he thought, an important matter of principle. He was not totally opposed to any quotation whatsoever of such material, but as Mr. Tomka had said, it should be done sparingly and only when truly necessary.

65. Mr. ECONOMIDES said that reports by special rapporteurs were endorsed by the Commission not in their entirety, but to the extent that the material therein was reproduced in the report of the Commission to the General Assembly. Mention of such reports in a footnote did not mean that each and every member of the Commission accepted their entire contents. Consequently, he could not understand Mr. Pellet's statement that the Commission was the proprietor of work by special rapporteurs.

66. Mr. SIMMA said the Commission should take a pragmatic, not dogmatic, position, and should resolve such questions on a case-by-case basis.

67. Mr. CRAWFORD said that the beginning of the second sentence in paragraph (6), “This was originally intended”, was misleading, as it implied that there was a different intention at the current time. The commentaries should be self-contained and not refer back to past

<sup>2</sup> *Yearbook . . . 1999*, vol. II (Part One), document A/CN.4/501.

decisions except where absolutely necessary. In general, it was bad practice to cite in the commentary reports by the special rapporteur on the topic of that commentary, and the Commission should adopt a policy of deleting all such references. The commentary constituted the collective view of the Commission and as such superseded the reports.

68. Mr. TOMKA (Chairman of the Drafting Committee) proposed that the phrase, "This was originally intended", mentioned by Mr. Crawford, should be replaced by "This approach has been adopted in order" and that footnote 7 should simply read: "*Official Records of the General Assembly, Thirty-Second Session, Supplement No. 10 (A/32/10)*, para. 17."

*It was so agreed.*

69. The CHAIRMAN suggested that the end of the third sentence, "irrespective of . . . not prohibited.", together with footnote 8, should be deleted.

70. Mr. SIMMA said he was opposed to such a deletion, as the sentence would be devoid of meaning.

71. Mr. CRAWFORD said he would prefer to replace the phrase "irrespective of . . . not prohibited" by "although the activity itself is not prohibited", which would restore consistency with article 1.

*It was so agreed.*

72. Mr. HAFNER proposed that, in the fifth sentence, the words "or at any event, the minimization" should read "at any event of the minimization".

*It was so agreed.*

73. Mr. PELLET proposed that in the penultimate sentence, the word "the" should be replaced by "a".

*It was so agreed.*

74. The CHAIRMAN said that all references to reports by special rapporteurs would be removed from the text during the editing process. If he heard no objection, he would take it that the Commission wished to adopt paragraph (6), as amended.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

*Paragraph (7) was adopted.*

Paragraph (8)

75. Mr. CRAWFORD said that there were perfectly good reasons for limiting the draft to transboundary harm arising in a State's territory, without getting into issues of extraterritorial jurisdiction. The first sentence was therefore unnecessary and problematic and should be deleted.

*It was so agreed.*

76. Mr. MOMTAZ drew attention to a discrepancy in the underlining of words in the English and French language versions. The sixth sentence, "The Commission, however, is mindful of situations where a State, under international law, has to yield jurisdiction within its territory to another State", was something of an overstatement. A State, rather than yielding jurisdiction, assumed what could be described as functional jurisdiction in such instances.

77. Mr. ECONOMIDES endorsed those remarks and suggested that the unduly strong term "yield" should be replaced by "accept limits to".

*It was so agreed.*

78. Mr. HAFNER proposed that the word "territory", in the same sentence, should be replaced by "territorial jurisdiction".

*It was so agreed.*

*Paragraph (8), as amended, was adopted.*

Paragraph (9)

79. Mr. HAFNER proposed that, at the end of the first sentence, the phrase "is narrow and therefore the concepts of 'jurisdiction' and 'control' are also used" should be replaced by the words "does not cover all cases where a State exercises 'jurisdiction' or 'control'".

*It was so agreed.*

*Paragraph (9), as amended, was adopted.*

Paragraphs (10) and (11)

80. Mr. MOMTAZ said the second sentence of paragraph (11) failed to draw a necessary distinction between the territorial sea, the contiguous zone and exclusive economic zones, which did not have the same status. In the territorial sea, States exercised sovereign rights, not "functional mixed" jurisdiction, as the sentence suggested.

81. Mr. PAMBOU-TCHIVOUNDA said he agreed that the three different concepts should be treated separately but disagreed about the sovereignty of States in the territorial sea. There, they exercised full sovereignty, whereas in the exclusive economic zones, they exercised sovereign rights.

82. Mr. PELLET said that the sentence was accurately worded in that it referred to functional mixed jurisdiction over "navigation and passage" through the areas cited by Mr. Momtaz, not over those areas themselves. He agreed with Mr. Momtaz, however, that the three areas should not be placed on the same footing, because States exercised sovereign rights in the exclusive economic zones and territorial sovereignty in the territorial sea. He suggested

that the words “contiguous zone and exclusive economic zones” should be deleted.

83. Mr. BROWNLIE said he endorsed the criticisms made by Mr. Momtaz, but in the final analysis there was a strong case for deleting paragraphs (10) and (11) because they set out problems but did not offer clear solutions. One solution, admittedly imperfect, was to be found in paragraph (12).

84. Mr. SIMMA said he agreed with Mr. Brownlie: the applicability of the draft articles to the situations described in paragraphs (10) and (11) would in any case be limited. Hence there was no need to go into specifics.

85. Mr. PELLET, supported by Mr. HERDOCIA SACASA, said that the two paragraphs contained useful examples that he would be loath to lose. On its own, paragraph (12) was by no means explicit enough. If paragraphs (10) and (11) were to be deleted, he would favour at least adding, before the word “States” in paragraph (12), the phrase “as often occurs under the law of the sea”.

86. Mr. PAMBOU-TCHIVOUNDA said he shared Mr. Pellet’s concern. The answer might be, after deleting paragraph (11), to compress paragraphs (10) and (12). He also suggested that the words “in outer space or on the high seas” in paragraph (10) should be replaced by a vaguer form of words, such as “maritime areas”. All possible cases should thus be covered.

87. Mr. BROWNLIE, supported by Mr. GOCO, said that he had not advocated expanding paragraph (12) with a form of words that would provide the wrong solutions. To refer to exclusive economic zones as involving a functional jurisdiction was no solution, since the superjacent airspace of an exclusive economic zone did not form part of that zone. It would be far too complex, as well as legally problematical, to attempt to include such considerations in paragraph (12). He would prefer to retain a succinct form of words, much like the existing paragraph (12).

88. Mr. ECONOMIDES said he had no objection to deleting the last two sentences of paragraph (10), although he found the examples useful. As for paragraph (11), the problems might be solved if the three maritime zones concerned were left unspecified. The point was to retain functional mixed jurisdictions. The phrase “the territorial sea, contiguous zone and exclusive economic zones” could thus be replaced by the phrase “maritime zones”.

89. Mr. MOMTAZ said he concurred. Since the jurisdiction of the flag State was the point at issue, the last sentence of paragraph (10) and the whole of paragraph (11) could safely be deleted if the words “flag State over a ship” in paragraph (10) were followed by “which, in accordance with the law of the sea, exercises a number of jurisdictions in the various maritime zones”.

90. Mr. Sreenivasa RAO (Special Rapporteur) said that the paragraphs concerned dated from the forty-eighth session, before he had become Special Rapporteur. He had therefore not given them particularly close attention. He was, however, aware of the various jurisdictions and competencies in different zones, for different purposes, and as between coastal and other States with competencies in those zones. He would therefore prefer to retain

paragraph (10). Moreover, as was stated at the end of paragraph (9), the article did not presume to resolve all the questions of conflicts of jurisdiction. Paragraph (11), on the other hand, attempted to combine too many concepts in too small a space, causing needless complexity, and it could therefore usefully be deleted.

*Paragraph (10) was adopted and paragraph (11) was deleted.*

Paragraph (12)

91. Mr. AL-BAHARNA suggested that, to bring extra clarity to paragraph (12), the phrase “such as the case of navigation and passage in maritime territory” should be added after the words “concurrent jurisdiction”. That would avoid the complications involved in Mr. Momtaz’s suggestion regarding references to specific terms such as “territorial sea”.

92. The CHAIRMAN, after urging members to restrict their comments to requests for clarification or specific proposals for amendments, said he took it that the Commission wished to retain the existing wording of paragraph (12).

*Paragraph (12) was adopted.*

Paragraph (13)

93. Mr. SIMMA said that the phrase “such as in cases of intervention, occupation and unlawful annexation which have not been recognized in international law”, in the first sentence, was ambiguous and generally unsatisfactory. He presumed that the intended meaning was “not recognized as valid”. The best solution would be to delete the phrase “which have not been recognized in international law” and to qualify all the three eventualities—intervention, occupation and annexation—with the word “unlawful” or “illegal”.

94. Mr. GOCO suggested that the phrase “even though it lacks jurisdiction *de jure*” was superfluous, in view of the immediately preceding reference to *de facto* jurisdiction.

95. Mr. Sreenivasa RAO (Special Rapporteur) said that the phrase should be retained because, whereas in normal cases of *de facto* control it was possible for *de jure* jurisdiction to follow, that was not the case when the intervention, occupation or annexation was unlawful.

96. Mr. KAMTO pointed out that, by definition, annexation could never be lawful.

97. Mr. PELLET said that the French version would be improved if the phrase *que la Cour avait déclaré illégale* were replaced by the phrase *dont la Cour avait constaté l’illicéité*. *Déclaré* was too strong a word in the context.

98. Mr. TOMKA (Chairman of the Drafting Committee) said that, according to his understanding, the word “case” had a connotation of contentiousness. He therefore suggested that the word “case” preceding the reference to



footnote 13 should be deleted and that the next sentence should begin “In that advisory opinion”.

*Paragraph (13), as amended, was adopted.*

Paragraph (14)

99. Mr. MOMTAZ said that presumably the intervention in question was that undertaken on environmental grounds. In order not to confuse the reader, that fact should be specified. It might also be useful to add a reference to the International Convention on Civil Liability for Oil Pollution Damage.

100. Mr. Sreenivasa RAO (Special Rapporteur) said that paragraph (14), also dated from before his time as Special Rapporteur. However, he understood the type of intervention concerned to be different from any mentioned previously: it was intervention by agreement, under which a State was given control by another for certain purposes. He had assumed that it related to military intervention, where the army of one State was stationed in another. In that situation the incoming State was the “controlling” State. He would add that he endorsed the Chairman’s plea for speed in adopting the report. Only a few pages had been adopted at the current meeting and some substantive issues requiring discussion lay ahead. Editing changes should be proposed only if they sought to correct glaring errors.

101. Mr. SIMMA said that second thoughts should not be excluded; shortage of time concentrated the mind. As for Mr. Momtaz’s point, environmental disasters were covered by the current wording, even though they could not be said to be subject to an agreement. On the other hand, if “intervention” referred to agreed intervention, the word “ousted” was surely too harsh, implying, as it did, deprivation of jurisdiction.

102. Mr. HAFNER said that, as the comments by other members showed, it was a difficult issue and the Commission was not in a position to cover all cases. He therefore suggested deleting paragraph (14), which only complicated matters. The duty imposed on States under other articles should suffice.

103. Mr. CRAWFORD said he strongly concurred. The draft articles could not deal with extreme situations involving any form of intervention, consensual or otherwise. If the paragraph were to be retained, the phrase “It is the view of the Commission that” should be deleted: the Commission was not making a general point of principle.

104. The CHAIRMAN suggested that paragraph (14) should be deleted.

*It was so agreed.*

*Paragraph (14) was deleted.*

Paragraph (15)

105. Mr. HAFNER suggested that the words “the possibility of” should be inserted before “any harm” in the penultimate sentence.

*Paragraph (15), as amended, was adopted.*

Paragraphs (16) to (18)

*Paragraphs (16) to (18) were adopted.*

Paragraph (19)

106. Mr. HAFNER asked whether the term “natural law”, in the second sentence, was the best expression to use. It seemed ambiguous in a way that the French version did not.

107. Mr. CRAWFORD concurred. The phrase “in response to a natural law” should be deleted. He also suggested deleting, or at least qualifying, the phrase “not from an intervening policy decision”, in the third sentence. An intervening policy decision might relate to the way in which the activity was being carried out and therefore be perfectly relevant to risk. He was aware that the draft articles did not cover decisions to use weapons, as distinct from the consequences of storage, but the distinction between the “quality” and a policy decision was too absolute. The simplest solution was to delete the phrase.

108. Mr. Sreenivasa RAO (Special Rapporteur) said that, while the phrase in question might have been misplaced, the intention had been to eliminate decisions that affected other countries because of a policy decision without any physical connection.

109. Mr. CRAWFORD said that that point, with which he agreed, was expressed in the example that had been given. Obviously, a country could not use injurious transboundary consequences as an excuse for a concern that might relate to the actual use of weapons.

*The meeting rose at 1.10 p.m.*

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## 2698th MEETING

*Monday, 30 July 2001, at 3 p.m.*

*Chairman: Mr. Peter KABATSI*

*Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.*

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

[Agenda item 8]

### VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRMAN warmly welcomed the President of the International Court of Justice, Mr. Gilbert Guillaume, for an exchange of views in accordance with the well-established practice of the Commission. Under Article 38 of its Statute, the function of the Court was to decide disputes in accordance with international law. It was thus the supreme court of the international community. By contrast, the Commission assisted in the making of international law in accordance with its mandate under Article 13, paragraph 1, of the Charter of the United Nations. There were close links and natural affinities between the two institutions: *ratione personae*, in that many of the judges of the Court were former members of the Commission, and *ratione materiae*, since the Court shaped international law through its judgments.

2. Mr. GUILLAUME (President of the International Court of Justice) said he agreed that the two institutions complemented each other in terms of members and functions. The role of the Commission was to codify and develop international law, while, in handing down judgments or opinions, the Court was sometimes called upon to clarify the content of international law. He had therefore been pleased to respond to the invitation of the Commission to report on what the Court had done in the past year and to inform it about the problems currently being faced and the prospects for the future. He was also prepared to reply to questions, thereby continuing his dialogue with the Commission.

3. The past year had been marked by two important judgments, one in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* and the other in the *LaGrand* case. The two cases were entirely different, but in each of them the Court had had to clarify the law on a number of important points. The case concerning Qatar and Bahrain had been a territorial dispute over islands, low-tide elevations and the maritime areas of the two States. It was an old conflict that had created real problems, including the use of armed force on two occasions. Saudi Arabia had attempted to solve the conflict through mediation, which had unfortunately failed, and the case had been submitted to the Court in 1991.

4. The judgment of the Court had only been issued 10 years later, and there were a number of reasons for that. The first was that its jurisdiction to adjudicate the dispute had been contested by Bahrain, but those objections had been overruled, and the second, that the authenticity of certain documents had been challenged, creating procedural difficulties. The final result had been a major political and diplomatic breakthrough. The judgment had been welcomed by both parties as definitively settling a territorial dispute that had hampered relations between the two countries. New, more satisfactory relations could

be entered into at the current time and were symbolized by the planned construction of a bridge to link Qatar with Bahrain through the disputed maritime areas. It was rare indeed that a judgment of the Court satisfied all the parties to a dispute.

5. The case had involved two sets of issues relating to sovereignty over certain islands and low-tide elevations and to maritime boundaries. Interestingly enough, the maritime boundaries could not be determined until territorial sovereignty had been established. That was something that the Court was competent to do, in contrast to the International Tribunal for the Law of the Sea, which had jurisdiction only to determine maritime boundaries. One issue that had long divided the two parties was that of the Hawar islands, which lay in immediate geographical proximity to the Qatar peninsula, but over which Bahrain considered that it had a valid claim through historical ties, by having carried out activities there and under a decision taken by the British authorities in its favour in 1939.

6. The Court had confined itself to examining that decision and had concluded that it did not constitute an arbitral award, after having defining arbitral awards. It had noted that the decision had been requested of the British authorities by the sovereign heads of both countries and had been acknowledged in advance by the two countries as binding. It had found that the decision had been procedurally correct and was binding on the two parties and it had accordingly granted the Hawar islands to Bahrain. By concentrating on the British decision, the Court had left to one side the interesting question whether the rules of *uti possidetis juris* were applicable, given that the parties were States which had been protectorates in colonial times and whose continuity had been ensured over the years, or whether the rules applied only in situations of colonization and subsequent transfer of sovereignty.

7. The Court had granted a number of small islands to one or another of the parties, thereby establishing the basis for maritime delimitation of both the territorial sea and the exclusive economic zone and continental shelf, for which the parties had requested a single maritime boundary. The Court had found that customary international law was the applicable law and that article 15 of the United Nations Convention on the Law of the Sea was part of customary law. Consequently, territorial seas had to be delimited according to the principle of equidistance, taking special circumstances into account, if necessary. The delimitation of the exclusive economic zone and the continental shelf had also been based on customary law, according to which the equidistance line must be found and adjusted to take account of relevant circumstances. That was true, the Court had indicated, not only for opposite coasts, as in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen*, but also for adjacent coasts. Those new elements attested to the development of the case law of the Court over the past 30 years.

8. The question had then been how to draw the equidistance line in respect of the territorial sea. The Court had referred to the United Nations Convention on the Law of the Sea, which stated that the equidistance line should be the low-water line along the coast. It had then had to decide how to treat the low-tide elevation, an area of land that was above water at low tide, but submerged at

\* Resumed from the 2673rd meeting.

high tide, unlike islands, which were permanently above water. Bahrain had contended that it had appropriated certain low-tide elevations by placing beacons and other installations on them and, consequently, that it exercised sovereignty over them and that the equidistance line should be drawn by taking them into account. Qatar, on the other hand, had maintained that low-tide elevations could not be appropriated as territory or islands could and must be given the same treatment as the maritime areas in which they were located. The low-tide elevations concerned were situated in a spot where the territorial seas of Bahrain and Qatar overlapped and were thus in both territorial seas. The Court had found that, in the particular circumstances, the low-tide elevations could not be appropriated and had the same status, not as islands, but as the territorial sea in which they were located. It had accordingly granted one of them to Qatar. Although its findings had dealt exclusively with low-tide elevations located in areas where territorial seas overlapped, not in areas beyond or on the high seas, they suggested that, in general, the Court was not in favour of appropriation by acquisition of low-tide elevations.

9. Another interesting point had been the argument by Bahrain that straight baselines joining the outermost points of its islands should be drawn, thereby transforming the entire disputed area into an inland sea. The Court had found that the relevant provisions of the United Nations Convention on the Law of the Sea had not been fulfilled and that straight baselines could not be drawn. The disputed area was not an inland sea, but a territorial sea through which Qatar retained the right of innocent passage.

10. Once the equidistance line in the territorial seas had been drawn, the Court had turned to the question whether there were special circumstances requiring its adjustment in order to obtain an equitable result and the short distance between the two coasts had accordingly been taken into account.

11. In dealing with the delimitation of the continental shelf and the exclusive economic zone, the Court had discarded all the relevant circumstances cited by the parties, but had found a new one, a Bahraini low-tide elevation which had not been mentioned by either of the parties, but which gave a definite advantage to Bahrain in the placement of the equidistance line. The Court had determined that the effect of the low-tide elevation on the equidistance line should be adjusted in order to arrive at an equitable result.

12. The most important legal elements in the case were the standardization of the fundamental rules relating to maritime delimitation and the determination of the treatment to be given to low-tide elevations and small islands that might have an inordinate effect on equidistance lines unless adjustments were made. As a result of the judgment, the Hawar islands had been granted to Bahrain and a maritime boundary that was reasonably favourable to Qatar had been drawn in the north.

13. The second case he wished to describe involved two German brothers named LaGrand. In 1984, they had received death sentences in the United States, but had not been duly informed of their right to communicate with

German consular authorities. That information had been given them only in 1998, while the German authorities had been informed of their incarceration only in 1992. One of the brothers had been executed in 1999. On 2 March 1999, Germany had instituted proceedings and applied for provisional measures. The response by the Court had come only 24 hours later and, on 3 March 1999, it had issued an order indicating provisional measures according to which the United States Government was to use all means at its disposal to prevent the second brother, Walter LaGrand, from being executed, pending a final decision by the Court. Only a few hours later, however, Walter LaGrand had been put to death.

14. In debating the merits of the *LaGrand* case, the Court had heard four sets of arguments by Germany. The first was that the United States was guilty because, by not informing the LaGrand brothers of their rights immediately upon their arrest, it had violated its obligations towards Germany. The United States had in fact acknowledged wrongdoing in that regard. Germany had added that the obligations of the United States towards the LaGrand brothers themselves had also been violated, since the Vienna Convention on Consular Relations accorded rights not only to States, but also to individuals. The Court had agreed with Germany on that point, but had refused to classify the rights in question as human rights, as Germany had requested, because that was not germane to the case. It had stated further that, in that case, the fact that the LaGrand brothers had not been informed of their rights had prevented them from receiving the assistance available under the Convention.

15. The second line of argument from Germany had related to the review of the guilty verdict. Based on the procedural default rule in United States domestic law, the courts of that country had found that, since the matter had not been brought before the Arizona courts, it could not be submitted to a federal court and that the verdict must stand. There again, ICJ had refrained from taking a general position, for example, that the procedural default rule was contrary to the Vienna Convention on Consular Relations, but had said that, given the way the trial had been conducted, the sentence should have been reviewed and the fact that it had not was a violation of the Convention.

16. The third submission by Germany had concerned the order by the Court indicating provisional measures. A question that had been under discussion in the literature for decades was whether provisional measures were or were not binding on the parties. It had never been resolved in case law and the Court had had to take a position on it. It had done so by saying that provisional measures were binding. The basis for its decision was Article 41 of its Statute. The Court had also considered the object and purpose of provisional measures:

The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court [para. 102 of the judgment of 27 June 2001].

The Court had then examined the preparatory work and had determined that it corroborated the conclusion in paragraph 102 of its judgment.

17. Next, the Court had considered its order of 3 March 1999 in the *LaGrand* case and had found, in paragraph 110 of its judgment in that case, that it was not a mere exhortation, that it had been adopted pursuant to Article 41 of the Statute and that it was consequently binding in character. In the order itself, the Court had indicated, in paragraph 111, that the United States must take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the Court in the case. The Court had acknowledged that the order did not create an obligation of result, but had nevertheless found that the various competent United States authorities had failed to take all the steps they could to prevent the execution of Walter LaGrand. One interesting point was that the Court had cited the decisions not only of the Governor of Arizona and the federal authorities, but also of the Supreme Court of the United States, thereby confirming the jurisprudence developed in its advisory opinion in the case concerning the *Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights*, namely, that courts were part of the domestic legal order and their conduct had to be considered by international courts in the light of the obligations of the State in question.

18. The Court had concluded that the United States had not complied with the order of 3 March 1999. It had observed, however, that the submission by Germany had requested the Court to adjudge a violation, but had not included a claim for indemnification. In view of the facts of the case, particularly the very short time period available for the United States to react, that country would not necessarily have been sentenced to pay indemnification, despite its failure to comply with its obligations. The Court was thus suggesting, without making the point explicitly, that wrongful conduct did not always entail responsibility—something to which further consideration might be given.

19. The fourth submission by Germany had concerned assurances that similar unlawful acts would not be repeated. In that connection, the Court was grateful to the Commission for having left in abeyance, pending the judgment of the Court, the article on non-repetition (art. 30) of the draft articles on the responsibility of States for internationally wrongful acts. It had studied with great interest the various reports on the topic, even if it did not cite them in its judgment. It had concluded that non-repetition was a component of satisfaction, in that Germany had requested a general guarantee that, when persons were imprisoned, the United States would inform them

of their right to contact their consular authorities. It had noted that the United States had taken a great many steps to inform local authorities of their duties which must be deemed to meet the request by Germany for a general guarantee of non-repetition. Germany had further requested that, if such an error should occur again, particularly in serious cases such as those involving the death sentence, the proceedings and convictions should be subject to review. The Court had ruled that, if in future German nationals were sentenced to severe penalties in violation of their rights of consular notification, the United States had to allow the review and reconsideration of the conviction and sentence.

20. Most of the findings in the judgment had been adopted by a large majority, usually 14 votes to 1, with Judge Oda dissenting.

21. The Court had also considered the *Arrest Warrant* case, in which a Belgian investigating magistrate had issued an international arrest warrant against the Minister for Foreign Affairs of the Democratic Republic of the Congo. That country had contested the lawfulness of the arrest warrant, claiming that the Belgian magistrate had no jurisdiction to issue it and that the Minister for Foreign Affairs held immunity from jurisdiction. It had also requested the indication of provisional measures in the form of the suspension of the arrest warrant. The Court had rejected that request because the Minister for Foreign Affairs had subsequently become the Minister of Education, which had reduced the urgency connected with his ability to travel. It had, however, determined that the handling of the case should be accelerated in view of the nature and importance of the interests involved. The Democratic Republic of the Congo had recently submitted a Memorial and the Counter-Memorial of Belgium was expected to be received soon, with hearings scheduled for early October 2001.

22. As to the future, the Court currently had 22 cases before it, a workload that created administrative and financial burdens. Fourteen additional posts had been created in 2001, primarily for translators, since the volume of material submitted for translation plainly exceeded the capacity of the Court. Thirty new posts had been requested for the upcoming biennium, a conservative estimate of staffing needs. Registry staff currently numbered 70, compared to 1,200 for the International Tribunal for the Former Yugoslavia, which had a budget of over US\$ 100 million. The budget of the Court stood at US\$ 10 million.

23. Because of the financial situation, the Court hoped to improve and accelerate its procedures and, to that end, had already amended two provisions of its Rules, with three more currently being reviewed. It had been working to obtain the best possible cooperation from parties to cases and had frequently been successful. Some parties had submitted their Memorials in the two working languages of the Court, saving time and money that would otherwise be spent on translation. The volume of documentation submitted by parties, particularly in the form of annexes, had been limited, although with differing success depending on the case. The deliberations of the Court in straightforward cases had been streamlined by doing away with judges' Notes, whose translation

regularly took two months. A decision had been taken to notify parties six months in advance as to the scheduling of cases, to enable them to prepare.

24. Of the 22 cases still on the docket, a number were intercontinental, such as those concerning the *Lockerbie*, *Oil Platforms* and *Arrest Warrant* cases. After the hearing of preliminary objections, those cases were currently ready for consideration as to the merits. There were three African cases: *Land and Maritime Boundary between Cameroon and Nigeria*, *Diallo* and *Armed Activities on the Territory of the Congo*. In an Asian case, *Sovereignty over Pulau Ligitan and Pulau Sipadan*, an application for permission to intervene had been received from the Philippines, but opposed by the parties, and hearings on the admissibility of the application had recently been held. In the Americas, there was a case concerning *Maritime Delimitation between Nicaragua and Honduras* in which Colombia had requested and been given access to the case file, something which might indicate that it intended to intervene. There were a number of European cases: the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, in which the finding of the Court that it was competent to adjudicate was being contested by Yugoslavia. Croatia had brought proceedings against Yugoslavia for genocide in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia)* and the consideration of that case had just begun. Yugoslavia was accusing 10 members of NATO of the illegal use of force in Kosovo in the case concerning the *Legality of Use of Force*, which was in the preliminary objections stage. Pursuant to the judgment in the *Gabčíkovo-Nagymaros Project* case, the Court was receiving regular reports from the parties, Hungary and Slovakia, on the ongoing negotiations. It had also begun to consider the *Certain Property* case between Liechtenstein and Germany concerning property confiscated following the Second World War.

25. That account should give an idea of the variety of subject matter, geographical settings and specific features of the cases before the Court, which was doing its best to cope. Since several cases would be ready for consideration in the next two years, the Court would have to work hard—something that it was perfectly ready to do.

26. The CHAIRMAN thanked the President of the International Court of Justice for his valuable and informative statement. Especially useful had been the account of how the Court had arrived at decisions on the legal regime for maritime delimitation and on the right to consular services and treaty obligations under the Vienna regime. He invited the members of the Commission to respond to the President's statement.

27. Mr. PELLET welcomed the fact that, since the forty-ninth session of the Commission, in 1997, the visit by the President of the International Court of Justice had become a tradition. He had been conversant with some of the cases described, but would like to hear more about the *LaGrand* case. The President had indicated that the Court had noted with interest the work of the Commission on guarantees of non-repetition, but had not cited that work in its judgment. He asked whether paragraphs

123 to 125 of that judgment could be interpreted to constitute recognition of the special nature of the remedy of non-repetition or whether they referred to compensation and, more specifically, to satisfaction. There had been some disagreement among the members of the Commission on that subject.

28. Mr. MELESCANU said that he, too, welcomed the traditional visit by the President of the International Court of Justice, which provided the Commission with inside information about the activities of the Court. In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, had the Court discussed or resolved the question of how small, uninhabited islands could affect the delimitation of the territorial sea, the exclusive economic zone and the continental shelf?

29. Mr. KAMTO said that the President's accounts of the judgments of the Court shed new light on them. In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the Court had declared that customary international law was the applicable law for the delimitation of the territorial sea and of the exclusive economic zone and the continental shelf. In view of the entry into force of the United Nations Convention on the Law of the Sea, had the Court applied the Convention as a valid instrument in force or had it treated it as custom? He also wished to know whether relevant circumstances were those of each specific case or whether some general indications had been given about them.

30. Mr. GUILLAUME (President of the International Court of Justice) said that paragraph 167 of the judgment in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* stated that:

The Parties are in agreement that the Court should render its decision on the maritime delimitation in accordance with international law. Neither Bahrain nor Qatar is party to the Geneva Conventions on the Law of the Sea of 29 April 1958; Bahrain has ratified the United Nations Convention on the Law of the Sea of 10 December 1982 but Qatar is only a signatory to it.

No conventional act had thus been applicable and customary international law had therefore been the applicable law. In its subsequent investigation of what was customary international law, the Court had reached the conclusion that some of the provisions of the United Nations Convention on the Law of the Sea, including those on the delimitation of territorial seas, were in the nature of customary law.

31. The judgments of the Court gave some general indications of what constituted relevant or special circumstances, but each individual case also had to be examined. In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, special circumstances could have been represented by the island of Qit'at Jaradah, which was so small that, at high tide, it measured about 3 by 10 metres. It was nevertheless an island, since it was not submerged at high tide. The Court had said, however, that the island did not have any effect on maritime delimitation. Fasht al Jarim, the maritime formation that had been overlooked by the two parties, had been difficult to classify as either an island or a low-tide elevation, owing to conflicting cartographic

data. The Court had decided that its classification was ultimately irrelevant, as its location gave it a preponderant influence over maritime delimitation, which very small islands or low-tide elevations clearly should not have.

32. It was by no means from lack of respect that the Court had not cited the work of the Commission on non-repetition in its judgment in the *LaGrand* case. The various special rapporteurs had taken different positions on the matter and the Commission itself had not taken a final position, having left the relevant article in abeyance pending the judgment of the Court. As to how paragraphs 123 to 125 of the judgment should be interpreted, he said the Court had definitely left some things unsaid and it had done so, in his view, because it considered the issue of non-repetition to be unimportant in the case at hand. He himself thought that the trend was towards viewing guarantees of non-repetition as a component of satisfaction.

33. Mr. GAJA thanked the President of the Court for his clarifications on a number of points and requested additional information on another. In the *LaGrand* case, the Court had stated that its orders indicating provisional measures were, in principle, binding. That might encourage States to bring proceedings in order to obtain provisional measures and might further inflate the already considerable caseload of the Court. Was the Court planning to take any procedural countermeasures in that regard? Imposing exclusively written proceedings, for example, would have the additional advantage of averting the sometimes excessive publicity surrounding hearings.

34. Mr. GOCO welcomed the opportunity for dialogue with the President of the Court, but assured him he would not raise the issue of Philippine intervention in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan*. He asked whether the fact that a number of other tribunals were currently discharging judicial functions raised any concern as to the preservation of the status of the Court as the principal judicial organ of the United Nations. He would also like to know whether the issue of denial of justice had come up in the *LaGrand* case.

35. Mr. ROSENSTOCK thanked the President of the Court for visiting the Commission and expressed gratitude to the Court for not getting into issues that it did not need to consider, particularly with regard to guarantees and assurances.

36. Mr. PAMBOU-TCHIVOUNDA joined other speakers in thanking the President of the Court for talking with the Commission about recent cases. The activist approach of the Court to the application of customary law in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* had particularly attracted his attention. The Court had been called upon to delimit the exclusive economic zone and the continental shelf on the basis of the principle of equidistance and, at the same time, with a view to equity, to decide which relevant circumstances could be used to adjust that rule. None of the circumstances put forward by the parties had been deemed worthy of consideration, but the Court had adduced others. Was that normal practice? What documents had the Court used to discover the low-tide elevation that had been unknown even to the parties and were they universally accessible?

37. Mr. CRAWFORD said that he endorsed the comments made by Mr. Rosenstock. The *LaGrand* case illustrated the different roles of the Court and the Commission, that of the Court being to decide cases and that of the Commission to systematize the law by addressing certain unresolved issues. The history of the development of State responsibility showed how much the Commission owed to the Court for the clarification it had provided in deciding such cases as the *Gabčíkovo-Nagymaros Project* and the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.

38. Mr. GUILLAUME (President of the International Court of Justice) said the danger that States might request provisional measures more often now that they had been declared binding in nature had already materialized. Provisional measures had been requested in the cases concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*; *Legality of Use of Force*; *Land and Maritime Boundary between Cameroon and Nigeria*; and *Armed Activities on the Territory of the Congo*, inter alia. The Court had not, however, considered streamlining the procedures for indicating provisional measures, although that might be worth doing. A precedent existed in the *LaGrand* case, when provisional measures had been ordered in the space of 24 hours and without hearings.

39. Intervention had initially been conceived exclusively as a way of deciding disputes between two States. The growing complexity of international relations meant that disputes were by no means always bilateral, however. The Court would soon be called upon to take a position on the matter in its decision on the admissibility of the Philippine application for permission to intervene in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan*.

40. Referring to the question on denial of justice, he said that, to his knowledge, the Court had never refused to decide a dispute on grounds of imperfections in international law. As to the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, he said the low-tide elevation that neither of the parties had taken into account for the drawing of the equidistance line had appeared on all the maps produced by the parties. The parties had had opposing views on where the maritime boundary should go, however, and had adopted differing legal strategies. Bahrain had simply wanted the general outline of the coast to be taken into account, even though the effect of the low-tide elevation was advantageous to it. Qatar had had no interest in mentioning the low-tide elevation, for obvious reasons. The Court could, however, not draw the equidistance line without taking the low-tide elevation into account, since it was shown in the maps submitted to it and plainly had an effect on maritime delimitation that did not yield an equitable result.

41. The CHAIRMAN thanked the President of the International Court of Justice for sharing his time with the Commission to discuss important legal issues.

## Draft report of the Commission on the work of its fifty-third session (*continued*)

### CHAPTER IV. *International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities) (continued)* (A/CN.4/L.607 and Add.1 and Add.1/Corr.1)

#### E. Draft articles on prevention of transboundary harm from hazardous activities (*continued*)

#### 2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*) (A/CN.4/L.607/Add.1 and Corr.1)

##### *Commentary to article 1 (Scope) (continued)*

##### Paragraph (19) (*concluded*)

42. The CHAIRMAN recalled that the Commission had decided to delete the words “in response to a natural law” in the second sentence and the words “not from an intervening policy decision” in the third sentence.

43. Mr. CRAWFORD said that he had proposed the deletion in the third sentence, but the Special Rapporteur had opposed it. He would be happy for the words “not from an intervening policy decision” to stay in, provided it was understood that they referred not to a policy decision as to the way in which the activity itself was carried out, but to an intervening policy decision of the kind referred to in paragraph (19).

44. Mr. Sreenivasa RAO (Special Rapporteur) thanked Mr. Crawford for his understanding, but said that he had agreed to the deletion in order to remove any ambiguity and because it would not prevent the basic idea from being conveyed.

45. Mr. PAMBOU-TCHIVOUNDA said that the entire second sentence seemed redundant and could perhaps be deleted.

46. Mr. Sreenivasa RAO (Special Rapporteur) said that, to his mind, stating the same thing in two different ways was sometimes helpful in emphasizing certain points. He would prefer to retain the second sentence.

*It was so agreed.*

*Paragraph (19), as amended, was adopted.*

##### *Commentary to article 2 (Use of terms)*

##### Paragraph (1)

47. Mr. PELLET proposed that, in the first sentence, the word “and” should be replaced by the word “or”, as the subject was two separate elements of article 2, subparagraph (a).

48. Mr. GALICKI suggested that the wording of article 2, subparagraph (a), should be amended as a consequence of that amendment.

49. Mr. PELLET pointed out that the French version of article 2, subparagraph (a), was slightly clearer than the original English text, but proposed that both should be retained unchanged.

*Paragraph (1), as amended, was adopted.*

##### Paragraph (2)

50. Mr. PELLET, referring to the first part of the penultimate sentence, said that, in describing the consideration of commentaries on second reading, there was no need to say that something had been the view of the Commission. He therefore proposed that the words “It is the view of the Commission that” should be deleted.

51. Mr. CRAWFORD said that he supported that proposal.

*Paragraph (2), as amended, was adopted.*

##### Paragraph (3)

52. Mr. GAJA said that paragraph (3) should be amended to take account of the discussion by the Drafting Committee of the word “pole”. The second sentence should read: “The definition refers to two types of activities which fall under these articles”. The word “pole” in the third sentence should be deleted and the same word in the fifth sentence should be replaced by the word “one”. The discussion by the Committee of the word “spectrum” had not been taken into account in paragraph (3), but he would not press for an amendment on that point.

53. Mr. CRAWFORD said that some or all of the underlining should be deleted as it was superfluous and inelegant.

*Paragraph (3), as amended, was adopted.*

##### Paragraph (4)

54. Mr. PAMBOU-TCHIVOUNDA said that, in line with the policy of not having the text refer to the reasoning of the Commission, the first sentence should be amended to read: “The term ‘significant’ is not without ambiguity and a determination has to be made in each specific case.”

55. Mr. CRAWFORD proposed that the secretariat should delete all references in the text to the thinking of the Commission and place the emphasis on objective points.

*Paragraph (4), as amended, was adopted.*

##### Paragraph (5)

56. Mr. MELESCANU said the word “tolerable” at the end of the paragraph was inappropriate. The point was that the activities in question did not entail State responsibility.

57. Mr. ROSENSTOCK said that paragraph (5) put the entire exercise in context. It made the point, in a non-judgemental manner, that transboundary harm was an unavoidable fact of life, although it should not be allowed to get out of hand. The wording used was not really prob-

lematic and he appealed for the retention of the paragraph as it stood.

58. The CHAIRMAN recalled that the Commission should concentrate on clarifying specific issues or making suggestions for improvement. He suggested that the English text should be retained unchanged on the understanding that the secretariat would make the necessary corrections to the French text.

*Paragraph (5) was adopted.*

Paragraph (6)

59. Mr. CANDIOTI said that, in the first sentence, the words “the decision of” or “the award of” should be added before the words “the tribunal”.

60. Mr. TOMKA (Chairman of the Drafting Committee) proposed that the words “the tribunal” should be deleted and that the word “arbitration” should be replaced by the word “award”.

*Paragraph (6), as amended, was adopted.*

Paragraphs (7) to (9)

*Paragraphs (7) to (9) were adopted.*

Paragraph (10)

61. Mr. PELLET suggested that references to commentaries to other articles should be placed in footnotes, not in the text of the commentaries.

*Paragraph (10) was adopted subject to the necessary drafting changes.*

Paragraphs (11) and (12)

*Paragraphs (11) and (12) were adopted.*

*The commentary to article 2, as amended, was adopted.*

Commentary to article 3 (Prevention)

Paragraph (1)

62. Mr. HAFNER asked why principle 2 of the Rio Declaration,<sup>1</sup> which was the more recent instrument, had not also been referred to.

63. The CHAIRMAN said that the appropriate reference would be added.

*Paragraph (1) was adopted.*

Paragraphs (2) to (6)

*Paragraphs (2) to (6) were adopted.*

Paragraph (7)

64. Mr. PELLET said that the footnote at the end of the paragraph should refer to the Convention on the Law of the Non-navigational Uses of International Watercourses. The words *diligence voulue* in the first sentence of the French text meant absolutely nothing and should be replaced by the words *diligence due* or the words *célérité requise* or, preferably, left in English, “due diligence”, as had been done in the French text of paragraph (2) of the commentary to article 12.

65. Mr. CRAWFORD said he agreed that there was an element of substance as well as of speed in “due diligence” that the French translation did not convey. A generally acceptable French phrase should be found by looking at existing instruments in the field.

66. The CHAIRMAN said that the secretariat would check on the wording of the relevant international instruments and judgments of ICJ with a view to correcting the French text.

67. Mr. HAFNER proposed that, in the third sentence, the words “the risk of” should be deleted.

68. Mr. SIMMA said that the third sentence described what the duty of due diligence was intended to guarantee, i.e. the risk of significant harm, rather than significant harm itself.

69. Mr. Sreenivasa RAO (Special Rapporteur) said that risk could not be totally eliminated because it was inherent in certain activities, but it could be minimized by careful management. If there was no risk whatsoever, then the activity was innocuous and did not need to be covered in the draft articles. He favoured the original wording of the third sentence.

70. Mr. GOCO said that he preferred the original wording, in which the word “risk” was material.

71. Mr. TOMKA (Chairman of the Drafting Committee) suggested that, based on the wording of article 3 and the report of the Drafting Committee, the words “the risk of” should be deleted, but the word “eliminated” should be replaced by the word “prevented”.

72. Mr. Sreenivasa RAO (Special Rapporteur) said that he endorsed that proposal.

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

*Paragraph (8) was adopted.*

Paragraphs (9) and (10)

73. Mr. CRAWFORD said that paragraphs (9) and (10) did not belong in the commentary and should be deleted

<sup>1</sup> See 2675th meeting, footnote 6.



because the “Alabama” case had been about something entirely different from what was covered in article 3.

74. Mr. Sreenivasa RAO (Special Rapporteur) said that the principle enunciated by the United States and cited in paragraph (9) was based on a broad standard for due diligence, as opposed to the narrower national standard presented by the United Kingdom. That was an essential historical issue in the evolution of the concept of due diligence and as such deserved to be mentioned in the text. He would not, however, go against the will of the Commission if the members preferred to delete the two paragraphs.

75. Mr. SIMMA pointed out that the literature on due diligence usually referred to the “Alabama” case.

76. Mr. TOMKA (Chairman of the Drafting Committee) proposed that paragraphs (9) and (10) should be combined to form a single paragraph devoted to the “Alabama” case.

*Paragraphs (9) and (10), as amended, were adopted.*

Paragraph (11)

77. Mr. CRAWFORD said that he strongly objected to the reference to the *Donoghue v. Stevenson* case in paragraph (11), which should be deleted.

*Paragraph (11) was deleted.*

Paragraphs (12) to (15)

*Paragraphs (12) to (15) were adopted.*

Paragraph (16)

78. Mr. GAJA proposed that, in the last sentence, the words “more optimum” should be replaced by the word “better”.

79. Mr. CRAWFORD said that the entire first part of that sentence was awkward and should be deleted. The word “would” after the word “prevention” should be replaced by the words “may well”.

*Paragraph (16), as amended, was adopted.*

Paragraphs (17) and (18)

*Paragraphs (17) and (18) were adopted.*

Paragraph (19)

80. Mr. ROSENSTOCK proposed that the words “a minimal degree of” in the last sentence should be deleted because they suggested something that was at variance with article 3.

81. Mr. GALICKI, supported by Mr. Sreenivasa RAO (Special Rapporteur), said that the first sentence of the first footnote to the paragraph repeated the contents of

paragraph (14) of the commentary and should be deleted.

*Paragraph (19), as amended, was adopted.*

Paragraph (20)

82. Mr. GOCO proposed that, in the second sentence, the word “known” should be replaced by the word “foreseen”, in line with the use of the word “foreseeable” earlier in the sentence.

83. Mr. Sreenivasa RAO (Special Rapporteur) said that a distinction was being drawn between three different situations: foreseeability, knowledge and constructive knowledge. He would prefer the paragraph to remain unchanged.

*Paragraph (20) was adopted.*

Paragraph (21)

84. Mr. PELLET said that he was not sure what the paragraph meant.

85. Mr. CRAWFORD said he agreed that the meaning was obscure. “Shouldering a greater degree of burden of proof” was a metaphysical operation that should not be imposed on anyone in the context of articles dealing with substance, not procedure.

86. Mr. Sreenivasa RAO (Special Rapporteur) said paragraph (21) had been intended to indicate that the provision of evidence lay solely within the power of the State of origin and, unless it was brought out by that State, it would never be available for the other State’s consideration and comment. If the paragraph was not helpful, however, he would not press for its retention.

87. Mr. ROSENSTOCK said the point was a valid one, but not in connection with article 3. Paragraph (21) should therefore be deleted, on the understanding that the point would be made elsewhere in the text.

*Paragraph (21) was deleted.*

*The commentary to article 3, as amended, was adopted.*

*Commentary to article 4 (Cooperation)*

Paragraph (1)

88. Mr. CRAWFORD said that, since the fourth sentence referred to the text of the articles themselves, the words “have been” should be replaced by the word “are”.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

89. Mr. SIMMA, supported by Mr. Sreenivasa RAO (Special Rapporteur), proposed that, in the fourth sen-

tence, the word “structure” should be replaced by the word “law”.

90. Mr. TOMKA (Chairman of the Drafting Committee) said that, in the third sentence, the word “Vienna” should be inserted after “1978”.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

91. Mr. SIMMA asked what the phrase “on disputes concerning filleting with the Gulf of St. Lawrence *La Bretagne*” meant.

92. Mr. CRAWFORD said the phrase should read: “in the *La Bretagne* case”.

*Paragraph (3), as amended, was adopted.*

Paragraphs (4) to (6)

*Paragraphs (4) to (6) were adopted.*

*The commentary to article 4, as amended, was adopted.*

*Commentary to article 5 (Implementation)*

Paragraph (1)

93. Mr. TOMKA (Chairman of the Drafting Committee) said that, in the first sentence, the words “by virtue of becoming a party to” should be replaced by the word “under” and the words “would be” by the word “are”.

94. Mr. KAMTO proposed that, since the concept of implementation was often invoked without any indication of the distinction between implementation, execution and application, the following second sentence should be added: “Implementation, going beyond formal application, involves the adoption of specific measures to ensure the effectiveness of the provisions of the present articles”.

95. Mr. ROSENSTOCK said that he endorsed Mr. Kamto’s proposal.

*Paragraph (1), as amended by Mr. Tomka, was adopted.*

Paragraph (2)

96. Mr. CRAWFORD said that the hearings and quasi-judicial procedures mentioned in the first sentence overlapped: hearings were a form of quasi-judicial procedure. It might be better to differentiate between them by replacing the words “hearings to be granted to persons concerned and” by the words “the opportunity to persons concerned to make representations or”.

97. Mr. PELLET proposed that, in the third sentence, the word “entirely” should be deleted and that the words “for achieving this objective” should be added at the end.

98. Mr. Sreenivasa RAO (Special Rapporteur) said that paragraph (2) was intended to state that article 5 emphasized a basic obligation, but also indicated that the way in which it was to be fulfilled was to be left to the procedures and practices of the judicial system in each country, which could vary widely. He had no objection, however, to the deletion of the word “entirely”.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

99. Mr. CRAWFORD said paragraph (4), which stated that the States concerned included States that might in future be concerned, sounded a bit odd. What was meant was that the necessary measures, including the appropriate regulatory framework, might need to be established in advance. He could draft a sentence to that effect if the Special Rapporteur agreed.

100. Mr. Sreenivasa RAO (Special Rapporteur) said the paragraph had been intended to reflect comments made by Mr. Hafner and he would welcome Mr. Crawford’s assistance in improving it.

101. Mr. CANDIOTI pointed out that the paragraph extended the definition of “States concerned” given in article 2, subparagraph (f). The Commission should beware of introducing inconsistency.

102. Mr. CRAWFORD said he agreed that the paragraph expanded the definition of that term and deviated from the general statement made in paragraph (3), which was very well written. He proposed that paragraph (4) should read: “The action referred to in article 5 may appropriately be taken in advance; thus, a State may establish a suitable monitoring mechanism before the activity in question is approved or instituted.”

103. Mr. KUSUMA-ATMADJA asked whether paragraph (4) had to be included at all.

104. Mr. HAFNER said the issue was one of substance. Something had to be said about the fact that States had a duty, before the activity occurred, to establish the necessary legislation. He could go along with the text proposed by Mr. Crawford.

105. Mr. TOMKA (Chairman of the Drafting Committee) said that he endorsed Mr. Crawford’s proposal. The report of the Drafting Committee had indicated that, in order to allay concerns that article 5 might be misinterpreted to mean that only States that had plans for an activity falling under the scope of the articles would be obliged to take the steps referred to, the commentary should make it clear that the provision was applicable to any State if it was foreseeable that it might be likely to become a State concerned. It had to be made clear that the provision was binding on all States parties with regard to legislative and administrative measures, while the measures for the establishment of monitoring mechanisms would be incumbent only on the States concerned. The

paragraph should reflect that understanding reached in the Committee.

*Paragraph (4), as amended by Mr. Crawford, was adopted.*

*The commentary to article 5, as amended, was adopted.*

*The meeting rose at 6.10 p.m.*

## 2699th MEETING

*Tuesday, 31 July 2001 at 10.05 a.m.*

*Chairman: Mr. Peter KABATSI*

*Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Gaja, Mr. Galicki, 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. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.*

### Tribute to the memory of Ignaz Seidl-Hohenveldern

1. The CHAIRMAN said that Ignaz Seidl-Hohenveldern, who had just died, had been an eminent jurist and practitioner of international law who had had many links with the Commission. He had been an emeritus professor in Austria and Germany and a member of the Institute of International Law, as well as the author of numerous learned works on international claims, jurisdictional immunities of States, property and corporation law and protection of private property.

2. Mr. HAFNER, after recalling various aspects of Ignaz Seidl-Hohenveldern's career, paid a special tribute to his qualities as a teacher and friend.

*At the invitation of the Chairman, the members of the Commission observed a minute of silence in tribute to the memory of Ignaz Seidl-Hohenveldern.*

### Draft report of the Commission on the work of its fifty-third session (continued)

CHAPTER IV. *International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities) (continued) (A/CN.4/L.607 and Add.1 and Add.1/Corr.1)*

### E. Draft articles on prevention of transboundary harm from hazardous activities (continued)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (continued) (A/CN.4/L.607/Add.1 and Corr.1)

*Commentary to article 6 (Authorization)*

Paragraph (1)

3. Mr. BROWNLIE said that in the first sentence "undertaken in their territory or otherwise under their jurisdiction or control" should read: "undertaken in its territory or otherwise under its jurisdiction or control". The reference was to the State, not to the plural noun "activities".

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

4. Mr. PELLET pointed out, in relation to footnote 38 and a number of other footnotes, that "op. cit." was not used in French in referring to a case.

*Paragraph (2) was adopted.*

Paragraph (3)

5. Mr. BROWNLIE said that the quotation from the *Corfu Channel* case should be checked: the order of words sounded wrong.

*Paragraph (3) was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

6. Mr. TOMKA said that the direction of take-off and landing was constantly being changed on airport runways; such a practice could not be called a major change in an activity. The reference to runways in the second sentence should therefore be deleted.

7. Mr. Sreenivasa RAO (Special Rapporteur) said that the provision could usefully be reworded but should be retained, since it was intended to apply to the laying down of new lanes.

8. The CHAIRMAN suggested that in the second sentence, the words "an airport runway changing the direction of takeoff and landing" should be replaced by "or re-routing airport runways".

*It was so agreed.*

*Paragraph (5), as amended, was adopted.*

## Paragraph (6)

9. Mr. LUKASHUK said that the first two sentences begged a number of questions, with their reference to States “adopting” the regime contained in the articles or “assuming obligations”. Legally, both phrases were dubious, since States would be complying not with a convention but with a General Assembly resolution. He would therefore prefer to replace the phrase “once a State adopts the regime contained in these articles” with the less specific formulation “after adoption by States of these articles”. He would not insist on his proposal, however, if it found no support.

*Paragraph (6) was adopted.*

## Paragraph (7)

*Paragraph (7) was adopted.*

## Paragraph (8)

10. Mr. ROSENSTOCK said that, in order to bring the commentary into line with the article itself, the last sentence should read: “As appropriate, the State of origin shall terminate the authorization, and where appropriate prohibit the activity from taking place altogether.”

11. Mr. CANDIOTI, supported by Mr. GAJA, said that the word “requirement” was used in two different senses in the paragraph: once to mean the conditions under which authorization was granted and the other time to mean “obligation”. For clarity, in the first sentence the word should be replaced by “conditions”.

12. Mr. TOMKA said that the same ambiguity arose in article 6 itself, in paragraphs 2 and 3. Although the Commission had already adopted the article, he proposed that, as an exceptional measure, the phrase “requirements of the authorization” in paragraph 3 should be changed to “terms of the authorization”, with a corresponding change in the commentary.

13. Mr. MELESCANU said that Mr. Tomka’s proposal complicated the issue. The word “requirement” appeared once in the singular and once in the plural; the difference in meaning was perfectly comprehensible.

14. Mr. GALICKI said he strongly supported the amendment proposed by Mr. Tomka. The use of the word in two entirely different meanings could easily lead to misunderstandings.

15. Mr. LUKASHUK said he supported Mr. Melescanu’s suggestion. Such matters should be left to the Drafting Committee; the Commission should concentrate on substance.

16. Mr. Sreenivasa RAO (Special Rapporteur) said that the phrase “terms of the authorization” was perfectly acceptable, if it made better sense. As for any distinction between “requirement” and “requirements”, there was none in English.

17. Mr. PELLET said that, if the text of article 6 was to be revisited, he proposed that in paragraph 2 the words *La*

*règle de l’autorisation*, which sounded strange in French, should be replaced by *Les exigences de l’autorisation*.

18. The CHAIRMAN said, in response to Mr. Lukashuk, that it was incumbent on the Commission to improve the text, if it could. The Special Rapporteur had indicated his approval of Mr. Tomka’s proposal.

*Paragraph (8), as amended, was adopted.*

*Article 6 was amended in English and French.*

*The commentary to article 6, as amended, was adopted.*

## Commentary to article 7 (Assessment of risk)

## Paragraph (1)

19. Mr. KAMTO pointed out that the French text contained a phrase at the end that was redundant and, in any case, did not appear in the English text. It should be deleted.

*Paragraph (1), as amended, was adopted.*

## Paragraph (2)

*Paragraph (2) was adopted.*

## Paragraph (3)

20. Mr. BROWNLIE said that in the second sentence the word “Requirement” should read “The requirement”. Moreover, in the third sentence the words following “the Convention on Environmental Impact Assessment in a Transboundary Context” stated the obvious and should be deleted.

21. Mr. SIMMA said that in the footnote to the second sentence the phrase “the two multilateral treaties regarding communication systems” was ambiguous. It was not clear whether the phrase applied to the two conventions mentioned later in the footnote, but in any case there were more than two such treaties.

22. Mr. TOMKA concurred. Since impact assessment had not existed as a concept in the international law of that period, the two conventions referred to were not to the point and the reference to them could usefully be deleted.

23. Mr. PELLET said he saw a value in retaining the references. The conventions had had a considerable impact in their time and still had much to offer. The Commission should not altogether delete the references.

24. Mr. SIMMA said that, of the two treaties, the International Radiotelegraph Convention could be perceived as having an environmental element, in that the parties were required not to interfere with the radioelectric communications of other contracting States. The International Convention concerning the Use of Broadcasting in the Cause of Peace, on the other hand, which concerned the incitement of populations against their own Governments, had no environmental connection at all. If “impact

assessment” was to be given such a broad meaning, it could be found throughout international law, such as in the customary rule that each State should see that no hostile activities were undertaken from its territory. The entire second half of the footnote should be deleted.

25. Mr. PELLET said that he had been won over by Mr. Simma’s arguments with regard to the International Convention concerning the Use of Broadcasting in the Cause of Peace, but the reference to the International Radiotelegraph Convention was still worth retaining.

26. Mr. TOMKA said that the Commission seemed to be in broad agreement about deleting the reference to the International Convention concerning the Use of Broadcasting in the Cause of Peace, from which, indeed, some States had withdrawn. As for the International Radiotelegraph Convention, the impact assessment element had emerged only in the light of modern international law, as could be seen from the *Gabčíkovo-Nagymaros Project* case, for example. There was, however, no requirement of impact assessment in the Convention itself. Both references should be deleted.

27. Mr. Sreenivasa RAO (Special Rapporteur) said he could agree to the deletion, if the references were felt to be inappropriate.

28. Mr. GAJA said that—if the whole reference was not to be deleted—the word “signatories” should be replaced by “parties” for the sake of accuracy.

29. The CHAIRMAN suggested that the reference to the International Radiotelegraph Convention and the International Convention concerning the Use of Broadcasting in the Cause of Peace should be deleted in the footnote to the second sentence and paragraph (3) should end with the words “the Convention on Environmental Impact Assessment in a Transboundary Context”.

*It was so agreed.*

*Paragraph (3), as amended, was adopted.*

#### Paragraph (4)

30. Mr. SIMMA, supported by Mr. GAJA, said that in the first sentence the phrase “a statement on environmental impact assessment” was tautological. The assessment was itself a statement. The words “statement on” should be deleted. Secondly, the words “necessary obligation” in the fourth sentence was ambiguous: it was unclear whether it meant simply “an obligation” or whether the meaning would be better conveyed by the words “necessary condition”. He himself would prefer the latter.

31. Mr. ROSENSTOCK pointed out that if the word “obligation” were replaced by the word “condition”, the word “before” would need to be changed to “for”.

*Paragraph (4), as amended, was adopted.*

#### Paragraph (5)

32. Mr. PELLET proposed that in the third sentence, in the interests of clarity, the words “or applicable inter-

national instruments” should be amended to read: “or as parties to international instruments”.

33. Mr. KAMTO said that the French version should read *dans le cadre d’instruments internationaux*.

34. Mr. GOCO said that the second sentence seemed to be rendered redundant by what followed.

35. Mr. Sreenivasa RAO (Special Rapporteur) said that the second sentence was intended to dispel any erroneous impression that the State itself was obliged to carry out the environmental impact assessment.

*Paragraph (5), as amended, was adopted.*

#### Paragraph (6)

36. Mr. HAFNER proposed inserting a short sentence, after the second sentence, to read: “This corresponds to the basic duty expressed in article 3.”

37. Mr. KAMTO said that, in the interests of logic, the second sentence should be moved to the end of the paragraph. Alternatively, given that its substance was reproduced in paragraph (7), it could be deleted altogether.

38. Mr. Sreenivasa RAO (Special Rapporteur) said that paragraphs (6) and (7) seemed to him to fulfil their purpose adequately, namely, to provide guidance to countries that had little experience of risk assessment.

39. Mr. KUSUMA-ATMADJA endorsed the Special Rapporteur’s comment.

40. Mr. KAMTO said he would not press for his amendment.

*Paragraph (6), as amended by Mr. Hafner, was adopted.*

#### Paragraph (7)

41. Mr. GALICKI, supported by Mr. KUSUMA-ATMADJA, said that the third sentence of the paragraph, which related not to article 7 but to article 8, should be deleted.

42. Mr. TOMKA said that, if the third sentence was to be deleted, the fourth sentence would become meaningless and should therefore also be deleted.

43. Mr. GALICKI said that Mr. Tomka’s concern could be addressed by amending the last sentence—which should be retained—by replacing “those States to evaluate” by “the States likely to be affected to evaluate”.

*Paragraph (7), as amended by Mr. Galicki, was adopted.*

#### Paragraphs (8) and (9)

*Paragraphs (8) and (9) were adopted.*

*The commentary to article 7, as amended, was adopted.*

Commentary to article 8 (Notification and information)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

*Paragraph (5) was adopted with a minor editing change.*

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

44. Mr. HAFNER proposed deleting the last sentence of the paragraph.

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

*Paragraph (8) was adopted.*

Paragraph (9)

45. Mr. GAJA said that the words “the States concerned”, in the first sentence, should be replaced by “the States likely to be affected”. Consequently, the same words in the second sentence should read “these States”.

46. Mr. LUKASHUK said it was important for paragraph (9) to specify that, notwithstanding the very strict requirement set forth in article 8, paragraph 2, some preparatory work could nevertheless be permitted.

47. Mr. Sreenivasa RAO (Special Rapporteur) said that Mr. Lukashuk’s concern could be addressed by adding a “without prejudice” clause to paragraph (9). That, however, was already implicit in the wording.

*Paragraph (9), as amended, was adopted.*

*The commentary to article 8, as amended, was adopted.*

Commentary to article 9 (Consultations on preventive measures)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

*Paragraph (2) was adopted with a minor editing change.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

48. Mr. PELLET said that the third sentence should be recast to read: “The decision of the Court [...] is also relevant to this article.”

49. Mr. BROWNLIE said that, since the *North Sea Continental Shelf* cases had not, formally speaking, been adversarial proceedings, the citations *Federal Republic of Germany v. Denmark* and *Federal Republic of Germany v. Netherlands* should read *Federal Republic of Germany/Denmark*; *Federal Republic of Germany/Netherlands*.

50. Mr. SIMMA supported Mr. Pellet’s and Mr. Brownlie’s remarks.

51. Mr. TOMKA proposed that the third sentence should be deleted, and the fourth sentence recast so as to reflect its contents.

*Paragraph (4), as amended, was adopted.*

Paragraphs (5) to (9)

*Paragraphs (5) to (9) were adopted.*

Paragraphs (10) and (11)

52. Mr. PELLET said that the word “even” should be deleted in the last sentence of paragraph (10).

53. Mr. BROWNLIE asked why the second sentence of paragraph (11) appeared to give such prominence to domestic law as such.

54. Mr. Sreenivasa RAO (Special Rapporteur) said that rights under domestic law were simply one component in the enumeration in that sentence of rights of States likely to be affected.

55. Mr. HAFNER proposed deleting the word “also” from the first sentence in paragraph (11), and the reference to domestic law from the second sentence.

56. Mr. BROWNLIE said that the thrust of the first sentence was actually weakened by the elaboration contained in the second sentence, which should be deleted *in toto*.

57. Mr. GALICKI said that, if the second sentence was to be deleted, the first sentence should be amended to read: “The last part of paragraph 3 is without prejudice to the rights of States likely to be affected.”

58. The CHAIRMAN suggested that, if the second sentence of paragraph (11) was to be deleted, the first sentence might be moved to the end of paragraph (10), without further amendment.

*It was so agreed.*

*Paragraphs (10) and (11), as amended, were adopted.*

*The commentary to article 9, as amended, was adopted.*

*Commentary to article 10* (Factors involved in an equitable balance of interests)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

59. Mr. LUKASHUK said that the extremely important and accurate statement contained in the third sentence appeared to be incompatible with the title of article 10. The title should be amended to read: "Equitable balance of interests".

60. Mr. HAFNER proposed deleting the fourth sentence, beginning "Some of the factors may be relevant".

*Paragraph (2), as amended, was adopted.*

Paragraphs (3) to (5)

*Paragraphs (3) to (5) were adopted.*

Paragraph (6)

61. Mr. TOMKA said that some chronological discrepancies in paragraphs (6) and (7) could be eliminated by deleting the adverb "first" from the first sentence of paragraph (6).

62. Mr. HAFNER drew attention to the need to harmonize the references to "precautionary principle" and "principle of precaution" in paragraphs (6) and (7).

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

63. Mr. KAMTO said that the last sentence of the paragraph begged for examples to be given of previous treaties that applied the precautionary principle in a very general sense without making any explicit reference to it; they should be either in the text or in a footnote.

64. Mr. Sreenivasa RAO (Special Rapporteur) proposed that the last sentence should be deleted and the beginning of the first sentence amended to read: "The precautionary principle has been incorporated, without any explicit reference, in various other conventions".

65. Mr. CANDIOTI proposed that the beginning of the first sentence should read: "The precautionary principle has been referred to or incorporated, without any explicit reference, in various other conventions".

66. Mr. PELLET said that the order in which the conventions and declarations were listed in paragraph (7) and the preceding paragraph was not very rational. If the Vienna Convention for the Protection of the Ozone Layer had provisions similar to those of the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, the United Nations Framework Convention on Climate Change and the Treaty on Euro-

pean Union (Maastricht Treaty), they should be placed before; if, however, the provisions were of a different nature the reference should be placed elsewhere.

67. Mr. BROWNLIE said that the Commission was not supposed to be engaging in a drafting exercise. The source of the problem was that the precautionary principle had a large penumbra of uncertainty, and paragraph (7) and the first line of paragraph (8) unnecessarily enlarged that penumbra. It did not help to invoke a row of rather specialized conventions and then make the bold assumption that they all applied the precautionary principle in a very general sense. It was not a very good idea for the commentary to make quite so many claims for the principle.

68. Mr. GALICKI said he shared Mr. Pellet's view that there was a need to put some order into the list, or to shorten the paragraph or move some of it into footnotes. That would make the paragraph more proportional to the sometimes questionable nature of the precautionary principle.

69. Mr. PELLET said that paragraph (6) should be retained because the Bergen Ministerial Declaration on Sustainable Development in the ECE Region (Bergen Declaration)<sup>1</sup> was more explicit than principle 15 of the Rio Declaration.<sup>2</sup> In his opinion, the whole of paragraph (7) should be incorporated in the footnote at the end of paragraph (6), with the first part of the first sentence reworded as had been proposed, the colon replaced by a full stop and the word "See", followed by the conventions and treaties placed in a more rational order, and the last sentence deleted.

70. Mr. HAFNER said that what ever else happened to paragraph (7) the reference to the Maastricht Treaty had to be changed. It was already outdated to refer to "article 130r" and would give a wrong picture of the Commission if it were to cite only the Maastricht Treaty as if it did not know that the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts had entered into force in May 1999.

71. Mr. Sreenivasa RAO (Special Rapporteur) said that Mr. Pellet's proposal dealt with much of the problem. His own proposal, however, was to incorporate the amended first part of the first sentence into paragraph (6), reorder the references to treaties and conventions, with Mr. Hafner's proposed amendment in respect of the Treaty of Amsterdam, place the references in the footnote at the end of paragraph (6), and delete the last sentence, thereby in effect deleting paragraph (7) as a whole.

72. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the proposals just outlined by the Special Rapporteur.

*It was so agreed.*

*Paragraph (7) was deleted.*

<sup>1</sup> A/CONF.151/PC/10, annex I.

<sup>2</sup> See 2675th meeting, footnote 6.

Paragraph (8)

73. Mr. Sreenivasa RAO (Special Rapporteur) said that the inelegance of the first sentence had been brought to his attention. The words “conduct of” should be deleted.

74. Mr. PELLET said that the footnote at the end of the paragraph was rather strangely drafted. He proposed that in the first sentence “could” should be replaced by “did”.

*Paragraph (8), as amended, was adopted.*

Paragraph (9)

*Paragraph (9) was adopted.*

Paragraph (10)

75. Mr. ROSENSTOCK proposed that in the last sentence, the words “cost-effective” should be deleted and the paragraph should end with the words “in the first instance” because there was no need to repeat the obligation.

76. Mr. KAMTO proposed that “cost-effective” be replaced by “any other”.

77. Mr. Sreenivasa RAO (Special Rapporteur) said the issue was that article 3 imposed certain obligations on States, and over and above the basic duty there were additional measures that the States likely to be affected might wish the State of origin to implement because, for example, they had the means and technology and were prepared to assist. “Other measures” might be taken to refer to the measures that the State of origin was currently incorporating by way of cooperation. There was a need to specify which “other” measures were meant; otherwise the reader would assume that there were measures over and above cooperation, whereas in fact cooperation itself was over and above what was required.

78. Mr. KAMTO said that he would not press for his proposed amendment.

79. Mr. HAFNER proposed that the last sentence of the paragraph should be amended to read: “This however should not underplay the measures the State of origin is obliged to take under these articles.”

80. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph (10) as amended by Mr. Hafner.

*It was so agreed.*

*Paragraph (10), as amended, was adopted.*

Paragraph (11)

81. Mr. PELLET said that the reference in the footnote to the OECD environment directive should be direct, quoting the OECD document symbol, rather than indirect, quoting A/CN.4/471, which might not be very accessible to readers. In any event, it was not appropriate to cite the survey in question, which was an internal document of the Commission. If it had been published

in the *Yearbook of the International Law Commission*, reference should be made to that. Otherwise, researchers would not be able to find it. The omission of the reference to the survey would require the same amendments in respect of other footnotes. In the footnote at the end of the paragraph the second reference to the work edited by Winfield Lang should read: “Winfield Lang, *ibid.*”

82. In the fifth sentence the words “essentially an economic principle” did not mean much and should be deleted or, *in extremis*, replaced by a phrase such as “a principle of an essentially economic nature”. The words “of course” in the penultimate sentence were superfluous and highly arguable. They should be deleted.

83. Mr. ROSENSTOCK wondered whether the last sentence of the paragraph was appropriate in a commentary. It might be preferable to incorporate it at the end of the footnote to the penultimate sentence rather than refer to a controversy in the commentary.

84. Mr. HAFNER supported Mr. Pellet’s comments on the words “essentially an economic principle” and proposed that the sentence be amended to read: “The principle is conceived as the most efficient means of allocating . . .”. As for the penultimate sentence, it should be amended so that there was clear-cut reference to European Community treaty language. It should then read: “This principle is even referred to in the Treaty establishing the European Community”, with a footnote to the source of the reference.

85. Mr. KAMTO felt that the first sentence was not very clearly understood and did not render well the idea the Special Rapporteur was trying to get across. He proposed that it be changed to read: “These considerations are in line with the content of the basic polluter-pays principle.” As to the discussion on the reference to “an economic principle”, it was very common in international environmental law texts to refer to the polluter-pays principle as a principle of an economic nature.

86. Mr. PELLET said that, as far as the first sentence was concerned, some confusion had arisen because of an error in the French translation. The original English “basic policy” had been rendered as “basic principles”.

87. Mr. Sreenivasa RAO (Special Rapporteur) said he agreed to Mr. Rosenstock’s proposal that the last sentence be deleted but resisted the proposed deletion of the words “an economic principle” in the fifth sentence immediately following the quotation from the Rio Declaration because it was necessary to draw an inference from that quotation. He would prefer the formula “a principle of an economic nature”. The idea he wished to convey was that, rather than being an established principle that was rigid, it should be accepted and implemented as flexibly as possible. Deleting the reference to European practice would give the impression that the Europeans were virtually unanimous about the principle, which was not the case.

88. Mr. TOMKA proposed that the word “environmental” in the fifth sentence should be deleted.

*Paragraph (11), as amended, was adopted.*



Paragraph (12)

*Paragraph (12) was adopted.*

Paragraph (13)

89. Mr. PELLET, referring to the last sentence, proposed the deletion of the word “much” before “lower risk”.

*Paragraph (13), as amended, was adopted.*

Paragraphs (14) and (15)

90. Mr. GALICKI suggested that paragraph (14) should be deleted, as it dealt with a subject that was not that of article 10, subparagraph (f).

91. Mr. Sreenivasa RAO (Special Rapporteur) said the material in paragraph (14) had seemed to him to be useful as guidance, but he would not insist on retaining it.

92. Mr. HAFNER said the explanations in paragraph (14) were useful and should be retained. If the paragraph was to be deleted, the first sentence of paragraph (15) should be amended by inserting the phrase “in the State likely to be affected” between the words “comparable activities” and “in other regions”.

93. Mr. ROSENSTOCK supported deletion of paragraph (14), since the essential point made therein was covered more simply and clearly in paragraph (15).

94. Mr. GOCO said he, too, favoured deleting paragraph (14) but suggested that the heading, “Subparagraph (f)”, should be transposed to paragraph (15).

95. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to delete paragraph (14) and amend paragraph (15) as proposed by Mr. Hafner and Mr. Goco.

*It was so agreed.*

*Paragraph (14) was deleted and paragraph (15), as amended, was adopted.*

*The commentary to article 10, as amended, was adopted.*

*Commentary to article 11 (Procedures in the absence of notification)*

Paragraph (1)

96. Mr. KAMTO proposed replacing the words “private entity” with “private source”.

97. Mr. Sreenivasa RAO (Special Rapporteur) said he was opposed to such a change as the term “private source” was much broader than “private entity”, a legal term which could refer to a corporation, an individual or a combination of the two.

98. Mr. KUSUMA-ATMADJA endorsed the Special Rapporteur’s remark and added that in some countries oil or gas was exploited by a State company, which could not be described as an entity.

99. Mr. GOCO suggested retention of the word “entity”.

100. Mr. HAFNER proposed replacing that word by “operator”.

101. Mr. PELLET, responding to a question raised by Mr. KAMTO, said that paragraph (1) was not so much about a source of information as it was about who or what was carrying out a certain activity.

*Paragraph (1), as amended by Mr. Hafner, was adopted.*

Paragraph (2)

102. Mr. TOMKA, referring to the last sentence, proposed that the phrase “of the activity” should be deleted.

*Paragraph (2), as amended, was adopted.*

Paragraphs (3) to (6)

*Paragraphs (3) to (6) were adopted.*

*The commentary to article 11, as amended, was adopted.*

*Commentary to article 12 (Exchange of information)*

103. Mr. TOMKA pointed out the need for an editing correction to the text of article 12.

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

104. Mr. TOMKA proposed that, in the last sentence of the footnote, the word “conventions” should be replaced by “instruments”, as the Code of Conduct on Accidental Pollution of Transboundary Inland Waters<sup>3</sup> cited in the footnote could not be described as a convention.

*Paragraph (4), as amended, was adopted.*

Paragraphs (5) to (7)

*Paragraphs (5) to (7) were adopted.*

*The commentary to article 12, as amended, was adopted.*

<sup>3</sup> United Nations publication, Sales No. E.90.II.E.28.

*Commentary to article 13 (Information to the public)*

## Paragraph (1)

105. Mr. PELLET pointed out that the phrase “that might result from an activity subject to authorization” did not appear in article 13 and was ambiguous.

106. Mr. Sreenivasa RAO (Special Rapporteur) suggested that the phrase “subject to authorization and” should be deleted as it conveyed no essential information.

*Paragraph (1), as amended, was adopted.*

## Paragraphs (2) to (4)

*Paragraphs (2) to (4) were adopted.*

## Paragraph (5)

107. Mr. BROWNLIE proposed that the word “agreements” in the first sentence should be replaced by “instruments”.

108. Following a discussion in which Mr. CANDIOTI, Mr. GALICKI and Mr. TOMKA took part, the CHAIRMAN suggested that the secretariat should be asked to verify the consistency of the references to watercourse conventions in paragraph (5) and to ensure that no important instruments had been omitted.

*It was so agreed.*

*Paragraph (5), as amended, was adopted.*

## Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

## Paragraph (8)

109. Mr. CANDIOTI proposed that the phrase “before responding to the notification”, at the end of the paragraph, preceded by the word “and”, should follow the words “State of origin”.

*Paragraph (8), as amended, was adopted.*

## Paragraph (9)

110. Mr. LUKASHUK said that the penultimate sentence departed from the general style of the commentaries and could easily be deleted.

111. Mr. Sreenivasa RAO (Special Rapporteur) said any problem of style could be rectified but the substance was important and he would prefer to keep it in.

112. Mr. GOCO suggested deleting the second sentence because it conveyed the idea that individuals who were not organized into groups did not form part of the public.

113. Mr. KUSUMA-ATMADJA pointed out that the concept of the “public” covered not only individuals organized into groups, such as those who participated in the production process, but also the potential victims of industrial processes.

*Paragraph (9) was adopted.*

## Paragraph (10)

114. Mr. GAJA proposed that the last sentence should be deleted.

115. Mr. Sreenivasa RAO (Special Rapporteur) said he could go along with that proposal as long as the footnote to the sentence was transposed to paragraph (9).

116. Mr. PELLET urged that the numbering of the footnotes should be reviewed and that in the French text of the footnote, the title of the work, which was given in English only, should be translated into French, in conformity with academic style and as had been done elsewhere in the draft.

*Paragraph (10), as amended, was adopted.*

*The commentary to article 13, as amended, was adopted.*

*Commentary to article 14 (National security and industrial secrets)*

## Paragraph (1)

117. Following a discussion in which Mr. BROWNLIE, Mr. PELLET and Mr. YAMADA took part, Mr. Sreenivasa RAO (Special Rapporteur) proposed that, to take account of the concerns expressed, the last part of the second sentence beginning with “or is considered”, should be deleted.

*Paragraph (1), as amended, was adopted.*

## Paragraph (2)

118. The CHAIRMAN suggested that the word “even” in the third sentence should be deleted.

*It was so agreed.*

119. Mr. LUKASHUK said that the third and fourth sentences implied that a very broad interpretation might be given to the concept of industrial secret, one that might amount to abuse of domestic law. To clarify the scope of industrial secret, he suggested that the phrase “in accordance with internationally recognized standards” should be inserted in the fourth sentence, between the words “is considered” and “an industrial secret”.

120. Mr. TOMKA said he was opposed to such a change. The phrase “internationally recognized standards” was better suited to the field of human rights than to intellectual property rights, which was a very precise area of the law, covered in both international conventions and domestic legislation.

121. Mr. PELLET drew attention to the strong similarity between the fifth sentence of paragraph (2) and the third sentence of paragraph (1).

122. In response to a remark made by Mr. GALICKI, Mr. Sreenivasa RAO (Special Rapporteur) proposed that, in the second sentence of paragraph (2), the quotation marks around “intellectual property rights” should be removed.

*Paragraph (2), as amended by the Chairman and the Special Rapporteur, was adopted.*

Paragraph (3)

*Paragraph (3) was adopted.*

*The commentary to article 14, as amended, was adopted.*

*The meeting rose at 1.05 p.m.*

## 2700th MEETING

*Thursday, 2 August 2001, at 10 a.m.*

*Chairman:* Mr. Peter KABATSI

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

### **Draft report of the Commission on the work of its fifty-third session (*continued*)**

**CHAPTER IV. *International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities)* (*continued*) (A/CN.4/L.607 and Add.1 and Add.1/Corr.1)**

**E. *Draft articles on prevention of transboundary harm from hazardous activities* (*continued*)**

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*) (A/CN.4/L.607/Add.1 and Corr.1)

*Commentary to article 15 (Non-discrimination)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

1. Mr. BROWNLIE suggested that in the third sentence the words “This obligation does not intend to affect” should be replaced by the words “It is not intended that this obligation should affect”.

2. Mr. PAMBOU-TCHIVOUNDA, supporting Mr. Brownlie’s proposal, suggested that the French text should be amended accordingly.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

3. Mr. GALICKI, supported by Mr. CANDIOTI, proposed that the last sentence should be deleted.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

*Paragraph (5) was adopted subject to minor editing changes.*

Paragraph (6)

*Paragraph (6) was adopted.*

*The commentary to article 15, as amended, was adopted.*

*Commentary to article 16 (Emergency preparedness)*

Paragraph (1)

4. Mr. GALICKI proposed that, in the first footnote, the reference to article 199 of the United Nations Convention on the Law of the Sea should be deleted because that article was mentioned in paragraph (3).

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

5. Mr. GALICKI, supported by Mr. GOCO, said that the words “other States” in the second sentence were confusing and that he would like the Special Rapporteur to explain which those “other States” were.

6. Mr. Sreenivasa RAO (Special Rapporteur) said that they were not other States in general, but States likely to be affected. For greater clarity, he proposed that the words “likely to be affected” should be added after the words “other States”.

7. Mr. GALICKI proposed that, in the last sentence, the words “set up by the States concerned” should be deleted.

8. Mr. Sreenivasa RAO (Special Rapporteur) said that the States concerned were those that were members of the competent international organization in question. For greater clarity, however, he proposed that the last sentence should read: “In addition, the coordination of response efforts might be most effectively handled by a competent international organization of which the States concerned are members.”

*Paragraph (2), as amended by the Special Rapporteur, was adopted.*

Paragraph (3)

*Paragraph (3) was adopted subject to minor editing changes.*

*The commentary to article 16, as amended, was adopted.*

*Commentary to article 17 (Notification of an emergency)*

9. Mr. GALICKI said that, in the article itself, in the phrase “notify the State likely to be affected by an emergency”, the word “by” should be replaced by the word “of”.

10. Mr. CANDIOTI, endorsing Mr. Galicki’s comment, suggested that the words “of any emergency” should be used, as in the Convention on the Non-navigational Uses of International Watercourses, which was referred to in paragraph (1).

11. Mr. Sreenivasa RAO (Special Rapporteur) said that article 17 had already been adopted and that its wording did not seem to give rise to any problems. The aim was to notify States likely to be affected by an emergency of that emergency situation.

12. Mr. PELLET said that the problem was perhaps one of terminology and that the French text also gave rise to a problem. In order to harmonize the French and English texts, he proposed the following wording: “The State of origin shall report the existence of an emergency to the State likely to be affected . . .”.

13. Mr. Sreenivasa RAO (Special Rapporteur) proposed that, in order to avoid any ambiguity, the words “notify the State likely to be affected by an emergency” should be replaced by the words “notify an emergency to the State likely to be affected”.

14. Mr. CANDIOTI emphasized that any ambiguity must be lifted because article 17 established an obligation.

15. The CHAIRMAN said that it should be left to the Chairman of the Drafting Committee and the Special Rapporteur to review the text of article 17. He invited the members to consider the commentary.

Paragraph (1)

16. Mr. TOMKA said that the Convention on Biological Diversity had been adopted in 1992, not in 1994, and that that mistake should be corrected.

*Paragraph (1) was adopted, subject to that correction.*

Paragraph (2)

17. Mr. GAJA proposed that, in the last sentence, the words “a State has recourse” should be replaced by the words “a State may have recourse”.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

18. Mr. LUKASHUK said he was surprised that a State would not be held liable for the consequences of a natural disaster, as stated in the last sentence. Referring to paragraph (5) of the commentary to article 3, which stated that “a State of origin does not bear the risk of unforeseeable consequences”, he asked what was meant by “unforeseeable consequences”. In paragraph (7) of the commentary to article 3, which stated that “The duty of due diligence involved, however, is not intended to guarantee that significant harm be totally prevented”, he was not sure about the nature of the risks in question. That was why it was necessary, in his view, to explain what risks natural disasters involved and to determine which ones could not be foreseen in advance by a State. He therefore suggested that the last sentence of paragraph (3) of the commentary to article 17 should be deleted.

19. Mr. CANDIOTI said he also thought that the last sentence of paragraph (3), as it stood, was too absolute. In his opinion, a State could be liable for harm because it had not taken the necessary measures.

20. Mr. Sreenivasa RAO (Special Rapporteur) said that the last sentence of paragraph (3) could be deleted without affecting the rest of the commentary.

*Paragraph (3), as amended, was adopted.*

*Commentary to article 18 (Relationship to other rules of international law)*

21. Mr. PELLET proposed that the paragraph should be divided into two parts. The first would go from the beginning until the words “its actual or potential transboundary effects”. The second, which would thus become paragraph (2), would begin with the words “The reference in”.

22. Mr. GAJA proposed that, in the first sentence, the words “to which these articles might otherwise, i.e. in the absence of such an obligation, be thought to apply” should be replaced by the words “to which these articles apply” and that the word “apparent” in the second sentence should be deleted.

23. Mr. TOMKA and Mr. GALICKI said that they supported that proposal.

24. Mr. CANDIOTI said that he also supported that proposal and suggested that the words “including any other primary rule” in the second sentence should be deleted.

25. Mr. ROSENSTOCK said that, in the last sentence, it would be better to replace the word “intend” by the word “purport”.

26. Mr. ECONOMIDES said that it would be more logical to change the order in which obligations were referred to in the last sentence, which should read: “between obligations under treaties and customary international law and obligations under the present articles”.

*The commentary to article 18, as amended, was adopted.*

*Commentary to article 19 (Settlement of disputes)*

Paragraphs (1) to (4)

27. Mr. GALICKI asked why the Convention on the Law of the Non-navigational Uses of International Watercourses, the provisions on dispute settlement of which the Commission had used as a basis for the wording of article 19, was not cited, if only in a footnote.

28. Mr. Sreenivasa RAO (Special Rapporteur) said that a footnote referring to that Convention on the Law of the Non-navigational Uses of International Watercourses could be added to paragraph (4) of the commentary to article 19, following the words “impartial fact-finding commission”.

*Paragraphs (1) to (4), as amended, were adopted.*

Paragraph (5)

29. Mr. TOMKA said that, in the last sentence, the word “prevention” should be replaced by the word “settlement” because article 19 dealt with the settlement, not with the prevention, of disputes.

30. Mr. MOMTAZ pointed out that the General Assembly resolution referred to was not the latest on the subject and that the text of the commentary should be updated. If his memory served him correctly, the Assembly had adopted a more recent resolution based on a draft prepared by the Special Committee on the Charter of the United Nations and the Strengthening of the Role of the Organization.

31. Mr. TOMKA said that the resolution in question was referred to in the footnote to the paragraph, but it related more particularly to the maintenance of international peace and security.

32. Mr. CANDIOTI proposed that the words “Inquiry or” at the beginning of the first sentence should be deleted because article 19 referred only to fact-finding commissions.

*Paragraph (5), as amended, was adopted.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

Paragraph (8)

33. Mr. GAJA said that the judgment of ICJ in the *North Sea Continental Shelf* cases referred to in the paragraph had also been between the Netherlands and the Federal Republic of Germany.

34. Mr. PELLET said that paragraph (8) simply repeated what has already been stated in paragraph (4) of the commentary to article 9. He therefore proposed that it should be deleted and that, at the end of paragraph (7), a footnote should be added to indicate that the requirement of “good faith” was discussed in paragraph (4) of the commentary to article 9.

35. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to Mr. Pellet’s proposal.

*It was so agreed.*

*The commentary to article 19, as amended, was adopted.*

36. The CHAIRMAN invited the members of the Commission to decide on the two questions left pending in connection with a commentary to the preamble to the draft articles and paragraph (2) of the commentary to article 1.

*Commentary to the preamble*

37. The commentary to the preamble, as prepared by the Special Rapporteur, read:

“(1) The preamble sets out the general context in which the topic of prevention is elaborated, keeping in view the mandate given to the Commission to codify and develop international law. Activities covered under the present topic of prevention require States to engage in cooperation and accommodation in mutual interest. States are free to formulate necessary policies to develop their natural resources and to carry out or authorize activities in response to the needs of their populations. In so doing however, States have to ensure that such activities are carried out taking into account the interests of other States and therefore the freedom they have within their own jurisdiction is not unlimited.

“(2) The prevention of transboundary harm from hazardous activities should also be seen in the context of the general principles incorporated in the Rio Declaration and other considerations that emphasized the close interrelationship between issues of environment and development. A general reference in the third paragraph of the preamble to the Rio Declaration indicates the importance of the integrated nature of all the principles contained therein. This is without prejudice

to highlighting specific principles of the Rio Declaration, as appropriate, in the commentaries to follow on particular articles.”

38. Mr. BROWNLIE said that he supported the commentary proposed for the preamble by the Special Rapporteur, but wished to suggest two purely drafting changes. The word “their” should be added before the word “mutual” in the second sentence of paragraph (1) and the word “emphasized” should be in the present tense in the first sentence of paragraph (2). He also found that the penultimate sentence of paragraph (2) was not entirely clear and proposed that the word “integrated” should be replaced by the word “interactive”.

*The commentary to the preamble, as amended, was adopted.*

Commentary to article 1 (Scope) (*concluded*)\*

Paragraph (2) (*concluded*)\*

39. The CHAIRMAN recalled that the Commission had not adopted paragraph (2) of the commentary to article 1 because of a problem with the penultimate sentence raised by Mr. Simma.

40. Mr. Sreenivasa RAO (Special Rapporteur) proposed that that sentence should be deleted because it was not essential for the definition of the scope of the articles.

*Paragraph (2), as amended, was adopted.*

*The commentary to article 1, as amended, was adopted.*

*Section E.2, as amended, was adopted.*

41. The CHAIRMAN said that the only remaining question with regard to chapter IV of the draft report was that of the text of article 17. He suggested that the Drafting Committee and the Special Rapporteur should be requested to redraft the text with the assistance of the secretariat in order to take account of the comments made on it.

*It was so agreed.*

#### CHAPTER VI. *Reservations to treaties* (A/CN.4/L.609 and Add.1–5)

42. The CHAIRMAN said that the parts of chapter VI of the draft report of the Commission contained in documents A/CN.4/L.609/Add.1 and Add.5 were not yet available and he therefore proposed that the discussion should begin with the parts that were already available.

##### A. *Introduction* (A/CN.4/L.609)

##### B. *Consideration of the topic at the present session* (A/CN.4/L.609 and Add.1)

*Sections A and B were adopted.*

#### C. *Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission* (A/CN.4/L.609/Add.2–5)

##### 1. *TEXT OF THE DRAFT GUIDELINES* (A/CN.4/L.609/Add.2)

43. Mr. GAJA said that footnotes should be added explaining that the gaps in the numbering of the guidelines were the result of the fact that the Commission intended to draft other guidelines that would be inserted in the text. For the sake of clarity, moreover, the following titles should be added for sections 2 and 3 of chapter 2 entitled “Procedure”:

“2.2 Confirmation of reservations when signing

“2.3 Late formulation of a reservation.”

44. Mr. KATEKA drew attention to the comments on the numbering of the draft guidelines he had made at the fifty-second session. The numbering was confusing and he did not see, for example, why the numbering adopted by the Special Rapporteur in his reports had to be kept. In addition, there was no way of distinguishing between draft guidelines adopted at the preceding session and those adopted at the current session and, because of the numbering system adopted, it was also not possible to know how many guidelines had been prepared in all. He asked the Special Rapporteur whether it would not be possible, for forthcoming sessions, to simplify the numbering of the Guide to Practice.

*Section C.1 was adopted subject to the amendments proposed by Mr. Gaja.*

##### 2. *TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-THIRD SESSION* (A/CN.4/L.609/Add.3–5)

*Commentary to guideline 2.2.1* (Formal confirmation of reservations formulated when signing a treaty) (A/CN.4/L.609/Add.3)

Paragraphs (1) to (8)

*Paragraphs (1) to (8) were adopted.*

Paragraph (9)

45. Mr. GAJA said that, in the second footnote, it should be made clear to which author “*ibid.*” referred.

46. Mr. TOMKA said that the footnote referred to Imbert’s work. It should therefore read: “See Imbert, *ibid.*, pp. 253–254.”

*Paragraph (9), as amended, was adopted.*

Paragraphs (10) to (17)

*Paragraphs (10) to (17) were adopted.*

\* Resumed from the 2697th meeting.

*The commentary to guideline 2.2.1, as amended, was adopted.*

*Commentary to guideline 2.2.2 [2.2.3]* (Instances of non-requirement of confirmation of reservations formulated when signing a treaty)

Paragraph (1)

47. Mr. SIMMA said that the first footnote paid too much attention to the difference between French-speaking and common law authors. The concept of agreements in simplified form was far from unknown to English-speaking writers.

48. Mr. BROWNLIE said that his work, *Principles of Public International Law*, had been published by Clarendon Press, not by Oxford University Press.

49. Mr. LUKASHUK, supporting the comment by Mr. Simma, proposed that the last two sentences of the first footnote should be deleted.

50. Mr. PELLET (Special Rapporteur) said that he accepted that proposal.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted.*

Paragraph (4)

51. Mr. SIMMA said that he did not agree with the use of the term “Roman law”. Recalling that the English-speaking or common law countries had no problems with the term “agreements in simplified form”, he proposed that paragraph (4) should be deleted.

52. Mr. PELLET (Special Rapporteur) said that he did not see any reason to delete the paragraph, which faithfully reflected the discussions in the Commission.

53. Mr. PAMBOU-TCHIVOUNDA proposed that, as a compromise, the text of the paragraph might be replaced by the following: “Although some members of the Commission would have preferred the term ‘agreement in simplified form’ which is commonly used in French writings, it seemed preferable not to use this term which was not used in the 1969 Vienna Convention.”

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

*The commentary to guideline 2.2.2 [2.2.3], as amended, was adopted.*

*Commentary to guideline 2.2.3 [2.2.4]* (Reservations formulated upon signature when a treaty expressly so provides)

Paragraphs (1) to (4)

54. Mr. KATEKA said that the numbering was likely to create confusion. He would have preferred the draft guidelines to be numbered in arithmetical order because it would then have been easier to see how many provisions the Commission had already adopted.

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

55. Mr. LUKASHUK said that in the first sentence the words “residual in nature”, should be replaced by “operative provisions” to describe the provisions of the 1969 and 1986 Vienna Conventions.

56. Mr. PELLET (Special Rapporteur) said that he could not speak for the English text, but, in French, the term *caractère supplétif* was correct.

*Paragraph (5) was adopted.*

Paragraph (6)

57. Mr. GAJA proposed that the words “illegal (or without effect)” in the last sentence should be replaced by the words “without effect”.

58. Mr. KATEKA said he did not see the need for the double negative at the beginning of the first sentence, which should read: “Accordingly, the Commission decided to endorse”.

*Paragraph (6), as amended, was adopted.*

*The commentary to guideline 2.2.3 [2.2.4], as amended, was adopted.*

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

[Agenda item 8]

STATEMENT BY THE OBSERVER FOR  
THE COUNCIL OF EUROPE

59. The CHAIRMAN invited Mr. Benítez, Secretary of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, to report to the Commission on new developments in the Council of Europe since the preceding session of the Commission.

60. Mr. BENÍTEZ (Observer for the Council of Europe) noted that all the documents he would refer to in his statement were to be found on the Council of Europe website<sup>1</sup> under the heading “Legal affairs”.

61. On 25 January 2001, Armenia and Azerbaijan had become the forty-second and forty-third member States of the Council of Europe. Four other countries, Belarus,

\* Resumed from the 2698th meeting.

<sup>1</sup> <http://www.coe.int>.

Bosnia and Herzegovina, Monaco and the Federal Republic of Yugoslavia, had submitted membership applications, which were still under consideration. The President of the Federal Republic of Yugoslavia, Mr. Kostunica, had attended the 107th session of the Committee of Ministers, at which he had said that his country wished to become a member of the Council of Europe and accede to the 16 conventions to which the Socialist Federal Republic of Yugoslavia had been a party. The Federal Republic of Yugoslavia had already acceded to 11 of those conventions without retroactive effect, i.e. as a successor State.

62. The Committee of Ministers and the Parliamentary Assembly were pursuing their monitoring activities, to which a new theme had been added: the effectiveness of judicial remedies, particularly with regard to the length of proceedings, judicial control of deprivation of liberty, the holding of trials within a reasonable time and the execution of judicial decisions. Other themes being monitored included freedom of the press and local and regional democracy.

63. 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, the new European Court of Human Rights had become fully operational. Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, on the general prohibition of discrimination, opened up new perspectives for individuals, who could currently be protected autonomously against discrimination.

64. In 2000, the Committee of Ministers had adopted recommendation No. R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation. The Council of Europe was called upon to play a key role during the Second World Congress against Commercial Sexual Exploitation of Children, to be held in Yokohama, Japan, in December 2001. The Committee of Ministers had also adopted recommendation No. R (2000) 13 on a European policy on access to archives, as well as recommendation No. R (2000) 19 on the role of public prosecution in the criminal justice system. That would be a useful tool for countries that were reforming their system of criminal justice. The Committee of Ministers had also adopted recommendation No. R (2000) 21 on the freedom of exercise of the profession of lawyer. In that connection, he announced that the twenty-eighth Colloquy on European Law, which would be held at Pau University, in Bayonne, France, in 2002, would be devoted to the independence of lawyers.

65. In 2001, the Committee of Ministers had adopted recommendation No. R (2001) 2 concerning the design and redesign of court systems and legal information systems in a cost-effective manner and recommendation No. R (2001) 3 on the delivery of court and other legal services to the citizen through the use of new technologies. He also drew attention to the Framework Global Action Plan for Judges in Europe, which had led to the establishment of the Consultative Council of European Judges, which had met for the first time in November 2000.

66. In the field of new technologies, the Committee of Ministers had adopted the Additional Protocol to the Eu-

ropean Agreement on the Transmission of Applications for Legal Aid and the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows.

67. A convention on cybercrime was being prepared with the active participation of the member States of the European Union and the Council of Europe. In that connection, he pointed out that the mutual communication of documents among member States was becoming an increasing practice of the European Union and the Council of Europe. That increased willingness to cooperate had, moreover, been reaffirmed by the European Union "Troika" of the Article 36 Committee (former K4 Committee). He also drew attention to the entry into force in March 2001 of 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. Lastly, the Council of Europe was currently finalizing the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

68. In the context of its legal cooperation and assistance activities, the Council of Europe gave priority to the countries of South-East Europe, Ukraine, the Republic of Moldova, the countries of the Caucasus and the Russian Federation. With regard to the latter country, the Council of Europe was carrying out a joint programme with the European Union for the establishment of an Academy of Justice. The Russian Government had just submitted four bills for expert appraisal on the reform of legislation governing the judiciary.

69. In respect of action to combat corruption, the Council of Europe had established the Group of States against Corruption (GRECO) in 1999. GRECO currently had 30 member States, including 28 members of the Council of Europe and two non-members, Bosnia and Herzegovina and the United States. Through a dynamic process of peer pressure, GRECO evaluated compliance with undertakings provided for in Council of Europe legal instruments to combat corruption, namely, the Criminal Law Convention on Corruption, signed by 29 States and ratified by 10 others, the Civil Law Convention on Corruption, signed by 24 States and ratified by 3 others, and the Model Code of Conduct for Public Officials. In 2000, GRECO had evaluated the situation of five of its member States, Finland, Georgia, Luxemburg, Spain and Sweden. The evaluation reports were available on the GRECO website.

70. As to international law, CAHDI attached great importance to cooperation with the Commission, as shown by the election, the preceding year, of a member of the Commission, Mr. Tomka, as its Chairman.

71. CAHDI had continued to play its role as the European observatory of reservations to international treaties in the light of the recommendation by the Committee of Ministers on reactions to reservations to international treaties regarded as inadmissible and the Guide to Practice on key questions relating to the formulation of reservations to international treaties. When it had doubts about the admissibility of a reservation or a declaration, CAHDI and the State concerned established a dialogue



and, on a number of occasions, that dialogue had proved to be very helpful because the State became aware of the dangers the reservation or declaration might involve. CAHDI welcomed the participation of the Special Rapporteur on reservations to treaties, Mr. Pellet, in one of its meetings on that question.

72. In respect of consent of States to be bound by treaties, CAHDI had sent the member States of the Council of Europe and various observer States a questionnaire on that matter, which had provided very useful information on the relevant State practice. CAHDI had also commissioned an analytical report on the question from the British Institute of Comparative and International Law. Country reports and that analytical report would be included in a work to be published jointly by the Council of Europe and Kluwer Law International in September 2001.

73. CAHDI had embarked on the study of the jurisdictional and execution immunities of States. It had decided to implement a pilot project to collect information on State practice in that regard. At its next meeting, CAHDI would discuss key questions relating to the immunities enjoyed by Heads of State and Government and would decide whether or not that question should be studied. In all those areas, CAHDI took full account of the work of the International Law Commission and the Sixth Committee of the General Assembly. The European Union Working Group on Public International Law (COJUR) was also working on that question. It was to be hoped that those activities would be synergistic.

74. In connection with the International Criminal Court, CAHDI would organize, on 14 and 15 September 2001, a second multilateral consultation meeting on the implications of the ratification of the Rome Statute of the International Criminal Court for the domestic legal order of member States. The Council of Europe would like the Rome Statute to enter into force rapidly, as shown by the fact that 41 of its 43 member States had already signed it and nearly one third had ratified it. He pointed out that the European Commission for Democracy through Law (Venice Commission) had set aside one of its sessions for the discussion of the constitutional consequences of the ratification of the Rome Statute and had adopted an opinion thereon.

75. At its next meeting, CAHDI would discuss the work of the International Law Commission on State responsibility. It had invited the Special Rapporteur of the Commission on that topic, Mr. Crawford, to take part in an exchange of views with its members.

76. CAHDI was also interested in the Charter of Fundamental Rights of the European Union and its consequences for the European Convention on Human Rights, as well as in new developments relating to ICJ, whose President had recently taken part in a CAHDI meeting; the tribunals set up to protect the victims of armed conflict; and the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda.

77. In conclusion, he said that CAHDI continued to take an active part in the discussion of key items of public international law and to strengthen its cooperation with

COJUR at the European level and with the Commission at the international level in order to promote the progressive development of international law. It was aware of its responsibilities and would continue to work in the spirit of the values of human rights, democracy and the rule of law that the Council of Europe had been defending for over 50 years.

78. Mr. HAFNER thanked the Observer for the Council of Europe for his statement and congratulated the Council of Europe on the international law activities it was carrying out in connection with reservations to multilateral treaties, State responsibility and jurisdictional immunities. He hoped that those activities would not have a negative impact on the negotiations currently under way in international organizations, including the United Nations.

79. Mr. GALICKI said he knew from experience, for having taken an active part in the work of certain Council of Europe bodies, that it took account of the work of the Commission. For example, the Committee of Experts on Nationality was currently preparing a report on the need to adopt an instrument to supplement the European Convention on Nationality, concerning statelessness in relation to State succession, which was broadly based on the work of the Commission.

80. It was commendable that the Council of Europe had welcomed new members and it was to be hoped that the Federal Republic of Yugoslavia would soon join. That would be important for the activities of the Council in that part of Europe.

81. He also welcomed the open-mindedness of the Council of Europe, which involved observers from non-European countries such as Canada and Asian countries, in its work and whose instruments went well beyond the European framework in scope.

82. Mr. GOCO said that, in general, regional instruments were much more effective than universal instruments, especially in the field of human rights. That was the case, for example, of the American Convention on Human Rights: "Pact of San José, Costa Rica" and the European Convention on Human Rights.

83. With regard to corruption, with which the Council of Europe was dealing, it must be emphasized that that pernicious practice had to be considered in conjunction with problems such as the traffic in human beings, the independence of criminal justice, money laundering and the recovery of funds stolen by corrupt leaders.

84. In that connection, he would like the Commission to have more documents on corruption and related practices.

85. Mr. SIMMA said he would like the Council of Europe to transmit to the Commission all the documents it had prepared on topics such as reservations to multilateral treaties, the practice of States in respect of treaty-making and objections by the Council to reservations to international treaties formulated by States. Care would have to be taken in that regard to ensure that the study which Ms. Hampson, Special Rapporteur of the Subcommission on the Promotion and Protection of Human Rights, was to

carry out did not duplicate the work of the Commission and its Special Rapporteur on the topic, Mr. Pellet.

86. Mr. BENÍTEZ (Observer for the Council of Europe) said he wished to reassure the Commission that the Council of Europe in general and CAHDI in particular would not only do nothing to jeopardize the work of a universal nature being carried out by the Commission, but would also take the fullest account of that work and do everything possible to strengthen cooperation with the Commission.

87. It must be noted that the instruments adopted by the Council of Europe often took on an extra-European dimension. For example, at the request of non-European observers, the word “European” had been removed from the Model Code of Conduct for Public Officials adopted by the Committee of Ministers in connection with action to combat corruption.

88. He also noted that the Committee of Ministers and CAHDI had decided to publish the reports of the Committee of Ministers on reservations to international treaties, which had previously been confidential, and that they would be communicated to the Commission. In that connection, he drew attention to the importance the Committee of Ministers attached to the dialogue it entered into with member States in order better to understand the reasons why they formulated the reservations. CAHDI would continue to play its role as the European observatory of reservations to international treaties, to try to understand the reasons underlying the formulation of reservations and to make States aware of the dangers that some of those reservations could entail.

*The meeting rose at 1.05 p.m.*

## 2701st MEETING

*Friday, 3 August 2001, at 10 a.m.*

*Chairman:* Mr. Peter KABATSI

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

## Draft report of the Commission on the work of its fifty-third session (*continued*)

### CHAPTER VI. *Reservations to treaties (continued)* (A/CN.4/L.609 and Add.1–5)

#### C. *Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (continued)* (A/CN.4/L.609/Add.2–5)

##### 2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO ADOPTED AT THE FIFTY-THIRD SESSION (*continued*) (A/CN.4/L.609/Add.3–5)

*Commentary to guideline 2.3* (Late formulation of a reservation) (A/CN.4/L.609/Add.4)

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

*The commentary to guideline 2.3 was adopted.*

*Commentary to guideline 2.3.1* (Late formulation of a reservation)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

1. Mr. PELLET (Special Rapporteur), responding to a comment by Mr. SIMMA, proposed that in the first sentence the word “hypothesis” should be replaced by the word “possibility”.

*It was so agreed.*

2. Mr. ECONOMIDES queried the inclusion of the footnote concerning the extremely fine distinction made between reservations and reservation clauses as it seemed unnecessary.

3. Mr. PELLET (Special Rapporteur) said that the footnote drew attention to the incorrect use of the term “reservation” in the Convention referred to in paragraph (3). What was meant were reservation clauses, provisions in treaties that authorized reservations under certain conditions.

4. Mr. SIMMA proposed replacing the word “hypothesis” in the footnote on article 38 of the Hague Convention by “provision”.

*It was so agreed.*

5. Mr. GALICKI, supported by Mr. PELLET (Special Rapporteur), drew attention to the need for editing corrections to the references in paragraph (3) to the Warsaw Convention, the Chicago Protocol and the Hague Protocol.

6. The CHAIRMAN said that the corrections would be made.

*Paragraph (3) was adopted on that understanding.*

Paragraph (4)

7. Mr. HAFNER suggested that it might be useful to the reader to indicate that there were some difficulties with the designation of certain declarations as reservations. To that end, a sentence might be added at the end of paragraph (4), to read: "Although this kind of declaration does not comply with the definition of reservation under guideline 1.1, it is necessary to use the term reservation in order to conform to practice."

8. Mr. MELESCANU said that adopting Mr. Hafner's amendment would mean that the Commission was clearly against the formulation of late reservations but condoned certain kinds of declarations which did not conform to the definition of reservations. It was a major departure from the approach the Commission had taken so far, namely to avoid encouraging a practice that it considered detrimental to the stability of international agreements but at the same time to avoid rejecting it outright, since it was applied in State practice. He was not opposed to an addition along the lines suggested by Mr. Hafner, but thought a more neutral formulation should be sought.

9. Mr. SIMMA said that Mr. Hafner's idea had been aired when the Commission had been discussing the definition of reservations and the inclusion of across-the-board reservations. In essence, it was that, if a declaration did not fit within all the parameters of the 1969 Vienna Convention, it was not a reservation. But that was not the policy the Commission had been following up to now. The majority of members had acquiesced in giving the name "reservation" to something that did not *prima facie* fit the definition, namely, late reservations. Even though he did not approve of late reservations, he thought the Commission should remain firm in its stance of not saying that they were not true reservations.

10. Mr. PELLET (Special Rapporteur) endorsed the comments by Mr. Melescanu and Mr. Simma and said the sentence proposed by Mr. Hafner would be acceptable only if preceded by wording such as "Some members took the view". If it was true that late reservations were not reservations, then every treaty that mentioned the possibility of formulating a reservation after ratification would be referring to something that was not a reservation. Article 30 of the Convention on Mutual Administrative Assistance in Tax Matters, for example, stated that, after the entry into force of that instrument, a Party could make one or more reservations.

11. There was another substantive objection to Mr. Hafner's proposed amendment. States could derogate from the indications in the Guide to Practice and the 1969 Vienna Convention if they decided to do so unanimously, and that was precisely what the Commission wished to retain in respect of late reservations. In other words, if States considered unanimously that, for the purposes of a given convention, the definition of reservations should be

set aside, then that should be feasible. Mr. Hafner's proposal would make that impossible, however. The effect of a late reservation was, after all, precisely the same as that of a reservation.

12. Mr. HAFNER said he had thought it would be useful for the reader to have an explanation of the inconsistency between guideline 1.1 and the definition of reservations. The proposed amendment was not really a departure from the position of the Commission. It simply stated that certain declarations did not conform to the definition in guideline 1.1, which was indisputably the case. He had no objection, however, to preceding the wording with a formulation such as "According to the view of some members".

13. Mr. TOMKA proposed that, in the amendment, the words "does not comply with" should be replaced by "is not covered by".

14. In response to a question raised by Mr. SIMMA, Mr. GALICKI and Mr. KATEKA said that they supported the views advanced by Mr. Hafner.

15. Mr. BROWNLIE said that he, too, supported those views. The Special Rapporteur had undertaken his task by using a photographic approach of surveying what States did and avoiding a judgemental approach. The Commission had gone along with that, but it would do no harm for the commentary to record that it was considered questionable by some members of the Commission whether certain declarations were compatible with the 1969 Vienna Convention.

16. Mr. HAFNER, revising his proposal in the light of Mr. Brownlie's remarks, suggested that it should read: "According to some members of the Commission it was questionable whether that kind of declaration was compatible with the definition of reservations under guideline 1.1."

*It was so agreed.*

17. Mr. PELLET (Special Rapporteur) said that the proper place to insert the amendment was not in paragraph (4) but at the beginning of paragraph (2).

18. Further to a discussion about the placement of minority views in relation to those of the majority, in which Mr. GOCO, Mr. HAFNER, Mr. KAMTO, Mr. ROSENSTOCK and Mr. TOMKA took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph (4) unamended and to insert the amendment proposed and revised by Mr. Hafner at the beginning of paragraph (2).

*It was so agreed.*

*Paragraph (4) was adopted.*

Paragraph (5)

19. Mr. SIMMA said that, since the European Commission on Human Rights no longer existed, in the first

sentence the words “is flexible ” should be replaced by “was flexible”.

*Paragraph (5), as amended, was adopted.*

Paragraphs (6) to (11)

*Paragraphs (6) to (11) were adopted.*

Paragraph (12)

20. Mr. SIMMA asked whether Belgium’s reservation, referred to in the first footnote, was a true reservation in the sense of the definition of the Commission.

21. Mr. PELLET (Special Rapporteur) said that it might be clearer to refer to the “declaration” made by Belgium.

*Paragraph (12) was adopted.*

Paragraphs (13) to (16)

*Paragraphs (13) to (16) were adopted.*

Paragraph (17)

22. Mr. SIMMA proposed that “this word”, in the footnote to the paragraph should be replaced by “the word ‘objects’”.

*Paragraph 17, as amended, was adopted.*

Paragraph (18)

23. Mr. GAJA said that the word “the” in square brackets in the first sentence existed in the original text and that the brackets should be removed.

*Paragraph 18, as amended, was adopted.*

Paragraph (19)

*Paragraph (19) was adopted.*

Paragraph (20)

24. Mr. GAJA proposed that the first sentence and the corresponding footnote should be deleted because the reference it made to his work, in which he was seeking to make a distinction between opposition and objection, was not accurate.

*Paragraph (20), as amended, was adopted.*

Paragraphs (21) to (23)

*Paragraphs (21) to (23) were adopted.*

*The commentary to guideline 2.3.1, as amended, was adopted.*

*Commentary to guideline 2.3.2* (Acceptance of late formulation of a reservation)

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

25. Mr. LUKASHUK proposed that the words “now well-established”, in the first sentence, should be deleted and said that depositaries could be international organizations or States. Accordingly, it should be made clear that the latter were not being referred to.

26. Mr. PELLET (Special Rapporteur) accepted the first proposal but said he was firmly opposed to the second.

27. Mr. LUKASHUK said that he would not press his proposal to expand the paragraph.

*Paragraph (4), as amended, was adopted.*

Paragraphs (5) to (8)

*Paragraphs (5) to (8) were adopted.*

Paragraph (9)

28. Mr. GAJA, referring to the second sentence, said that a “reservation dialogue” usually took place after a reservation had been formulated. What was meant in the present instance was a dialogue held before acceptance even of the possibility of a reservation being made. The reference was misleading and he proposed that the sentence be deleted.

*Paragraph (9), as amended, was adopted.*

Paragraphs (10) to (12)

*Paragraphs (10) to (12) were adopted.*

*The commentary to guideline 2.3.2, as amended, was adopted.*

*Commentary to guideline 2.3.3* (Objection to late formulation of a reservation)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

29. Mr. SIMMA said that the first sentence would be clearer if the word “they”, was replaced by “while these” and the word “whereas” was deleted.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

*The commentary to guideline 2.3.3, as amended, was adopted.*

*Commentary to guideline 2.3.4 (Subsequent exclusion or modification of the legal effects of a treaty by means other than reservations)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

30. Mr. SIMMA said that the paragraph should be made more precise and should relate more closely to what the draft guideline actually said. It did not speak of the principle that a reservation could not be formulated after the expression of definitive consent to be bound, but that later interpretations of reservations could not exclude or modify the legal effects of a treaty. It was not concerned with the formulation of a reservation at a certain point in time.

31. Mr. KAMTO said that “definitive” was a problematic adjective and should perhaps be deleted.

32. Mr. PELLET (Special Rapporteur) agreed, but said that he had not understood the point being made by Mr. Simma.

33. Mr. MELESCANU, supported by Mr. SIMMA, proposed that the paragraph be amended to read: “The principle that a party may not modify the legal effect of a treaty by a unilateral interpretation after the formulation of the reservation after the expression of . . .”.

34. Mr. GALICKI said that he strongly supported Mr. Simma’s view. The inconsistency in the paragraph might be dealt with if the word “formulated” was replaced by “reformulated”.

35. Mr. GAJA said that it was essential to avoid stating that a party could not modify a reservation. It was done all the time. He would prefer an amendment that was more limited than the one being proposed at the current time.

36. Mr. GOCO said he saw no ambiguity in the paragraph. The key words were “after the expression of definitive consent”. The paragraph should be adopted unchanged.

37. Mr. PELLET (Special Rapporteur) said that he was still experiencing difficulty understanding the proposed amendment. The Inter-American Court of Human Rights could not be made to say something it had not said.

38. Mr. SIMMA said that the Inter-American Court of Human Rights had stated that a reservation, once made,

“escaped” from its author and no effort could be made to interpret it in another way later on. The second paragraph quoted from the advisory opinion of the Court equated that course of action with a reservation that was made late.

39. Mr. MELESCANU said that the question was of a practical nature. The draft guideline dealt with an interpretation or unilateral declaration, which sought to modify the legal effect of provisions of a treaty. If the paragraph was presenting arguments in favour of the idea that subsequent modification of the legal effect of a treaty by procedures other than reservations and late formulations of a reservation should be excluded, then an attempt should be made to show a practice, which was opposed to that. The paragraph should begin by setting out what guideline 2.3.4 really said.

40. Mr. GAJA proposed adding a first sentence to the paragraph, to read: “After the expression of its consent, a State may not, through the interpretation of a reservation, avoid certain obligations established by a treaty.” The paragraph would then continue: “That principle appeared to be sufficiently established . . .”, thereafter continuing unchanged.

*Paragraph (3), was adopted.*

Paragraphs (4) and (5)

*Paragraphs (4) and (5) were adopted.*

Paragraph (6)

41. Mr. MOMTAZ noted that the “*Loizidou* judgment of 23 March 1995 rendered in the same case” related to a case cited in paragraph (5) as “the *Chrysostomos et al.* case” and in footnote 38 as the “*Chrysostomos* and *Loizidou* cases”. If all those citations related to one and the same case, they should perhaps be referred to throughout as “the *Chrysostomos-Loizidou* case”.

42. Mr. BROWNLIE said that the two cases had originally been considered jointly but had later been separated. To refer to them as the *Chrysostomos-Loizidou* case could give rise to confusion.

43. Mr. SIMMA suggested that the problem could be solved by deleting the words “rendered in the same case”.

44. Mr. PELLET (Special Rapporteur) said that Mr. Simma’s proposal was acceptable.

*Paragraph (6), as amended, was adopted.*

Paragraphs (7) and (8)

*Paragraphs (7) and (8) were adopted.*

45. Mr. ECONOMIDES said that mention should be made somewhere in the commentary of the fact that some members had remained unconvinced of the need for the inclusion of guideline 2.3.4 in the Guide to Practice. The

main reason given had been that its terminology was insufficiently precise.

46. Mr. PELLET (Special Rapporteur) said he had no objection to the inclusion of an additional paragraph reflecting the concerns raised by Mr. Economides.

47. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt an additional paragraph, paragraph (9), reflecting those concerns.

*It was so agreed.*

*The commentary to guideline 2.3.4, as amended, was adopted.*

**CHAPTER IV. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities) (concluded) (A/CN.4/L.607 and Add.1 and Add.1/Corr.1)**

**E. Draft articles on prevention of transboundary harm from hazardous activities (concluded)**

**1. TEXT OF THE DRAFT ARTICLES**

**ARTICLE 17 (A/CN.4/L.607/Add.1 and Corr.1)**

48. The CHAIRMAN said that a reformulated text of article 17, prepared by the Chairman of the Drafting Committee, was available at the current time. The text read:

“The State of origin shall, without delay and by the most expeditious means, at its disposal, notify the State likely to be affected by an emergency concerning an activity within the scope of the present articles of such emergency and provide it with all relevant and available information.”

49. Mr. GALICKI expressed dissatisfaction with the reformulated text, which, even linguistically, left a good deal to be desired. More important, however, was the fact that retention of the wording “likely to be affected by an emergency” introduced a new concept into the draft articles. The term “State likely to be affected” was defined in article 2 (Use of terms), which contained no reference to emergencies. Article 28, paragraph 2, of the Convention on the Law of the Non-navigational Uses of International Watercourses, which formed the basis for article 17, established a clear requirement for a State to “notify other potentially affected States [ . . . ] of any emergency”. The best solution, one already proposed by Mr. Candioti, would be to replace the words “notify the State likely to be affected by an emergency” by “notify the State likely to be affected of an emergency”—thereby reflecting the wording of the title of the article, namely: “notification of an emergency”; and of articles 16 and 2.

50. Mr. CANDIOTI and Mr. GOCO supported Mr. Galicki’s comments.

51. Mr. KAMTO said that the reformulation proposed by the Chairman of the Drafting Committee did not solve the problem already noted with regard to the French text.

52. Mr. Sreenivasa RAO (Special Rapporteur) said he would be happy to accept the text proposed by the Chairman of the Drafting Committee, but would not oppose the wording proposed by Mr. Candioti and Mr. Galicki.

53. Mr. ROSENSTOCK said there was a slight substantive difference between the two formulations. If the wording “affected by” was adopted, the obligation would be to inform a State which was itself likely to be affected by an emergency, whereas the wording “notify . . . of” established an obligation to notify all States of an emergency, whether or not those States were likely to fall prey to it. The latter approach was the one adopted in the Convention on the Law of the Non-navigational Uses of International Watercourses. Either requirement was perfectly reasonable, but he personally favoured the latter formulation.

54. In response to a request for clarification by Mr. MELESCANU, Mr. CANDIOTI reiterated his own proposal, namely, that the article should read:

“The State of origin shall, without delay and by the most expeditious means at its disposal, notify the State likely to be affected of an emergency concerning an activity within the scope of the present articles and provide it with all relevant and available information.”

55. Mr. PELLET said he supported Mr. Candioti’s proposal for the English text, and drew attention to a grammatical error in the French text.

*Article 17, as amended by Mr. Candioti, was adopted.*

*Section E.1, as amended, was adopted.*

*Section E, as amended, was adopted.*

**C. Recommendation of the Commission (A/CN.4/L.607)**

56. The CHAIRMAN said that a paper had been circulated containing the proposed text of a recommendation of the Commission to the General Assembly regarding the draft articles, to be inserted. The text read:

“At its 2701st meeting, on 3 August 2001, the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly the elaboration of a convention by the Assembly on the basis of the draft articles on prevention of transboundary harm from hazardous activities.”

*Section C was adopted.*

**D. Tribute to the Special Rapporteur**

57. The CHAIRMAN drew members’ attention to the proposal, contained in the same paper, for a tribute to the Special Rapporteur, to be inserted. The proposal read:

“At its 2701st meeting, on 3 August 2001, the Commission, after adopting the text of the draft preamble and draft articles on prevention of transboundary harm from hazardous activities, adopted the following resolution by acclamation:

*The International Law Commission,*

*Having adopted* the draft preamble and draft articles on prevention of transboundary harm from hazardous activities,

*Expresses* to the Special Rapporteur, Mr. Pemmaraju Sreenivasa Rao, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft preamble and draft articles on prevention of transboundary harm from hazardous activities.

“The Commission also expressed its deep appreciation to the previous Special Rapporteurs, Mr. Robert Q. Quentin-Baxter and Mr. Julio Barboza, for their outstanding contribution to the work on the topic.”

*Section D was adopted.*

*Chapter IV, as amended, was adopted.*

**Unilateral acts of States (*concluded*)\* (A/CN.4/513, sect. C, A/CN.4/519<sup>1</sup>)**

[Agenda item 4]

REPORT OF THE WORKING GROUP

58. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that, as decided at the previous session, the Working Group was to consider the topic of invalidity, with particular reference to article 5,<sup>2</sup> as contained in the third report.<sup>3</sup> It was also to consider the possibility of drafting a specific provision on the conditions for validity, as well as other aspects of the topic, which was complex and contained a number of elements on which there were divergent views. Those considerations had had to be put to one side, however, to enable the Group to turn again to a question it considered fundamental, namely State practice. The issue was crucial not only to the formulation of unilateral acts but to the interpretation that States put on their own and other States' unilateral acts. Stress had been laid on the need to obtain more information on such practice, so that it could be established when a given act by a State was, in its own view, unilateral and produced international legal effects. The Working Group had therefore decided to draw up specific questions for States in order to obtain reliable information on practice, with regard to both their own and other States' unilateral acts.

59. The Working Group had produced a document with a brief general introduction dealing with basic issues that would help Governments to reply. The questions to be

transmitted to Governments by the Secretariat were the following:

1. Has the State formulated a declaration or other similar expression of the State's will which can be considered to fall, *inter alia*, under one or more of the following categories: a promise, recognition, waiver or protest? If the answer is affirmative, could the State provide elements of such practice?

2. Has the State relied on other States' unilateral acts or otherwise considered that other States' unilateral acts produce legal effects? If the answer is affirmative, could the State provide elements of such practice?

3. Could the State provide some elements of practice concerning the existence of legal effects or the interpretation of unilateral acts referred to in the questions above?

60. Efforts to obtain more information on practice should, however, go beyond merely asking Governments for their experience. The Working Group had therefore agreed to approach academic foundations and institutions for financial assistance in organizing a short-term investigation project so that as much information as possible on State practice could be compiled.

61. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to the recommendation of the Working Group and to request the Secretariat to circulate a questionnaire to Governments asking for additional information.

*It was so agreed.*

**State responsibility<sup>4</sup> (*concluded*)\* (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,<sup>5</sup> A/CN.4/517 and Add.1,<sup>6</sup> A/CN.4/L.602 and Corr.1 and Rev.1)**

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING (*concluded*)\*

62. The CHAIRMAN invited the members to consider the report of the Drafting Committee containing the titles and texts of the draft articles on responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading (A/CN.4/L.602/Rev.1).\*\*

63. Mr. GAJA, speaking on behalf of the Chairman of the Drafting Committee, who had been called away, said that the Committee had held two additional meetings during the second part of the session to discuss the pending issue of assurances and guarantees of non-repetition, in article 30 (Cessation and non-repetition), subparagraph

\* Resumed from the 2696th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 2001, vol. II (Part One).

<sup>2</sup> *Yearbook* . . . 2000, vol. II (Part Two), para. 605.

<sup>3</sup> *Ibid.*, vol. II (Part One), document A/CN.4/505.

\* Resumed from the 2683rd meeting.

\*\* Issued on 26 July 2001.

<sup>4</sup> For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook* . . . 2000, vol. II (Part Two), chap. IV, annex.

<sup>5</sup> Reproduced in *Yearbook* . . . 2001, vol. II (Part One).

<sup>6</sup> *Ibid.*

(b), and article 48 (Invocation of responsibility by a State other than an injured State), paragraph 2 (a), because the issue had been *sub judice* during the first part of the session.

64. On second reading, the Drafting Committee had considered that, since assurances and guarantees of non-repetition were akin to cessation rather than reparation, in that they concerned future rather than past conduct and, moreover, probably future conduct in cases other than the case that had given rise to the dispute, they should be included in article 30, subparagraph (b). That position had been generally endorsed. The Committee had begun with the understanding that, while some Governments questioned whether a provision on assurances and guarantees of non-repetition could have a normative basis, others had expressed no objection to the inclusion of such a text.

65. The question of assurances and guarantees of non-repetition had been a central issue in the *LaGrand* case and the discussion in the Drafting Committee had understandably revolved around the interpretation that should be placed on the ruling of ICJ in that case. Some members of the Committee had seen the Court's ruling as support for the retention of article 30, subparagraph (b), while others considered that the Court had not taken a clear position on the obligation to provide assurances and guarantees of non-repetition. Some members had thought that the Court had avoided taking up a clear-cut position, while, according to others, the Court had mainly envisaged the consequences of a hypothetical wrongful act that could occur in the future. It had, however, been agreed that, while the decision in the *LaGrand* case was important, it was not the only basis on which the Committee should decide on the issue of assurances and guarantees of non-repetition. In the end, the Committee had decided to retain article 30, subparagraph (b), and article 48, paragraph 2 (a), on the grounds that the provisions were drafted with great flexibility and introduced a useful policy. In particular, the words "if circumstances so required" clearly indicated that such guarantees and assurances did not form a necessary part of the legal consequences of all internationally wrongful acts. Some members of the Committee, however, had held that the provision lacked substantial roots in existing State practice and that there was no clear evidence of an emerging principle of international law in that direction.

66. The Drafting Committee had also reconsidered the question of the relationship between assurances and guarantees of non-repetition, on the one hand, and satisfaction as a form of reparation, on the other. While reiterating the view that such assurances and guarantees were generally related to cessation, the Committee had agreed that, in certain instances, they could form part of the remedy of satisfaction, which, being of a flexible nature, could take many different forms. The commentary to article 37 (Satisfaction) should therefore indicate that such assurances and guarantees could sometimes be provided as a form of the remedy of satisfaction.

67. The Drafting Committee had taken a further look at the articles for the purposes of a *toilette finale* and consistency in the various language versions. It had made minor

editing changes to some articles and, in those with multiple paragraphs or subparagraphs, it had inserted the words "or" or "and", in order to clarify whether they should be understood as alternative or cumulative requirements. French, Russian and Spanish language groups had further reviewed the text that had emerged from the Committee for consistency with the original drafting language, English, and the articles had been renumbered sequentially and in their final form. He recommended that the Commission should adopt the set of draft articles, which also included changes made after the Commission had taken decisions on them during the first part of the session.

68. Mr. PELLET expressed grave misgivings about the placement of article 30, subparagraph (b): the text was perfectly acceptable, but it belonged in article 37. The Commission had, to his disapproval, decided to wait for the ruling by ICJ in the *LaGrand* case, which had, however, confirmed that one consequence of a State's assumption of responsibility was that it might have to provide assurances and guarantees of non-repetition.

69. The draft articles were logically structured. Under article 30, a State was under an obligation of cessation and, under article 31, of reparation: two distinct sets of consequences, specific details of which appeared in articles 34 to 38. Yet the retention of subparagraph (b) in article 30 sent out the clear message that assurances and guarantees of non-repetition did not form part of reparation. In other words, they did not constitute a possible element of satisfaction. All the commentary in the world would not alter that message. He was opposed to that interpretation, not least because ICJ had also ruled against it, having linked assurances and guarantees of non-repetition with the concept of apologies. It had specifically stated that, since apologies which were indubiously parts of satisfaction might not suffice in some cases, they could be extended by assurances and guarantees of non-repetition.

70. In any case, one could hardly envisage a situation in which assurances and guarantees of non-repetition were not linked with satisfaction. For that reason article 30, subparagraph (b), should rightfully appear in article 37, in conformity with the position of ICJ.

71. He wished to point out that he had withdrawn his reservations about the fact that assurances and guarantees of non-repetition might be withheld, but he was taken aback by the fact that the Drafting Committee considered them a part of cessation. Mr. Gaja's explanation was not convincing. There was still time for the Commission to make the necessary change. Furthermore, the placement of the subparagraph also affected the provisions of article 48, paragraph 2 (a), which currently provided that a non-injured State could demand assurances and guarantees of non-repetition. That, presumably, was why some members were so keen to retain the provision in article 30. Personally, however, he found it shocking that a State, which had not been injured, could demand such assurances and guarantees rather than apologies. The issue was not of secondary importance, as it might seem.

72. Mr. LUKASHUK said that the provision contained in article 30, subparagraph (b), was well founded. Not only was it supported by practice and doctrine, but it



applied to wrongdoing States the elementary psychology applied by mothers to their children. Recalcitrant States were simply asked to promise that they would not do it again.

73. Mr. SIMMA said that he did not agree with Mr. Pellet's reading of the ruling by ICJ in the *LaGrand* case. Mr. Pellet attached too much weight to one sentence in which the Court had said that in certain cases it was not sufficient for the wrongdoing State to apologize and that it should take further measures. It was misguided to take that as meaning that assurances and guarantees of non-repetition properly belonged with satisfaction rather than with cessation. As for Mr. Pellet's concern about article 48, paragraph 2 (a), the situation would remain unchanged even if his advice were followed. Under article 48, a State other than an injured State could demand reparation, which also comprised satisfaction, and the corollary was that, even if assurances and guarantees of non-repetition were bracketed with satisfaction, they would still be contained in article 48.

74. Mr. ECONOMIDES said that the role of assurances and guarantees of non-repetition under article 30 was simply to act as an optional complement to cessation. That was not, however, to say that such assurances and guarantees could not also play a positive role in satisfaction. Various kinds of satisfaction were possible, after all. He therefore agreed with the form of the draft as it stood.

75. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the titles and texts of the draft articles on responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading.

*It was so agreed.*

76. Mr. YAMADA said it was a cause for satisfaction that the entire set of draft articles had been adopted, the whole of the second reading having been completed within the relatively short period of five years. It was a significant achievement, for which credit was due to the successive special rapporteurs and, in particular, to Mr. Crawford. The final text showed a significant improvement over the previous one and more or less reflected the current customary rules and State practice. That did not mean, however, that he necessarily endorsed every article.

77. When a State committed an internationally wrongful act—a breach of an international obligation—the rights of the other States concerned were affected. That was the concept of “injury”. Mr. Brownlie had written in his *Principles of Public International Law*<sup>7</sup> that the term “breach of duty” denoted an illegal act or omission, an “injury” in the broad sense. It was doubtful, however, whether the definition of “injury” set out in article 31, paragraph 2, corresponded with Mr. Brownlie's or his own understanding. The article gave “injury” a broader scope than that of “damage”.

78. That was not the only example of broadening the scope of “injury” in the draft articles. According to article 48, if the obligation *erga omnes* was breached, States other than injured States could claim cessation or non-repetition, as provided for in article 30, even though they could not directly claim reparation because they had not suffered injury. It could therefore be said that those interested States had suffered something other than “injury” through the breach of the obligation in question—what might be termed “infringement of interests of a legal nature”—but that, too, was covered by the draft articles, giving a broader scope to “injury” as defined in article 31, paragraph 2. The relationship and demarcation among the three concepts—damage, injury and infringement of interests of a legal nature—remained ambiguous. He hoped that they would be clarified as case law and State practice developed.

79. In his view, the addition of subparagraph (b) (ii) to article 42 (Invocation of responsibility by an injured State) gave too wide a scope to the concept of the injured State. It was argued that the so-called integral obligation existed in the 1969 Vienna Convention, in article 60, paragraph 2 (c), and it should be retained because the new provisions on countermeasures did not permit recourse to it by States other than the injured State. There had been no cases, however, of treaties being terminated on the basis of article 60, paragraph 2 (c). The integral obligation element of treaties was too important to be discarded; a treaty could be paralysed if individual countermeasures were allowed. Integral obligation was best safeguarded by relying on the self-contained mechanism of the treaty in question. If the paragraph had been put to the vote, therefore, he would have voted against it.

80. He had serious reservations about articles 40 (Application of this Chapter) and 41 (Particular consequences of a serious breach of an obligation under this Chapter). Admittedly, such breaches existed and they were qualitatively different from other breaches. What he could not accept was that there were particular legal consequences arising out of serious breaches. The legal consequences in the case of article 41 were not something special and did not warrant the retention of the category of such breaches in the State responsibility regime. Again, he would have voted against articles 40 and 41 if they had been put to the vote.

81. He also had serious reservations about article 48, paragraph 2 (b), particularly the last phrase “or of the beneficiaries of the obligation breached”, which could give rise to many difficulties. Whereas article 31 stipulated that the responsible State was under an obligation to make full reparation for the injury, article 48 related to States that had suffered no injury. Article 48, paragraph 2 (b), must therefore be authorizing such a State to claim performance of the reparation obligation for injured individuals who were not its own nationals. According to his understanding, reparation should, in the context of State responsibility, be made by States to other States, not to individuals. It could therefore be said that reparation under article 48, paragraph 2 (b), was actually an “obligation in the air”, which claimants could not invoke for themselves. That raised a serious problem about “to whom the obligation of reparation is owed” and “to

<sup>7</sup> See 2689th meeting, footnote 4.

whom reparation due shall be allocated”. The confusion was compounded by the phrase “obligation owed to the international community as a whole”, appearing in article 33 (Scope of international obligations set out in this Part) and elsewhere, which could be construed as including the responsibility of States to individuals and non-governmental organizations, not only to other States. Yet the work of the Commission dealt only with the relationship between States. The phrase “international community of States as a whole”, as proposed by the Governments of France, Mexico, the United Kingdom and others, was therefore preferable, in order to avoid confusion. Accordingly, he could not endorse the last phrase of article 48, paragraph 2 (b).

82. The provisions on countermeasures had been improved greatly, although he still had some doubts about the narrow definition of the object of countermeasures in article 49 (Object and limits of countermeasures) and about the fact that proportionality, as defined in article 51 (Proportionality), did not seem to rally with the object of countermeasures. He was, however, at one with the Commission in recommending the draft articles as a whole to the General Assembly.

*The meeting rose at 1 p.m.*

## 2702nd MEETING

*Monday, 6 August 2001, at 10 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, 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.

### Draft report of the Commission on the work of its fifty-third session (*continued*)

#### CHAPTER V. *State responsibility* (A/CN.4/L.608 and Corr.1 and Add.1 and Corr.1 and Add.2–10)

##### A. *Introduction* (A/CN.4/L.608)

##### Paragraph 1

1. Mr. GALICKI proposed that, in the footnote, something should be added to refer to the reports of the first Special Rapporteur on State responsibility, F. V. García Amador, in order to re-establish the balance with the references to the reports of the other special rapporteurs.

*Paragraph 1, as amended, was adopted.*

##### Paragraphs 2 to 11

*Paragraphs 2 to 11 were adopted.*

*Section A, as amended, was adopted.*

#### B. *Consideration of the topic at the present session* (A/CN.4/L.608 and Corr.1)

##### Paragraphs 12 to 16

*Paragraphs 12 to 16 were adopted.*

##### Paragraph 17

2. Mr. PELLET proposed that the words “to discard the concept of ‘international crimes of State’” in the second sentence should be replaced by the words “not to make reference to the concept of ‘international crimes of State’”, which were more neutral.

*Paragraph 17, as amended, was adopted.*

##### Paragraph 18

3. Mr. GAJA proposed that in the last phrase of the paragraph the word “consequences” should be added before the words “were neither”.

4. Mr. ECONOMIDES proposed that, at the end of the fourth phrase of the second sentence, the word “general” should be added before the words “international law” because very specific traces of punitive damages were to be found in regional international law.

5. Mr. CRAWFORD (Special Rapporteur) said that he accepted the two proposed amendments and noted that, at the end of the fourth phrase of the second sentence, the text should read: “which were not available under general international law at present”.

*Paragraph 18, as amended, was adopted.*

##### Paragraphs 19 to 32

*Paragraphs 19 to 32 were adopted.*

##### Paragraph 33

6. Mr. GAJA proposed that part of the last sentence should be deleted. The sentence would then read: “Furthermore, codification conferences tended to make very few changes to consensus texts prepared by the Commission.”

7. Mr. CRAWFORD (Special Rapporteur) said that he accepted that amendment, but noted that the word “had” should be added before the word “tended”.

*Paragraph 33, as amended, was adopted.*

Paragraph 34

*Paragraph 34 was adopted.*

Paragraph 35

8. Mr. TOMKA (Chairman of the Drafting Committee) proposed that, in the last sentence, the words “the practice of” should be replaced by the words “the jurisprudence of”.

*Paragraph 35, as amended, was adopted.*

Paragraph 36

9. Mr. ECONOMIDES proposed that, at the end of the first sentence of the French text, the word *validité* should be replaced by the word *importance*.

10. Mr. CRAWFORD (Special Rapporteur), accepting the proposal, said that, in English, the word “validity” should be replaced by the word “value”.

*Paragraph 36, as amended, was adopted.*

Paragraph 37

11. Mr. ECONOMIDES proposed that the following sentence should be added between the penultimate and last sentences: “The 1969 Vienna Convention introduced the fundamental concept of peremptory norms” because that had been stated during the discussion, but not reported in the commentary.

12. Mr. CRAWFORD (Special Rapporteur) said that he could agree to the addition of that sentence, but at the end of the paragraph. Since what was involved was no longer the link between codification and progressive development, that last sentence should be introduced by a transitional sentence, which might read: “In addition, substantial elements of international law had been articulated in conventions. For example, . . .”.

*Paragraph 37, as amended, was adopted.*

Paragraph 38

13. Mr. GAJA proposed that, in the penultimate sentence, the words “in the second phase” should be deleted because they duplicated the words “at a later stage”. He also proposed that the word “conclusion” should be replaced by the word “adoption”.

14. Mr. ECONOMIDES said that there was an imbalance in the way the two parts of the understanding the Commission had reached were reported. He therefore proposed that the wording of the penultimate sentence should be strengthened and amended to read: “The Commission also agreed that, considering the importance of

the topic, in the second phase, it should recommend to the General Assembly, the conclusion of a convention on this topic”.

15. Mr. PAMBOU-TCHIVOUNDA, supporting that proposal, said that the same result could be achieved simply by deleting the word *souhaiter* in the French text.

16. Mr. CRAWFORD (Special Rapporteur) said that he agreed with that proposal, which would achieve the desired result without requiring the full rewording of the sentence. He also accepted the amendments proposed by Mr. Gaja and suggested that the word “indicate” should be replaced by the word “propose”.

17. Mr. ECONOMIDES said that the words “may consider” were weak and should be replaced by the words “should consider”.

18. Mr. CRAWFORD (Special Rapporteur) said that, in order to harmonize the different language versions, the word “should” should be added before the word “consider”, although such an addition was not entirely necessary.

19. Mr. KATEKA said that he did not see why the words “in the second phase” would be deleted when the words “in the first instance” were used at the beginning of the paragraph.

20. Mr. PELLET said that he agreed with Mr. Kateka, but pointed out that it would be more logical to use the words “in the second instance”.

21. Mr. CRAWFORD (Special Rapporteur) said that, in English at least, the words “in a second and later stage” would solve the problem. In that case, the words “at a later stage” at the end of the sentence should be deleted.

22. Mr. ROSENSTOCK said that, in the first sentence, the words “in the first instance” were confusing because they implied that the Commission might act in two stages.

23. Mr. PELLET said that he agreed with Mr. Rosenstock. The Commission would only—and could only—make a recommendation that would be broken down into two parts. He therefore proposed that, in the first sentence, the words “in the first instance” should be placed after the words “General Assembly”.

24. Mr. CRAWFORD (Special Rapporteur) said that he accepted that proposal. The words “in the first instance” should even be placed after the word “should”. That amendment would be in addition to those proposed for the penultimate sentence.

25. Mr. TOMKA (Chairman of the Drafting Committee) said that the content of paragraph 38 depended on the decision that the Commission would formally adopt. He therefore proposed that paragraph 38 should be adopted provisionally, with the amendments proposed. After having taken its decision, the Commission could reconsider the paragraph and make the necessary changes.

*Paragraph 38 was adopted, as provisionally amended.*

Paragraphs 39 to 42

*Paragraphs 39 to 42 were adopted.*

**E. Text of the draft articles on responsibility of States for internationally wrongful acts (A/CN.4/L.608/Add.1 and Corr.1 and Add.2–10)**

**2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO**

26. Mr. PELLET paid tribute to the Special Rapporteur for the great achievement of having prepared the commentaries. He nevertheless wished to know why the Special Rapporteur had not kept to the excellent intentions he had expressed at the outset, namely, that he would not refer to doctrine in second-reading commentaries. Even if he had tried not to refer only to English-speaking doctrine, the result was still questionable.

27. Mr. CRAWFORD (Special Rapporteur) said that he would have preferred not to make any reference to modern-day legal writings on State responsibility, but several experts had convinced him that it was advisable to illustrate the commentaries by means of some references. The Commission would have to decide whether to keep those references or delete them.

28. In reply to a question by Mr. Sreenivasa Rao, he said that he had tried to avoid any specific or general reference to unresolved disputes relating to State responsibility. He also thanked the Working Group chaired by Mr. Melescanu for the work it had done.

29. Mr. PELLET said that he would like all references to modern doctrine to be deleted.

30. Mr. KATEKA said that the references to modern doctrine were very useful and that, in order to meet Mr. Pellet's concern for balance, other references might be added to the commentaries.

31. Mr. PAMBOU-TCHIVOUNDA said that he was also in favour of such an approach, which he found well balanced, and that he did not see why the Commission should not refer to modern doctrine.

32. Mr. CRAWFORD (Special Rapporteur) proposed that the references should be retained and considered on a case-by-case basis.

33. The CHAIRMAN said he thought that the large majority of members of the Commission were in favour of retaining those references.

*It was so agreed.*

*General Commentary (A/CN.4/L.608/Add.2)*

Paragraph (1)

34. Mr. LUKASHUK said that the wording of the first sentence should be strengthened by adding the phrase “, by way of codification and progressive development,” after the words “These articles seek to formulate”.

35. Mr. TOMKA (Chairman of the Drafting Committee) proposed that, for the sake of clarity, the words “which flow from this responsibility” at the end of the second sentence should be replaced by the words “which flow from such internationally wrongful acts”.

36. Mr. CRAWFORD (Special Rapporteur) said that he would prefer the words “and the legal consequences which flow therefrom”.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

Paragraph (3)

37. Mr. PELLET, supported by Mr. KAMTO, proposed that in subparagraph (e) the words “e.g. in cases of *force majeure* or distress” should be deleted because there was no point in mentioning those factors and not others.

38. Mr. TOMKA (Chairman of the Drafting Committee) proposed that at the beginning of subparagraph (f) the word “consequences” should be replaced by the word “content”, which was used in the title of Part Two (Content of the international responsibility of a State).

39. Mr. CRAWFORD (Special Rapporteur), replying to a request by Mr. Lukashuk, proposed that at the end of subparagraph (h) the words “cessation or restitution” should be replaced by “the fulfilment of the obligations of the responsible State under these articles”. He also proposed that the last phrase in the last sentence of paragraph (3) should be deleted because it had become superfluous as a result of the amendment to the first sentence of paragraph (1) proposed by Mr. Lukashuk.

*Paragraph (3), as amended, was adopted.*

Paragraphs (4) to (6)

*Paragraphs (4) to (6) were adopted.*

*The general commentary, as amended, was adopted.*

**PART ONE. THE INTERNATIONALLY WRONGFUL ACT OF A STATE**

**CHAPTER I. GENERAL PRINCIPLES**

*Commentary to article 1 (Responsibility of a State for its internationally wrongful acts)*

Paragraph (1)

40. Mr. LUKASHUK proposed that the word “all” in the penultimate sentence should be deleted.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

## Paragraph (3)

41. Mr. PELLET proposed that three footnotes should be added to explain the three points of view referred to, namely, those of Anzilotti, Kelsen and the third, which seemed to be that of Ago.

42. Mr. LUKASHUK said that he would also like Kelsen's position, especially with regard to sanctions, to be explained in greater detail in a footnote.

43. Mr. CRAWFORD (Special Rapporteur) said that he accepted those proposals, but would like the third view, which had come to prevail, to be presented in the body of the text as that of the Commission, even though it had originated with Ago. It should accordingly be referred to in the footnote.

*It was so agreed.*

*Paragraph (3), as amended, was adopted.*

## Paragraph (4)

44. Mr. KAMTO said that the sentence following the quotation relating to the *Barcelona Traction* case should be amended to read: "the protection of certain basic human rights and the fulfilment of certain essential obligations of States".

45. Mr. PAMBOU-TCHIVOUNDA said he also regretted that it was not clear who was entitled to the basic rights in question.

46. Mr. MELESCANU said that the Working Group had purposely decided not to restrict such basic rights to human rights.

47. Mr. CRAWFORD (Special Rapporteur) said that he supported Mr. Melescanu's comment.

*Paragraph (4) was adopted.*

## Paragraphs (5) to (7)

*Paragraphs (5) to (7) were adopted.*

## Paragraph (8)

48. Mr. GAJA proposed that, after the third sentence the following sentence should be inserted to read: "Moreover, the latter term appears to imply that the legal consequences are intended by its author." Accordingly, the beginning of the next sentence should read: "For the same reasons".

*Paragraph (8), as amended, was adopted.*

*The commentary to article 1, as amended, was adopted.*

*Commentary to article 2* (Elements of an internationally wrongful act of a State)

## Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

## Paragraph (3)

49. Mr. LUKASHUK said that, however brilliant it might be, the analysis of the terms "subjective" and "objective" was not necessary.

50. Mr. CRAWFORD (Special Rapporteur) said that those terms were used so often in the articles that he thought their meaning should be explained.

*Paragraph (3) was adopted.*

## Paragraphs (4) and (5)

*Paragraphs (4) and (5) were adopted.*

## Paragraph (6)

51. Mr. HAFNER proposed that the beginning of the second sentence should be amended to read: "Under many national legal systems, the State consists of different legal persons".

52. Mr. CRAWFORD (Special Rapporteur) proposed that the word "national" in that sentence should be deleted.

*Paragraph (6), as amended, was adopted.*

## Paragraph (7)

53. Mr. PELLET said that he did not see why reference was made to the English version of the articles in the last sentence of the French text. He therefore proposed that the French text should be amended to read: *l'expression retenue est "violation d'une obligation internationale"*. That comment also applied to the other languages.

54. Mr. CRAWFORD (Special Rapporteur) said that he agreed with that proposal.

*Paragraph (7), as amended, was adopted.*

## Paragraph (8)

55. Mr. LUKASHUK said he was surprised that the words "infringement of the rights of others" were used in the first sentence, whereas the words "contrary to the treaty right[s]" were used in the second sentence.

56. Mr. CRAWFORD (Special Rapporteur) proposed that in the first sentence the words "infringement of the rights of others" should be amended to read: "conduct contrary to the rights of others".

*Paragraph (8), as amended, was adopted.*

## Paragraph (9)

57. Mr. PELLET said it was clear that the existence of "damage" was not a necessary condition for an internationally wrongful act, but the Commission must not appear to be overlooking the extent of the damage in the case of the implementation of responsibility. He there-

fore proposed that the following two sentences should be added to paragraph (9): “However, the existence of damage is, in most cases, a necessary condition for the implementation of responsibility in accordance with the provisions of Part Three of the present articles. This is true except in the cases dealt with in article 48.”

58. Mr. CRAWFORD (Special Rapporteur) said that the sentences that Mr. Pellet proposed to add were not necessary.

*Paragraph (9) was adopted.*

Paragraph (10)

*Paragraph (10) was adopted.*

59. Mr. PELLET said that a new paragraph on fault should be added after paragraph (10).

60. Mr. CRAWFORD (Special Rapporteur) said that the question of fault was already dealt with in paragraph (3) of the commentary to article 2. He was, however, not opposed to the idea of adding a new paragraph on that question, provided that its wording was compatible with paragraph (3) and it came after paragraph (9), not after paragraph (10).

61. Mr. TOMKA (Chairman of the Drafting Committee) proposed that Mr. Pellet should work with the Special Rapporteur on a written text to be distributed to the members of the Commission, who could then take a decision on it.

62. The CHAIRMAN said that, if he heard no objection, he would take it that the members of the Commission agreed to that proposal.

*It was so agreed.*

Paragraph (11)

*Paragraph (11) was adopted.*

Paragraph (12)

63. Mr. LUKASHUK said that the third and fourth sentences were unnecessary because the origin of the obligation breached was not relevant in that particular case. He therefore proposed that they should be deleted.

64. Mr. CRAWFORD (Special Rapporteur) said that he supported Mr. Lukashuk's proposal, subject to replacing the word “these” in the penultimate sentence by “the”.

*Paragraph (12), as amended, was adopted.*

*Commentary to article 3* (Characterization of an act of a State as internationally wrongful)

Paragraphs (1) to (5)

*Paragraphs (1) to (5) were adopted.*

Paragraph (6)

65. Mr. GAJA said that, in the footnote, the word “capacity” should be replaced by the word “competence”.

*Paragraph (6), as amended, was adopted.*

Paragraphs (7) to (9)

*Paragraphs (7) to (9) were adopted.*

*The commentary to article 3, as amended, was adopted.*

#### CHAPTER III. BREACH OF AN INTERNATIONAL OBLIGATION

*Commentary to chapter III* (A/CN.4/L.608/Add.7)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

66. Mr. PELLET said that, in the last sentence, the word “systematic” should be deleted because article 15 did not refer to a “systematic breach”.

67. Mr. CRAWFORD (Special Rapporteur) proposed that the same wording as in the text of article 15 should be used in order to take account of Mr. Pellet's comment. The end of the last sentence would then read: “the breach lies in a series of acts defined in aggregate as wrongful (art. 15)”.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

*The commentary to chapter III, as amended, was adopted.*

*Commentary to article 12* (Existence of a breach of an international obligation)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

68. Mr. ECONOMIDES said that the word “procedures” in the sixth sentence should be replaced by the word “provisions”.

69. Mr. PELLET proposed that, in the last sentence, the word “however” should be deleted because its use was not logical.

*Paragraph (3), as amended, was adopted.*

## Paragraph (4)

70. Mr. PELLET said that, if the same obligations were being referred to in the first and second sentences, and not obligations likely to be breached, on the one hand, and those relating to responsibility, on the other, that should be more clearly indicated by starting the second sentence with the words “Obligations may arise”.

*Paragraph (4), as amended, was adopted.*

## Paragraph (5)

*Paragraph (5) was adopted.*

## Paragraph (6)

71. Mr. GALICKI said that the first sentence was awkward and that, bearing in mind the discussions the Commission has held on that question, reference should not be made to the “criminal” responsibility of States.

72. Mr. KAMTO said that the words *certain*s and *plusieurs* duplicated one another and that the words *ou plusieurs* should be deleted. As to the penultimate sentence, the word “thus” did not belong in a sentence beginning with the word “But”.

73. Mr. LUKASHUK said that he agreed with Mr. Galicki’s comment and stressed that, somewhere in the commentary, emphasis should be placed on the basic idea that State responsibility was neither civil nor criminal, but *sui generis*.

74. Mr. PELLET said that he shared Mr. Lukashuk’s view, but pointed out that that was precisely what was stated in the first sentence.

75. Mr. CRAWFORD (Special Rapporteur) said that the words *ou plusieurs* could be deleted, as Mr. Kamto had proposed, even though the problem did not arise in English, which used the words “some or many”. With regard to Mr. Galicki’s comment, the first sentence stated an indisputable truth.

76. Mr. ROSENSTOCK said that the reference to Part One of the articles had no place in paragraph (6) because it suggested that the statement contained in the first sentence related particularly to that Part, whereas it applied to the articles as a whole. A possible solution to Mr. Galicki’s objection would be to delete the first sentence of paragraph (6) and amend the end of paragraph (5) to read: “As far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility. Nor does any distinction exist between the ‘civil’ and ‘criminal’ responsibility as is the case in internal legal systems”.

*Paragraph (6), as amended, was adopted.*

## Paragraph (7)

77. Mr. PELLET, supported by Mr. HAFNER, proposed that the present text of the first sentence should be replaced by the following: “Even what may be called the

fundamental principles of the international legal order do not derive from any special source of law.”

78. Mr. ECONOMIDES, supported by Mr. KAMTO, said that, even as newly worded, the sentence was not clear. He therefore proposed that it should be deleted.

79. Mr. CRAWFORD (Special Rapporteur) said that he accepted Mr. Pellet’s proposal. He was not in favour of the deletion of the sentence because the structure of the text required a connecting sentence.

80. Mr. PELLET proposed that, in the third sentence, at least in the French text, the words “as the holders of legislative authority in respect of the international community” should be replaced by the words “as the normative authority on behalf of the international community”. In the fourth sentence, he proposed that the words “by definition” should be added before the word “affect”.

81. Mr. CRAWFORD (Special Rapporteur) said that he accepted Mr. Pellet’s two proposals.

82. Mr. HAFNER said that he was not sure whether States were really the only holders of normative authority and proposed that the word “first” should be added before the word “holders”.

83. Mr. CRAWFORD (Special Rapporteur) said that he would prefer to keep the sentence as it stood.

84. Mr. ECONOMIDES proposed that, in order to take account of Mr. Hafner’s comment, the words “par excellence” should be added between the word “States” and the word “have”. In the following sentence, the words “may entail” should be replaced by the word “entail”.

85. Mr. CRAWFORD (Special Rapporteur) said that he had no objection to the use of the term “par excellence”, but he did think it was important to keep the words “may entail” because the breach had to be “serious” in order to entail a stricter regime of responsibility.

## Paragraph (8)

86. Mr. LUKASHUK said that, since there was no need to establish a hierarchy among the different sources of law, the beginning of the last sentence should be amended to read: “The special importance of the Charter, as reflected in its Article 103, derives from its express provisions”.

87. Mr. KAMTO said that he supported Mr. Lukashuk’s proposal and suggested that the sentence might be further simplified by deleting the phrase between dashes.

88. Mr. HAFNER said that he supported the proposals by Mr. Lukashuk and Mr. Kamto.

*Paragraph (8), as amended, was adopted.*

## Paragraphs (9) and (10)

*Paragraphs (9) and (10) were adopted.*

Paragraph (11)

89. Mr. PELLET said that at the beginning of the fifth sentence the words “But it is neither exhaustive nor exclusive” should be amended to read: “But it is not exclusive” because it made no sense to say that a distinction was exhaustive.

90. Mr. CRAWFORD (Special Rapporteur) said that he agreed with Mr. Pellet’s comment.

*Paragraph (11), as amended, was adopted.*

Paragraph (12)

*Paragraph (12) was adopted.*

*Commentary to article 13* (International obligation in force for a State)

Paragraph (1)

91. Mr. GAJA said that in the first sentence the words “the obligation is in force for the State” should be amended to read “the State is bound by the obligation”.

92. Mr. ECONOMIDES said that the wording of article 13 was entirely suitable for treaty obligations, but, for other obligations (customary and deriving from peremptory norms of international law), the important element was the existence of the rule.

93. Mr. TOMKA (Chairman of the Drafting Committee) said that the two elements were important. There had to be an obligation and the State had to be bound by that obligation.

94. Mr. CRAWFORD (Special Rapporteur) said that there were rules of international law by which States were not bound. The fact that a State was bound was therefore an important element.

95. Mr. KUSUMA-ATMADJA said that he agreed with the Special Rapporteur. The provision, as it stood, was simple and clear.

96. Mr. PAMBOU-TCHIVOUNDA said that, throughout the draft articles on State responsibility, reference should be made to “an act of the State” and not “an act of a State”.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

Paragraph (3)

97. Mr. KAMTO said that it should be made clear at the beginning of paragraph (3) to which case reference was being made.

98. Mr. CRAWFORD (Special Rapporteur), taking note of Mr. Kamto’s comment, said that he would add the necessary reference.

*Paragraph (3) was adopted on that understanding.*

Paragraphs (4) to (9)

*Paragraphs (4) to (9) were adopted.*

*The commentary to article 13, as amended, was adopted.*

*Commentary to article 14* (Extension in time of the breach of an international obligation)

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

99. Mr. PELLET said that he did not understand what was meant by a “complete” act. He did not know whether that was a matter of substance or of form, but, in any event, “complete” was not the right term.

100. Mr. CRAWFORD (Special Rapporteur) said that a distinction was being made between an act that was “completed” and one that was continuing.

101. Mr. KAMTO proposed that the word *achevé* should be used in French.

102. Mr. PELLET said that he could accept the term *achevé*. In that case, however, it was the term “continuing” which seemed to be a problem, since all acts, whether continuing or not, were bound to be *achevé* at some time or another.

103. Mr. RODRÍGUEZ CEDEÑO said that the Spanish term *consumado* and *continuo* were satisfactory.

104. Mr. PAMBOU-TCHIVOUNDA asked whether the continuing or complete nature of an act depended on the act itself or on its effects.

*The meeting rose at 1.10 p.m.*

## 2703rd MEETING

*Monday, 6 August 2001, at 3.05 p.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki,



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.

### Draft report of the Commission on the work of its fifty-third session (*continued*)

#### CHAPTER V. *State responsibility* (*continued*) (A/CN.4/L.608 and Corr.1 and Add.1 and Corr.1 and Add.2–10)

##### E. Text of the draft articles on responsibility of States for internationally wrongful acts (*continued*) (A/CN.4/L.608/Add.1 and Corr.1 and Add.2–10)

#### 2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*)

##### PART ONE. THE INTERNATIONALLY WRONGFUL ACT OF A STATE (*continued*)

#### CHAPTER III. BREACH OF AN INTERNATIONAL OBLIGATION (*continued*)

*Commentary to article 14* (Extension in time of the breach of an international obligation) (*continued*) (A/CN.4/L.608/Add.7)

Paragraph (4) (*continued*)

1. Mr. PELLET said that it should be made clear that an act that had a continuing character but that was complete did not fall within the scope of article 14, paragraph 1. Also, in the interests of clarity, in the French text *accompli* should be replaced by *consommé*.

2. Mr. CRAWFORD (Special Rapporteur) agreed to draft a new sentence in line with Mr. Pellet's suggestion.

Paragraphs (5) to (7)

*Paragraphs (5) to (7) were adopted.*

Paragraph (8)

3. Mr. PAMBOU-TCHIVOUNDA asked whether the first sentence should not refer to the duration of the breach of the obligation rather than the duration of the obligation breached.

4. Mr. CRAWFORD (Special Rapporteur) explained that obligations, as well as breaches of obligations, could have a limited duration. The "*Rainbow Warrior*" case illustrated that there could be no continuing breach once the obligation came to an end.

*Paragraph (8) was adopted.*

Paragraphs (9) to (13)

*Paragraphs (9) to (13) were adopted.*

Paragraph (14)

5. Mr. GAJA said that the phrase "if the obligation is in force", in the third sentence, should be replaced by "if the State is bound by the obligation".

6. Mr. LUKASHUK, referring to the same sentence, said that as an "event" could not be the object of international law and obligations, an alternative such as an "act of State" should be used.

7. Mr. GAJA pointed out that the phrase "during which the event continues and remains not in conformity with what is required by that obligation" was taken from paragraph 3 of the article and therefore should not be changed.

8. Mr. CRAWFORD (Special Rapporteur) agreed to the amendment proposed by Mr. Gaja.

*Paragraph (14), as amended, was adopted.*

*Commentary to article 15* (Breach consisting of a composite act)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

9. Mr. PELLET said he failed to see what was meant by a "systematic" obligation. Why use "systematic" if "complex" or, simply, "composite" was meant? There was also a contradiction between the fifth sentence, "The isolated killing of a person . . . is not genocide", and the last sentence, ". . . any individual responsible for any of them [the acts] with the relevant intent will have committed genocide". The killing of a single person on the basis of a genocidal ideology was indeed a genocidal act, and he suggested that the sentence beginning "The isolated killing . . ." should be deleted.

10. Mr. ECONOMIDES said that the footnote was incomplete; the reference to other concepts of complex acts not included in the articles was unexplained and should be deleted.

11. Mr. CRAWFORD (Special Rapporteur) said that the footnote could end after "p. 709" to avoid confusion. With regard to the sentence Mr. Pellet wished to have deleted, it emphasized killings which were carried out in isolation and could not therefore be classed as genocide, but he would not object to deleting it as the last sentence in the paragraph made the point quite clearly. He had introduced the word "systematic" in an attempt to elaborate on the concept of an international obligation that defined certain conduct in aggregate as wrongful, but he would be glad to produce some alternative wording for approval by the Commission.

Paragraph (4)

12. Mr. PELLET said that the paragraph would be greatly improved if the Special Rapporteur could give an example of a simple act that caused continuing breaches.

13. Mr. CRAWFORD (Special Rapporteur) gave the example of the detention of a person over a period of time or a prohibition involving a series of different acts by the responsible State. He would look for an example from a specific case and submit it later for the approval by the Commission. He would also remove the words “or systematic” from the first sentence.

Paragraphs (5) and (6)

*Paragraphs (5) and (6) were adopted.*

Paragraph (7)

14. Mr. GALICKI questioned the need for quotation marks around “systematic” and “inaugurated”.

15. Mr. CRAWFORD (Special Rapporteur) said he would remove the quotation marks and also find an alternative for “systematic”.

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

16. Mr. PELLET proposed that the first sentence should be amended to read: “. . . the time at which the last action or omission occurs which . . . is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series.”

*Paragraph (8), as amended, was adopted.*

Paragraph (9)

*Paragraph (9) was adopted.*

Paragraph (10)

17. Mr. GAJA said that the reference to individual responsibility in the penultimate sentence was confusing and should be omitted, leaving the last two sentences to be merged so that they read: “If this were not so, the effectiveness of the prohibition would thereby be undermined.”

*Paragraph (10), as amended, was adopted.*

Paragraph (11)

18. Mr. GALICKI said that the article should be correctly quoted in the third sentence and the quotation marks used properly so that it read: “. . . the ‘first of the actions or omissions of the series’ for the purposes of . . .”.

19. Mr. GAJA suggested some rewording to avoid the overuse of the word “force”. In the second sentence, “the international obligation must be in force” should be replaced by “the State must be bound by the international obligation”. In the third sentence, “was not in force” should be replaced by “did not exist”, “came into force” by “came into being”, and “the obligation came into force” by “the obligation came into existence”.

*Paragraph (11), as amended by Mr. Gaja, was adopted.*

#### CHAPTER I. GENERAL PRINCIPLES (*continued*)

*Commentary to article 2* (Elements of an internationally wrongful act of a State) (*concluded*) (A/CN.4/L.608/Add.2)

New paragraph (9 bis)

20. The CHAIRMAN drew attention to the following proposed text for a new paragraph (9 bis):

“A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by ‘fault’ one understands the existence, for example, of an intention to harm. The international responsibility of a State in this regard presents an ‘objective’ character in the sense that in the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.”

21. Mr. Sreenivasa RAO said that the last sentence was unclear. It appeared to be a roundabout way of saying that fault was unrelated to intent and therefore that fault was not necessary for defining obligations.

22. Mr. PELLET said he had drafted the text and that Mr. Sreenivasa Rao’s interpretation was correct. The third sentence described an exception to the general rule that fault was not an element of international responsibility. In certain circumstances, such as cases of genocide, a subjective mental element could be an important part of an obligation, and some primary obligations could only be breached when there was intention.

23. Mr. ECONOMIDES said that, as he understood it, the paragraph was a complicated way of saying that fault was not a necessary element of the internationally wrongful act of a State except when it was provided for in a primary rule.

24. Mr. GAJA suggested that the meaning would be clearer if the first part of the last sentence was omitted, so that it began with: “In the absence of . . .”.

25. Mr. KAMTO suggested that *connexe* would be better than *proche* as a translation into French of “related”.

*Paragraph (9 bis), as amended, was adopted.*

*The commentary to article 2, as amended, was adopted.*

#### CHAPTER IV. RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

*Commentary to chapter IV* (A/CN.4/L.608/Add.1)

26. Mr. PELLET said that the French version of the entire commentary should be amended to conform to the wording decided on for the final version of article 17, where the word *direction* had been replaced by *directive*.

Paragraph (1)

27. Mr. PELLET said it was not clear precisely what was meant by the recurring phrase “independent responsibility”. Did it mean “the author’s own responsibility”?

28. Mr. ROSENSTOCK said that he found the phrase useful, and assumed the Special Rapporteur had coined it to contrast with the idea of “joint and several”.

29. Mr. CRAWFORD (Special Rapporteur) said that both Mr. Pellet and Mr. Rosenstock had correctly understood his intentions, but he would draft an explanation of the phrase to be included on its first occurrence.

Paragraphs (2) to (4)

*Paragraphs (2) to (4) were adopted.*

Paragraph (5)

30. Mr. HAFNER proposed the inclusion of the words “the organ of” between the words “conduct of” and “one State”.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

31. Mr. LUKASHUK proposed that, in order to bring the wording of the third sentence into line with that of article 16, the words “the commission of an internationally wrongful act by” should be inserted between “control over” and “the latter”.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

*Paragraph (7) was adopted.*

Paragraph (8)

32. Mr. LUKASHUK suggested that the word “lawful”, in the fourth sentence, should be replaced by “not wrongful”.

33. Mr. CRAWFORD (Special Rapporteur) proposed that the word “lawful” should simply be replaced by the word “not”.

*It was so agreed.*

*Paragraph (8), as amended, was adopted.*

Paragraph (9)

34. Mr. PELLET said the second and third sentences implied that support was a form of incitement, which was certainly not the case. He proposed that the third sentence should be deleted. In the sixth sentence, he queried the phrase “accessory after the fact” and suggested that that sentence, too, might be deleted. In the French text

of the twelfth sentence, the words *peut naître* should be replaced by *naît*.

35. Mr. CRAWFORD (Special Rapporteur) said that, as a consequence of Mr. Pellet’s final amendment, in the English version of the twelfth sentence, the word “can” should be deleted.

*It was so agreed.*

36. Mr. CRAWFORD (Special Rapporteur), responding to Mr. Pellet’s comment on the sixth sentence, said that the sentence did not suggest that being an accessory after the fact was a form of incitement, which it obviously was not: it was a form of complicity. He drew attention to the word “Another”, which made it clear that incitement was being contrasted, not equated, with being an accessory after the fact. He would prefer to retain the sixth sentence.

37. Mr. PELLET said that after hearing Mr. Crawford’s remarks, he thought that the sixth sentence could be retained, but the French version of the first words *Il y a aussi le* should be replaced by the words *Un autre*.

*It was so agreed.*

38. Mr. CRAWFORD (Special Rapporteur) said he endorsed Mr. Pellet’s proposal to delete the third sentence, because it was quite true that expressing support and incitement were two entirely different things.

*It was so agreed.*

39. Mr. GAJA proposed that the words “concrete support and” should be replaced by “concrete support or” in the fourth sentence of the English version and that the words “peremptory obligations” should be replaced by “obligations under peremptory norms” in the twelfth sentence.

*It was so agreed.*

40. Mr. LUKASHUK proposed that the word “exceptionally”, in the penultimate sentence, should be deleted.

*It was so agreed.*

41. In response to a question on the first footnote to the paragraph from Mr. KAMTO, Mr. CRAWFORD (Special Rapporteur) said that the phrase “dissenting opinion” had been incorrectly translated into French.

*Paragraph (9), as amended, was adopted.*

*The commentary to chapter IV, as amended, was adopted.*

*Commentary to article 16* (Aid or assistance in the commission of an internationally wrongful act)

Paragraph (1)

42. Mr. LUKASHUK said that the last sentence added an entirely new element to State responsibility, implying that assistance in the commission of a wrongful act could constitute a major component of a wrongful act. Either the text of article 16 should be amended to include that new element or the sentence should be deleted.

43. Mr. CRAWFORD (Special Rapporteur) said he would greatly prefer to retain the sentence and thought Mr. Lukashuk's objections were based on a misunderstanding. The sentence indicated that in a situation when there was no causal relationship between the assistance and the act, the assisting State did not assume responsibility for the act, although it could still be responsible for its own assistance. In some situations, the assistance was so central to the conduct that the State was deemed to have produced the conduct, but in other cases that was not so. The point was controversial, however, and there was no question of inserting anything in article 16.

44. Mr. PELLET said he was in favour of retaining the last sentence. Referring to the fourth sentence, he queried the term *fautif* as a translation for the word "wrongdoer" and suggested that it should be replaced by the word *responsable* in French.

45. Mr. CRAWFORD (Special Rapporteur) said that in English, too, the word "wrongdoer" was incorrect. He proposed that the phrase "The primary wrongdoer" should be replaced by "The State primarily responsible".

*It was so agreed.*

*Paragraph (1), as amended, was adopted.*

Paragraph (2) (A/CN.4/L.608/Add.1/Corr.1)

46. Mr. CRAWFORD (Special Rapporteur) said the paragraph made the point that there were a number of substantive rules prohibiting assistance and even requiring States to repress conduct. The footnote contained examples of cases when one State had assisted another in carrying out an attack on a third State. Such rules, as the paragraph indicated, did not rely on the general principle stated in article 16, but neither did they deny its existence. One could not infer from the existence of the principle the non-existence of the general rule formulated in article 16. Reference was made to Article 2, paragraph 5, of the Charter of the United Nations. He thought the paragraph made a useful point.

*Paragraph (2) was adopted.*

Paragraphs (3) and (4) (A/CN.4/L.608/Add.1)

*Paragraphs (3) and (4) were adopted.*

Paragraph (5)

47. Mr. ECONOMIDES, referring to the second sentence, said that the phrase "clearly and unequivocally"

was unduly strong and that one of the two words should be deleted. The last sentence served no purpose and should be deleted.

48. Mr. CRAWFORD (Special Rapporteur) said he could agree to deleting both the words "and unequivocally" and the last sentence.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

49. Mr. LUKASHUK, referring to the penultimate sentence, said that the phrase "Thus, it is also free to assist another State in doing so" seemed to legalize actions that went against the principles of international law. He therefore proposed that the sentence should be deleted.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

*Paragraph (7) was adopted.*

Paragraph (8)

50. Mr. ECONOMIDES proposed that the last sentence should be placed between the sixth and seventh sentences.

51. Mr. CRAWFORD (Special Rapporteur) said he could go along with that proposal and suggested that the first words in the transposed sentence, "For its part", should be deleted.

*Paragraph (8), as amended, was adopted.*

Paragraphs (9) to (11)

*Paragraphs (9) to (11) were adopted.*

*The commentary to article 16, as amended, was adopted.*

*Commentary to article 17* (Direction and control exercised over the commission of an internationally wrongful act)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

52. Mr. PELLET proposed that the words *finit par confirmer*, in the fifth sentence, should be replaced by the words *a confirmé* in the French.

53. Mr. CRAWFORD (Special Rapporteur) said he endorsed that proposal, which in English would result in the deletion of the word "eventually".

*Paragraph (2), as amended, was adopted.*

## Paragraph (3)

54. Mr. PELLET said that the end of the first sentence, “or reformulated so as to eliminate areas of uncertainty or dependency”, was not clear. He proposed that it should be deleted.

*Paragraph (3), as amended, was adopted.*

## Paragraph (4)

55. Mr. LUKASHUK drew attention to the third sentence: “Even in cases where a component unit of a federal State enters into treaties or other international legal relations in its own right, and not by delegation from the federal State, the component unit is not itself a State in international law.” The draft on the law of treaties originally considered by the Commission had contained a provision indicating that subjects of a federation could participate in international treaties to the extent permitted by the federal constitution. The provision had not gone into the 1969 Vienna Convention owing to the sharp protests of the Canadian delegation. Cases when one of the German *Länder* or a canton of Switzerland concluded its own treaty had to be taken into account, for those entities had international legal responsibility within their fields of competence.

56. Mr. HAFNER said he agreed to some extent with the concerns expressed by Mr. Lukashuk but could accept the text as it stood. On the other hand, he would propose deleting the phrase “or component units of federal States” from the first sentence, because the examples given thereafter related only to dependent territories.

*It was so agreed.*

57. Mr. GALICKI said that in the first sentence, the quotation marks around the word “dependency” should be deleted.

*It was so agreed.*

58. Mr. CRAWFORD (Special Rapporteur) said the proposition in the third sentence was not inconsistent with Mr. Lukashuk’s concerns. There might well be cases of treaty-making by component units of federal States in which the responsibility for a breach was that of the component unit, not of the federal State. That situation of responsibility fell outside the scope of the articles, however, because the component unit was not a State.

*Paragraph (4), as amended, was adopted.*

## Paragraph (5)

59. Further to a comment by Mr. ECONOMIDES, Mr. CRAWFORD (Special Rapporteur), supported by Mr. CANDIOTI, suggested that “St. Paul’s” should be replaced by the phrase “the Basilica of St. Paul”.

*It was so agreed.*

60. Mr. CRAWFORD (Special Rapporteur), responding to a comment by Mr. KAMTO, suggested that the word “has”, in the first sentence, should be replaced by “exercises”.

*It was so agreed.*

*Paragraph (5), as amended, was adopted.*

## Paragraph (6)

*Paragraph (6) was adopted.*

## Paragraph (7)

61. Mr. PELLET drew attention to the difficulties posed by the word *direction* in French, which could imply the exercise of total power. He therefore suggested that the following sentence should be added to the paragraph: “The choice of the expression, common in English, ‘direction and control’ raised some problems in other languages, owing in particular to the ambiguity of the term ‘direction’, which may imply, as is the case in French [and, perhaps, in the other official languages], complete power, whereas it does not have this implication in English.” If no such explanation were given, there could be awkward ramifications.

62. Mr. CANDIOTI said that the same problem did not exist in Spanish: the word *dirección* could carry the English connotation of “instruction” or “guideline”.

63. Mr. CRAWFORD (Special Rapporteur) said that he would willingly support the insertion of the sentence suggested by Mr. Pellet, although it might be preferable to refer simply to “other languages” without mentioning “other official languages”.

*It was so agreed.*

*Paragraph (7) as amended, was adopted.*

## Paragraphs (8) and (9)

*Paragraphs (8) and (9) were adopted.*

*The commentary to article 17, as amended, was adopted.*

## Commentary to article 18 (Coercion of another State)

## Paragraph (1)

64. Mr. LUKASHUK said that, although he understood the idea behind the third sentence, the current wording suggested that the coercing State had some general responsibility. He therefore suggested that the words “coercing State” should be followed by the phrase “with respect to third States”.

65. Mr. ROSENSTOCK, while concurring with the suggestion, pointed out that the reference to “third States” would be confusing when seen in conjunction with the reference at the end of the second sentence to “another State”.

66. Mr. CRAWFORD (Special Rapporteur) suggested that in the second sentence the words “another State” should be amended to read “a third State”. Mr. Lukashuk’s suggestion, which he supported, could then read: “with respect to the third State”.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

67. Mr. HAFNER said that the first sentence was ambiguous: it was not clear whether it meant that *force majeure* was comparable to coercion, insofar as it was irresistible, or whether it meant that coercion could be seen as *force majeure* in relation to the coerced State, enabling the latter to resort to *force majeure*. He assumed that the first meaning was intended; but clarification was required.

68. Mr. CRAWFORD (Special Rapporteur) said the intention was to emphasize that what was involved was indeed coercion, not some lesser action like persuasion or inducement. The *force majeure* did indeed qualify as irresistible force, so far as the acting State was concerned. He suggested, in view of the importance of the issue, that the sentence should be placed in square brackets and he would attempt to improve the wording.

69. Mr. PELLET suggested that the words “is to be equated with” could be replaced by the phrase “has the same essential character as”, which gave less of a hostage to fortune than the categorical wording currently used. Secondly, he was unhappy with the second sentence, which was too tortuous. It should be reworded along the following lines: “The will of the coerced State will not suffice. It is essential that it should have no effective choice but to . . .”.

70. Mr. CRAWFORD (Special Rapporteur) said Mr. Pellet’s comment persuaded him that the second sentence should also be placed in square brackets, since there was a clear relation between the first and second sentence. He would attempt to reword the sentences, aiming to emphasize that the point at issue was coercion, not merely strong measures or arm-twisting.

*It was so agreed.*

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

71. Mr. ECONOMIDES said that the reference to article 19, in the fourth sentence, was wrong: the article in question was 49.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

72. Mr. PELLET said, in relation to the last two sentences, that he greatly doubted that there could be situations in which coercion did not amount to *force majeure* and was therefore covered by article 18. Examples should be provided. Moreover, the penultimate sentence did

not tally with the statement at the beginning of paragraph (2).

73. Mr. CRAWFORD (Special Rapporteur) said that, although examples existed, unfortunately they related mostly to the coercion of Governments in the context of war crimes, crimes against humanity and even genocide during the Second World War and were thus difficult to deal with succinctly. It was possible to envisage cases in which the acting State could not rely on article 23, because of one of the exclusions, for example; but he acknowledged that that was not quite the meaning of the penultimate sentence. He was in any case reluctant, for other reasons, to add more examples. He therefore suggested that the last two sentences should be deleted altogether.

*Paragraph (4), as amended, was adopted.*

Paragraphs (5) to (7)

*Paragraphs (5) to (7) were adopted.*

*The commentary to article 18, as amended, was adopted.*

*Commentary to article 19 (Effect of this Chapter)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

*The commentary to article 19 was adopted.*

### **Cooperation with other bodies (concluded)\***

[Agenda item 8]

#### **STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION**

74. The CHAIRMAN invited Mr. Wafik Kamil, Secretary-General of the Asian-African Legal Consultative Organization (AALCO) to address the Commission.

75. Mr. KAMIL (Observer for the Asian-African Legal Consultative Organization) informed the Commission that, at its fortieth annual session, held in New Delhi from 20 to 24 June 2001, the organization had decided to change its name from the Asian-African Legal Consultative Committee in order to reflect the status of its functions and permanent structure.

76. AALCO, which attached great significance to its traditional, long-standing ties with the Commission, made it a primary objective to examine questions under consideration by the Commission and to place before it the views of member States. Over the years, that practice had helped forge closer bonds between both bodies and it had become customary for each to be represented at the other’s annual sessions. Thus the Commission had been represented at the meeting of the Legal Advisers of

\* Resumed from the 2700th meeting.

member States of AALCO during the fifty-fifth session of the General Assembly. Mr. Brownlie, Mr. Momtaz, Mr. Sreenivasa Rao and Mr. Yamada had attended and Mr. Hafner had addressed the meeting in his capacity as Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, on which AALCO had convened an open-ended working group of its own.

77. The fortieth session—the President of which had been Mr. Sreenivasa Rao and the Vice-President the Minister of Justice and Attorney-General of Nigeria—had considered no fewer than 13 substantive items, one of which was the work of the Commission at its fifty-second session. Everything discussed by the Commission was of interest to the Governments of the region and to AALCO as a whole, but the main topic taken up for in-depth consideration was State responsibility.

78. On that topic, he had been mandated to bring to the attention of the Commission the views expressed by member States. At a general level, delegates had welcomed the deletion of article 19,<sup>1</sup> which had embodied the controversial notion of “international crimes”. On the other hand, the reference to a “serious breach by a State of an obligation owed to the international community as a whole” had been considered a reasonable formulation that could gain consensus among States. Some delegations, however, had been concerned that the term “serious breaches” was ambiguous and open-ended, thus running the risk of multiple interpretations. It had therefore been suggested that the term should be clarified and its content and legal consequences set out more explicitly.

79. As for the definition of the “injured State”, delegates had noted the improvement in the formulation of article 42. In particular, the distinction between categories of injured States had been deemed to have practical utility. Given the implications that the definition might have in determining which State could invoke responsibility and also the nature of the remedy that could be sought, other delegates had cautioned against expanding the definition of the term “injured State”. While the distinction between “directly affected States” and “States interested in the performance of an obligation” had its relevance and value, it should not lead to the creation of new rights not accepted under international law.

80. The reference to collective interests in article 48, entitled “Invocation of responsibility by States other than the injured State”, had been seen by some as being ambiguous and therefore requiring further elaboration. Many delegates had also been opposed to the concept of “collective countermeasures”, since it could be abused by powerful States. As for the need to regulate the resort to countermeasures, delegates had emphasized the usefulness of including provisions for recourse to dispute settlement procedures.

81. Many delegates considered that the draft articles should be embodied in a convention, while others favoured their adoption by the General Assembly in the form of a declaration. Some were open to either option. The AALCO secretariat was currently studying the draft

articles, as adopted on second reading,<sup>2</sup> and he would therefore refrain from making any observations on the final text for the time being. The secretariat would prepare comments for the benefit of member States by the time they met in the Sixth Committee of the General Assembly at its fifty-sixth session.

82. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), a majority of delegates had supported the draft and urged that no substantive changes should be made. While the articles were seen as adopting a pragmatic approach to risk management and potentially playing an important role in addressing environment-related issues, it had also been pointed out that many of the principles contained in the articles had already gained acceptance in international law. Among the points raised by delegates were the following: the “duty to cooperate” should be explicitly spelt out; the “prevention” dimension should be retained; environmental impact assessment should be made compulsory and serve as a basic reference for consultations, notification and dispute settlement; and, lastly, the Commission should decide whether to retain or delete the reference to the expression “not prohibited by international law”. The view had been expressed that the articles should be formulated as a model law, so as to offer guidance to States in their bilateral and regional arrangements. AALCO member States also trusted that the Commission would shortly make a decision to examine the question of liability.

83. On the topic of reservation to treaties, it had been held that the Vienna Convention regime on treaties provided a flexible and pragmatic balance between the unity and integrity of treaties, on the one hand, and the need for universality of adherence, on the other. Delegates had therefore urged that the work on the topic should not deviate from the Vienna regime. The outcome of the work of the Commission could take the form either of a guide to practice or a model law, at the same time addressing any shortcomings on reservations in the Vienna regime. On the question of reservations to multilateral human rights treaties, one delegate had said that such reservations should be compatible and should not conflict with the 1969 Vienna Convention.

84. As for the topic of unilateral acts of States, it had been observed that it was crucial for the Commission to provide a precise delineation of the scope of unilateral acts. It had been suggested that the Commission should first seek to identify all the conceivable categories of unilateral acts, including recognition, acquiescence, estoppel and protest. Once that was accomplished, the work could move towards defining unilateral acts and their practical application. Another delegate had urged that the Commission should undertake in-depth studies while proceeding with the consideration of the topic.

85. On the topic of diplomatic protection, delegates had stated that it was a discretionary right vested in the State. They had opposed the proposal to authorize the use of force in securing diplomatic protection. Even if force were used, as an exceptional measure, it must have the authorization of the Security Council or other competent bodies. One delegate had commented that the treatment

<sup>1</sup> See 2665th meeting, footnote 5.

<sup>2</sup> See 2701st meeting, para. 75.

by the Commission of the topic seemed to focus too much on the procedural issue of the determination of nationality and too little on elements of substantive law involving the protection of nationals by States, such as denial of justice or national treatment of aliens. AALCO member States had been urged to reply to the questions by the Commission on the topic.

86. Other items considered at the fortieth session of AALCO had included international terrorism; status and treatment of refugees; deportation of Palestinians and other Israeli practices, including the 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; extraterritorial application of national legislation in connection with sanctions imposed against third parties; follow-up of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court; follow-up of the United Nations Conference on Environment and Development; legislative activities of United Nations agencies and other international organizations concerned with international trade law; WTO as a framework agreement and code of conduct for world trade; and establishing co-operation against trafficking in women and children.

87. At the same session, AALCO had organized, in cooperation with the International Organization for Migration, a one-day special meeting entitled "Some legal aspects of migration".

88. AALCO, as an intergovernmental body whose membership comprised 45 States from the continents of Asia and Africa, was uniquely placed to serve the States of the region in examining and formulating their responses to newly emerging challenges of international law. He had presented a proposal on rationalization of the work programme, which had aimed at identifying core legal issues of practical interest to member States. AALCO was also proud of its cooperative relationship with the Commission and he hoped that, during his term of office, the relationship would be intensified. In that context, he noted that in-depth consideration of important legal topics was often impossible on formal occasions, owing to the shortage of time. He therefore suggested that the two bodies could jointly organize a seminar or workshop, perhaps in collaboration with the United Nations Office of Legal Affairs. Despite the tight financial constraints and other limitations under which both bodies operated, the benefits of such an exercise would outweigh the drawbacks. The seminar could focus on one of the topics currently at a formative stage within the Commission, such as unilateral acts of States or diplomatic protection. Other possibilities would be to discuss the topics proposed under the long-term programme of work of the Commission or to undertake an exploratory study on possible approaches to the future work of the Commission on the question of liability. He was, however, open to any other suggestions. He added that an item entitled "Report on the work of the International Law Commission at its fifty-third session" would be considered at the forty-first session of AALCO to be held at Abuja, in July 2002, to which he invited all members of the Commission.

89. Mr. CRAWFORD said it was gratifying that the Asian-African Legal Consultative Committee, with whose impressive work he had, as a representative of Australia, had a modest involvement some years previously, was currently a fully-fledged organization. That change of status was entirely appropriate, given the need for a distinctively legal approach to the problems of the States of Asia and Africa.

90. In deciding to refer the draft articles on State responsibility to the General Assembly with a request that it initially take note thereof, the Commission had anticipated the views of many members of AALCO, attempting to respond to the concerns expressed by AALCO member States on issues such as collective countermeasures. Many of those concerns had been embodied in statements made by individual States in the Sixth Committee or in written communications. It was his personal hope that the textual outcome would be regarded as a balanced one, taking careful account of all those comments, and dealing with secondary obligations in the field of responsibility in a way that responded both to classical international law and to modern developments.

91. Mr. ECONOMIDES said he had been agreeably surprised by a number of the proposals made by the Observer for AALCO regarding the activities of the Commission. In particular, he had noted the views expressed about the need to regulate resort to countermeasures and to make provision for recourse to dispute settlement procedures. The Planning Group should consider ways of making co-operation between the two bodies closer and more effective, inter alia, by having advance notice of the views of AALCO on particular issues. He was also receptive to the idea of holding a joint seminar on a topic of common concern. One particularly promising topic was the international responsibility of international organizations.

92. Mr. MELESCANU said he wished to assure the Observer for AALCO that cooperation between the two bodies was much wider than the current somewhat limited exchange of views might lead one to suppose. Evidence of that assertion was the distinguished and active participation of Mr. Sreenivasa Rao and others in the work of both bodies. If the important views zealously promoted by country representatives in negotiations were not always fully reflected in the textual outcome of the work of the Commission, that was attributable, not to any lack of expertise or tenacity on the part of those representatives, but simply to the need to reach consensus formulations covering the interests of all to the fullest possible extent.

93. In their discussions on the topic of unilateral acts of States at the current session, all members of the Commission had agreed on the need for much fuller information regarding State practice, as an indispensable starting point for a solidly grounded codification exercise. He thus appealed to member States to do their utmost to make their views known to the Commission, either individually, or jointly under the aegis of AALCO—for instance, by responding to any questionnaires transmitted.

94. Mr. DUGARD endorsed Mr. Melescanu's remarks concerning the need for fuller information on the practice of States. On the topic for which he had responsibility as Special Rapporteur, that of diplomatic protection, there



was a wealth of judicial precedent and State practice, most of which, however, derived from Europe and Latin America. It would be of considerable assistance to him, in his task as Special Rapporteur, if more evidence could be made available on State practice in the countries of Asia and Africa.

95. On the issue of denial of justice, to which the Observer for AALCO had alluded, there was a division of opinion in the Commission as to whether that subject should or should not be included in the draft articles, with a number of Latin American members strongly favouring inclusion, whereas a majority of members took the view that its inclusion would introduce a primary rule into the draft articles. He would therefore be interested to know whether there was a strong body of opinion in AALCO in favour of including the concept of denial of justice in the draft on diplomatic protection.

96. Mr. GOCO welcomed the recent change of name to AALCO, as a reflection of its importance as an organization comprising no fewer than 45 member States, as well as the fruitful cooperation that existed between the two bodies pursuant to chapter III of the statute of the Commission—cooperation epitomized by the participation in various capacities of a number of members of the Commission in the work of AALCO. He wished to draw attention to the question of corruption and related practices as a possible topic for consideration by AALCO at its forty-first session. Recent events on the world stage clearly showed that corruption and organized crime had ceased to be narrowly national issues and had currently become an endemic universal problem.

97. Mr. HE congratulated the Observer for AALCO on his report on the work of the organization and welcomed its renaming, as an indication of its new-found status. The long-standing cooperation between the two bodies was an extremely useful exercise, and one that was beneficial to both. The decision by AALCO to extend its agenda was an appropriate reflection of its status as a body with a crucial role to play in the field of legal cooperation.

98. Mr. GALICKI said that the Commission should request the Observer for AALCO to congratulate AALCO on the decision it had taken to upgrade its status—a decision that had substantive as well as formal implications, reflecting as it did an intensification of legal cooperation between the States of Asia and Africa. AALCO was, in his view, the regional body that had reacted most comprehensively and directly to the work of the Commission, whether finalized or ongoing, and its views would be of great value to the Commission in its future work. As had already been stressed, the Commission would be grateful to AALCO for any efforts it could make to encourage its member States to provide the Commission with fuller information regarding State practice. The proposals regarding joint activities such as seminars would also doubtless be welcomed by members of the incoming Commission.

99. Mr. RODRÍGUEZ CEDEÑO thanked the Observer for AALCO for his report on the activities of the organization, with the useful proposals concerning, inter alia, the topic of unilateral acts of States. The forty-first session of AALCO would provide an ideal opportunity for holding a joint seminar on a topic of common interest,

and also for an exchange of information regarding State practice in the countries of Asia and Africa.

100. Mr. KATEKA commended AALCO on its acquisition of a new status and its expanded membership. The rationalization of its work, to which the Observer had alluded, should also extend to coordinating the work of the various Asian and African forums, and to selecting priority issues from a potentially very extensive agenda. Although the work of the Commission on State responsibility was nearing completion, it was not too late for AALCO member States to exert further influence on the topic in the General Assembly, and also, perhaps, at a future diplomatic conference.

101. Mr. KAMIL (Observer for the Asian-African Legal Consultative Organization) said he was extremely touched by members' comments, and also pleased at the emphasis placed on the need to improve cooperation between the two bodies. Welcoming the positive response to his proposal to hold a joint seminar, he said that, in accordance with customary practice of AALCO, one day during its forty-first session could be devoted to such a seminar, on a topic to be selected jointly by the bureaux and secretariats of the two bodies. Given the limited time available during sessions for each body to consider the other's work, there was a strong case for holding inter-sessional meetings, at which the input requested by the Commission could be provided. He would convey to the organization Mr. Galicki's and others' congratulations concerning its change of status, and also Mr. Goco's remarks concerning the inclusion of the topic of corruption on the agenda of AALCO.

102. The CHAIRMAN thanked the Observer for AALCO for the information he had provided on the activities of his organization. The Commission had particularly noted the suggestions made for future joint cooperative activities between the two bodies.

*The meeting rose at 6.10 p.m.*

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## 2704th MEETING

*Tuesday, 7 August 2001, at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, 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. Simma, Mr. Tomka, Mr. Yamada.

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## Draft report of the Commission on the work of its fifty-third session (*continued*)

### CHAPTER V. State responsibility (*continued*) (A/CN.4/L.608 and Corr.1 and Add.1 and Corr.1 and Add.2–10)

#### E. Text of the draft articles on responsibility of States for internationally wrongful acts (*continued*) (A/CN.4/L.608/Add.1 and Corr.1 and Add.2–10)

#### 2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*)

#### PART ONE. THE INTERNATIONALLY WRONGFUL ACT OF A STATE (*continued*)

#### CHAPTER V. CIRCUMSTANCES PRECLUDING WRONGFULNESS

#### *Commentary to chapter V* (A/CN.4/L.608/Add.3)

#### Paragraph (1)

1. Mr. KAMTO, supported by Mr. PAMBOU-TCHIVOUNDA, said that the second sentence should be amended, at least in the French text. The expression *permet à un État de se protéger contre une accusation* (“enables the State to protect itself against a claim”; in the English version: “provides a shield against . . . claim”) was not felicitous, since it was not possible to protect oneself against a claim. Rather, the point was for the State to exonerate itself from responsibility.

2. Mr. SIMMA said that, in his opinion, the English version was entirely satisfactory and a formulation closer to the English should therefore be found for the French version.

3. Mr. PELLET pointed out that it was not a translation problem but one of perspective. He proposed that it should be translated as *permet à l'État de répondre à une accusation*.

4. Mr. TOMKA (Chairman of the Drafting Committee) proposed the formulation *offre à l'État un bouclier contre une accusation*.

*Paragraph (1), as amended in the French text, was adopted.*

#### Paragraph (2)

5. Mr. KAMTO proposed that in the first sentence the words “the articles” should be replaced by “the present articles”. One wondered whether the current formulation meant all of the draft articles on State responsibility or only the articles in chapter V.

*Paragraph (2), as amended, was adopted.*

#### Paragraphs (3) to (5)

*Paragraphs (3) to (5) were adopted.*

#### Paragraph (6)

6. Mr. PELLET said that a footnote should be inserted at the end of the second sentence, referring to article 73 of the 1969 Vienna Convention.

*Paragraph (6), as amended, was adopted.*

#### Paragraph (7)

7. Mr. PAMBOU-TCHIVOUNDA proposed that the word *arguments*, in the first sentence of the French text, should be replaced by *moyens*.

*Paragraph (7), as amended in the French text, was adopted.*

#### Paragraph (8)

*Paragraph (8) was adopted.*

#### Paragraph (9)

8. Mr. PELLET said he failed to understand the meaning of the word “interpretation”, as used in the third sentence.

9. Mr. CRAWFORD (Special Rapporteur) said he had started by classing the exception of non-performance among the circumstances precluding wrongfulness, but the Commission had decided that it was not a rule of law and had to be excluded from chapter V. Accordingly, the sources cited in the footnote tended to make it a question of interpretation.

10. Mr. PELLET said that he was convinced that the exception of non-performance did not indeed have any place in chapter V, but it was not, for all that, a rule of interpretation. Rather, it was a rule under the law of treaties.

11. Mr. SIMMA proposed, as a compromise, that “interpretation” be replaced by “structure”.

12. Mr. CRAWFORD (Special Rapporteur) said that the solution proposed by Mr. Pellet caused a problem inasmuch as the exception of non-performance was not provided for in the 1969 and 1986 Vienna Conventions. The decision by the Commission to exclude it from chapter V would indicate that it was not an autonomous rule but a principle of interpretation or a specific rule that related only to certain treaties.

13. Mr. ECONOMIDES proposed the following wording: “. . . is a rule which concerns mutual and synallagmatic obligations and does not in itself constitute a circumstance precluding wrongfulness”.

14. Mr. TOMKA (Chairman of the Drafting Committee) proposed a formulation reading: “. . . is a particular characteristic of certain mutual or synallagmatic obligations and not an autonomous rule of international law”.

15. Mr. CRAWFORD (Special Rapporteur) said that he would prefer a formulation combining the proposals by Mr. Economides and Mr. Tomka, namely, “. . . as a

specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness”.

16. Mr. CANDIOTI proposed that the words “person or” should be inserted between “other” and “entity”, in the first footnote.

*Paragraph (9), as amended, was adopted.*

*The commentary to chapter V, as amended, was adopted.*

*Commentary to article 20 (Consent)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

17. Mr. PELLET proposed that the words “more properly treated as”, in the second sentence, should be deleted.

*Paragraph (3), as amended, was adopted.*

Paragraphs (4) and (5)

*Paragraphs (4) and (5) were adopted.*

Paragraph (6)

18. Mr. PELLET proposed that the text should be simplified by omitting the phrase “at least to some extent” in the first sentence.

19. Mr. ECONOMIDES said that the word “guidance”, in the last sentence, was too weak. The principles concerning the validity of consent to treaties offered much more than guidance.

20. Mr. CRAWFORD (Special Rapporteur) proposed that the words “provide guidance” should be replaced by “are relevant by analogy”.

21. Mr. ECONOMIDES said he was ready to accept “provide relevant guidelines by analogy”.

22. Mr. ROSENSTOCK said that, in his opinion, the expression “provide relevant guidance” was preferable.

23. Mr. CRAWFORD (Special Rapporteur) and Mr. ECONOMIDES endorsed the solution proposed by Mr. Rosenstock.

*Paragraph (6), as amended, was adopted.*

Paragraphs (7) to (10)

*Paragraphs (7) to (10) were adopted.*

*The commentary to article 20, as amended, was adopted.*

*Commentary to article 21 (Self-defence)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

24. Mr. PELLET said the affirmation in the first sentence was far too categorical. The sentence was redundant and should be deleted. In his opinion, cases in which self-defence was authorized were confined to aggression.

25. Mr. CRAWFORD (Special Rapporteur) said he had no objection to deleting the first sentence.

26. Mr. ROSENSTOCK said that he was not in favour of deleting the sentence, as it would make for imbalance with the last sentence of paragraph (1).

27. Mr. CRAWFORD (Special Rapporteur) pointed out that self-defence could justify, for example, blockading a port, in breach of a treaty guaranteeing freedom of navigation. He proposed that the scope of the sentence should be restricted by replacing “conduct” by “certain conduct”.

28. Mr. PELLET said he strongly objected to the example given by the Special Rapporteur. Self-defence could not justify a port blockade in the absence of aggression. As for Mr. Rosenstock’s arguments, they were not convincing because they related to form, whereas it was a matter of substance. It would have been possible to avoid mentioning Article 2, paragraph 4, of the Charter of the United Nations and simply refer to Article 51.

29. Mr. ECONOMIDES, endorsing Mr. Pellet’s comments, said that the sentence should be formulated more clearly. He could accept the solution proposed by the Special Rapporteur if there was a link-up with the next sentence.

30. Mr. KAMTO said he shared Mr. Pellet’s position and considered that the sentence should be deleted. It did not make for a better understanding and simply opened the door to undesirable situations.

31. Mr. TOMKA (Chairman of the Drafting Committee) proposed the following wording: “Self-defence may justify conduct in relation to certain obligations other than those under Article 2, paragraph 4, of the Charter of the United Nations, which is related to a breach of that provision.”

32. Mr. PELLET, reiterating that he would prefer to have the sentence deleted, said that he could accept the following wording: “Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision.”

33. Mr. CRAWFORD (Special Rapporteur) said that, unquestionably, self-defence did not concern only Article 2, paragraph 4, of the Charter of the United Nations. For example, a State that was a victim of aggression could freeze the aggressor State’s assets on its territory, some-

thing that did not constitute resort to force and did not concern Article 2, paragraph 4, of the Charter. It was lawful conduct in self-defence. Accordingly, he was ready to endorse the text proposed in the formulation suggested by Mr. Pellet.

*Paragraph (2), as amended by Mr. Pellet, was adopted.*

Paragraphs (3) to (5)

*Paragraphs (3) to (5) were adopted.*

Paragraph (6)

34. Mr. PELLET proposed that the words “referred to in the Charter” should be added at the end of the last sentence.

35. Mr. HAFNER proposed that the word “even”, in the third sentence, should be deleted.

*Paragraph (6), as amended, was adopted.*

*The commentary to article 21, as amended, was adopted.*

*Commentary to article 22 (Countermeasures in respect of an internationally wrongful act)*

Paragraph (1)

36. Mr. PELLET proposed that the following sentence should be added at the end of the paragraph: “Chapter II of Part Three regulates countermeasures in further detail”.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

37. Mr. KAMTO proposed that the term “countermeasures”, in the last sentence, should be replaced by “measures of this kind”, so as to ensure consistency between that sentence and the last sentence of paragraph (3), which stated that, since the *Air Service Agreement* case, the term “countermeasure” had been preferred.

*Paragraph (2), as amended, was adopted.*

Paragraphs (3) to (5)

*Paragraphs (3) to (5) were adopted.*

Paragraph (6)

38. Mr. GAJA proposed that the expression “parties to the obligation”, in the fourth sentence, should be replaced by “owed the obligation”.

*Paragraph (6), as amended, was adopted.*

*The commentary to article 22, as amended, was adopted.*

*Commentary to article 23 (Force majeure)*

Paragraphs (1) to (7)

*Paragraphs (1) to (7) were adopted.*

Paragraph (8)

39. Mr. LUKASHUK proposed that the paragraph, which related to private law and hence had no place in the commentary, should be deleted.

40. Mr. ROSENSTOCK said that, in any event, the first sentence and the relevant footnote, which were useful, should be kept.

41. Mr. CRAWFORD (Special Rapporteur) said he endorsed Mr. Rosenstock’s proposal, provided the footnote also mentioned the two texts quoted in the paragraph.

42. Mr. ECONOMIDES also proposed that the word *probablement*, in the first sentence of the French version, should be replaced by a stronger word, such as *vraisemblablement*.

*Paragraph (8), as amended, was adopted.*

Paragraph (9)

43. Mr. SIMMA pointed to an apparent contradiction between the first sentence, according to which a situation which had been caused or induced by the invoking State was not one of *force majeure*, and paragraph 2 of article 23, which stated that paragraph 1 did not apply if the situation of *force majeure* was due to the conduct of the State invoking it, in other words, that the situation of *force majeure* did exist, but could not be invoked.

44. Mr. CRAWFORD (Special Rapporteur) said that the point was well taken. He proposed that the wording of the first sentence should be changed to read: “A State may not invoke force majeure if it has caused or induced the situation in question.”

*Paragraph (9), as amended, was adopted.*

Paragraph (10)

*Paragraph (10) was adopted.*

*The commentary to article 23, as amended, was adopted.*

*Commentary to article 24 (Distress)*

Paragraphs (1) to (10)

*Paragraphs (1) to (10) were adopted.*

*The commentary to article 24 was adopted.*

*Commentary to article 25 (Necessity)*

## Paragraph (1)

45. Mr. AL-BAHARNA proposed that in the second sentence the word “tightly” should be replaced by “narrowly”.

*Paragraph (1), as amended, was adopted.*

## Paragraph (2)

46. Mr. HAFNER said that the statement in the fourth sentence, “the essential interests of the State itself” excessively restricted the notion of “essential” in relation to paragraph 1 (a) of article 25 itself. He therefore proposed that the formulation “the essential interests of the State itself”, in the fourth sentence, should be replaced by the “the essential interest of a State” and, in addition, that the expression “as a whole” should be added at the end of the sentence.

47. Mr. CRAWFORD (Special Rapporteur) said he could agree with the second part of the proposal, but not the first part, for a State could not tell another what its essential interests were. It would be remembered that, when the Commission had revised the first-reading text, it had done so on the understanding that it would be possible to allow what had happened in, for example, the context of conservation in the “Russian Fur Seals” case,<sup>1</sup> namely, that where the essential interests involved a natural resource which was not owned by the State concerned, one could nonetheless deem it appropriate, at least in principle and in extreme cases, to invoke a state of necessity to prevent extermination of the stock.

48. Mr. TOMKA (Chairman of the Drafting Committee) said that, like the Special Rapporteur, he was in favour of maintaining the definite article in front of “State”. As to the case mentioned by the Special Rapporteur, which dated back about 100 years, it had involved acts which had occurred beyond a State’s border but in space that did not belong to another State. The decision had not been intended to authorize a State to protect, by a unilateral decision, the interests of another State, without regard to the latter’s decision.

49. Mr. GOCO asked whether the notion expressed by the formulation “for the time being irreconcilable”, in the penultimate sentence, was important for the existence of a state of necessity.

50. Mr. CRAWFORD (Special Rapporteur) confirmed the importance of that notion. However, since a conflict was definitively insoluble only in theory, he could agree to deleting the words “for the time being”.

*It was so agreed.*

51. Mr. CANDIOTI, referring to the footnote, which quoted the speech by German Chancellor von Bethmann-Hollweg as a classic case of abuse of a state of

necessity, asked Mr. Simma whether the term *Notwehr* meant “state of necessity” or “self-defence”.

52. Mr. SIMMA said that the word *Notwehr* meant self-defence, but the German term to translate “state of necessity” also included the prefix *Not*, which explained why the phrase, *wir sind jetzt in der Notwehr; und Not kennt kein Gebot* could be translated as “we are in a state of necessity and necessity knows no law”. He therefore suggested that the footnote should remain unchanged.

53. Mr. CRAWFORD (Special Rapporteur) proposed that the quotation should be kept in German but not translated, for any English translation would be inaccurate or miss the point.

54. Mr. PELLET, supported by Mr. TOMKA, said that a translation was essential and proposed that only the second part of the phrase should be retained, which might be translated as “necessity is the law”.

55. Mr. CANDIOTI pointed out that the German word *Notwehr* meant self-defence and not state of necessity. The quotation did not have a rightful place and should therefore be deleted.

56. Mr. SIMMA said that in 1914, Germany could not justify invading a neutral country as self-defence. In fact, it was a state of necessity that had been invoked and it seemed that Bethmann-Hollweg had not used the word *Notwehr* properly. To avoid any confusion, he therefore proposed that only the second part of the quotation should be kept.

57. Mr. GAJA proposed that the whole of the quotation should be retained and translated as: “We are in a state of self-defence and necessity knows no law.”

58. Mr. CRAWFORD (Special Rapporteur) said he endorsed that proposal.

*It was so agreed.*

*Paragraph (2), as amended, was adopted.*

## Paragraphs (3) to (12)

*Paragraphs (3) to (12) were adopted.*

## Paragraph (13)

59. Mr. PELLET proposed that, in the last sentence, the word “opinion”, which seemed imprecise, should be replaced by the word “doctrine”; that the footnote should specify what the pages mentioned in the *Yearbook* of the Commission for 1980 were about; and to add a few references after 1980 in the same footnote.

*Paragraph (13), as amended, was adopted.*

## Paragraphs (14) to (19)

*Paragraphs (14) to (19) were adopted.*

<sup>1</sup> *British and Foreign State Papers, 1893-1894*, vol. 86 (London, H.M. Stationery Office, 1899), p. 220.

Paragraph (20)

60. Mr. ECONOMIDES proposed that the fourth sentence should be deleted, as it could imply that Article 2, paragraph 4, of the Charter of the United Nations could authorize humanitarian intervention. The Commission should be prudent and confine itself to citing the two problems that did exist and were presented in the first two paragraphs, indicating quite simply that those issues did not fall within the scope of article 25.

61. Mr. CRAWFORD (Special Rapporteur) said he could agree to delete the sentence, since the basic idea was expressed in the next sentence, namely, that the question of the lawfulness of humanitarian intervention was not covered by article 25.

*Paragraph (20), as amended, was adopted.*

*The commentary to article 25, as amended, was adopted.*

*Commentary to article 26 (Compliance with peremptory norms)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

62. Mr. GALICKI recalled that the Commission had decided not to speak of “peremptory obligations” but of “peremptory norms”. He therefore proposed that the first sentence should be amended to read: “Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail”.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

63. Mr. CRAWFORD (Special Rapporteur), in response to a question by Mr. Sreenivasa RAO about the footnote concerning a judgment of ICJ on East Timor, said that the Court’s judgment had said it was undisputable that self-determination was an obligation *erga omnes*.

*Paragraph (5) was adopted.*

Paragraph (6)

64. Mr. GAJA said that the words “international obligations”, in the second sentence, should be replaced by “norms” and, in addition, the paragraph should be placed after paragraph (17) of the commentary to article 25, in other words, after the paragraph that spoke for the first time of the “international community as a whole”.

65. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to that proposal.

*It was so agreed.*

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

66. Mr. ECONOMIDES proposed that a new sentence should be inserted after the fourth sentence, reading: “Similarly, if such an act is perpetrated, a State cannot unilaterally waive the right to invoke responsibility before final settlement of the case in accordance with international law.”

67. Mr. CRAWFORD (Special Rapporteur) said that to take up such an issue in paragraph (7) would unnecessarily complicate matters. A cross-reference could nonetheless be made to the commentary to article 45.

68. Mr. PELLET said he wholeheartedly endorsed Mr. Economides’s proposal. He would, however, be content with a cross-reference to the commentary to article 45. Nevertheless, he would point out that, for the time being, that article did not reflect Mr. Economides’s comment, which should not be forgotten, either in the commentary to article 45 or, better still, in the commentary to article 41. It was a very important point.

*Paragraph (7), as amended by the Special Rapporteur, was adopted.*

*The commentary to article 26, as amended, was adopted.*

*Commentary to article 27 (Consequences of invoking a circumstance precluding wrongfulness)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

69. Mr. GAJA said that the long quotation in the paragraph was already contained earlier in the document, in paragraph (3) of the commentary to chapter V. He therefore proposed that only the last sentence should be kept.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

70. Mr. PELLET proposed that the last sentence, which could be misleading, should be deleted. Even if the question of compensation were examined, it would not be taken up from the standpoint of state of necessity.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

*The commentary to article 27, as amended, was adopted.*

## PART TWO. CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

### *Commentary to Part Two*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

*The commentary to Part Two was adopted.*

## CHAPTER I. GENERAL PRINCIPLES

### *Commentary to chapter I*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

71. Mr. PELLET proposed that the phrase *parce qu'elles découlent directement au profit d'entités* should be replaced by *parce qu'elles profitent directement à des entités*.

72. Mr. CRAWFORD (Special Rapporteur) said he could agree to that change in the French version but thought that it was unnecessary to alter the English version.

73. Mr. CANDIOTI proposed that the word “secondary”, in the last sentence, should be deleted and the words “person or” inserted before “entities”, in order to bring it into line with the wording of article 33.

*Paragraph (2), as amended, was adopted.*

*The commentary to chapter I, as amended, was adopted.*

### *Commentary to article 28 (Legal consequences of an internationally wrongful act)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

74. Mr. CANDIOTI proposed that in the penultimate sentence the words “an entity” should be replaced by “a person or an entity”.

75. Mr. LUKASHUK proposed that the second and third sentences, which were redundant, should be deleted.

76. Mr. CRAWFORD (Special Rapporteur) said that, indeed, those sentences played an essential explanatory role.

77. Mr. MELESCANU said that the paragraph was essential, since it clarified the definition of an internationally wrongful act as given in article 1, a definition which applied to all wrongful acts without specifying to whom the act was directed. It could be a State, but also another entity. It was a very important idea for understanding the philosophy underlying the draft article.

*Paragraph (3), as amended by Mr. Candioti, was adopted.*

*The commentary to article 28, as amended, was adopted.*

### *Commentary to article 29 (Continued duty of performance)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

*The commentary to article 29 was adopted.*

### *Commentary to article 30 (Cessation and non-repetition)*

Paragraphs (1) to (7)

*Paragraphs (1) to (7) were adopted.*

Paragraph (8)

78. Mr. GAJA said that it would be appropriate, in the antepenultimate sentence, to use the words “no longer exists” instead of “does not remain in force”.

*Paragraph (8), as amended, was adopted.*

Paragraph (9)

79. Mr. LUKASHUK said that the analogy drawn in the second sentence between cessation and assurances and guarantees of non-repetition was artificial. Accordingly, the words “Like cessation” should be deleted.

80. Mr. PELLET said that the expression “they involve much more flexibility than cessation”, in the second sentence, was clumsy. The character of such assurances and guarantees of non-repetition was, moreover, explained later on in the commentary. He therefore proposed that the phrase in question should be replaced by, “although, unlike cessation, they are not demanded in all cases”.

*Paragraph (9), as amended by Mr. Lukashuk, was adopted.*

Paragraph (10)

81. Mr. CANDIOTI said that it would be better to alter the first sentence: assurances and guarantees of non-repetition were the legal consequences not of an internation-

ally wrongful act but of the obligation to compensate that flowed from the act.

82. Mr. ROSENSTOCK said that, logically, the last sentence should become the second sentence of the paragraph, as it was not normal to have to read such a long paragraph in order to find out what ICJ had done, or rather what it had not done, in the case mentioned in the first sentence, with regard to guarantees of non-repetition.

83. Mr. CRAWFORD (Special Rapporteur) said that the recasting of the paragraph proposed by Mr. Rosenstock would without doubt be better for the logic of the paragraph and he would produce a text to submit to the Commission.

84. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to that proposal.

*It was so agreed.*

*Paragraph (10) was adopted on that understanding.*

Paragraph (11)

85. Mr. PELLET said that, in his opinion, the paragraph was not complete in that a reference to article 48 was essential, as the Commission had adopted very clear positions on that point that should be reflected in the commentary. He therefore proposed that a sentence should be added, reading: “In addition, assurances and guarantees of non-repetition may be sought by a State other than an injured State in accordance with article 48.”

*Paragraph (11), as amended, was adopted.*

Paragraph (12)

*Paragraph (12) was adopted.*

Paragraph (13)

86. Mr. ECONOMIDES, supported by Mr. SIMMA, said that it was not logical to say in the penultimate sentence that the exceptional character of the measures was indicated by the words “if the circumstances so require”, as by definition one did not know what the circumstances would be. He therefore proposed that the words “more or less” should be inserted before “exceptional”.

87. Mr. LUKASHUK said that the sixth sentence was repetitive and added nothing to the analysis of the question. It should therefore be deleted.

*Paragraph (13), as amended, was adopted.*

*The commentary to article 30, as amended, was adopted.*

*Commentary to article 31 (Reparation)*

Paragraph (1)

88. Mr. PELLET pointed out that paragraph 48 of the judgment of ICJ in the *LaGrand* case mentioned in a foot-

note had nothing to do with assurances and guarantees of non-repetition.

89. Mr. CRAWFORD (Special Rapporteur) said that the footnote in question could be kept and the words “in the context of assurances and guarantees against repetition” could be deleted.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) to (4)

*Paragraphs (2) to (4) were adopted.*

Paragraph (5)

90. Mr. PELLET, supported by Mr. KAMTO and Mr. LUKASHUK, said that the definition of moral damage, in the sixth sentence, was not satisfactory in that it omitted the moral damage that could potentially be caused to the State in the form of an affront to its honour, dignity or prestige, as in the decision in the “*Rainbow Warrior*” case. In addition, the seventh and eighth sentences should be deleted, for that was not how he understood article 31. The whole of the end of paragraph (5) should therefore be reviewed.

91. Mr. CRAWFORD (Special Rapporteur) proposed that he should revise paragraph (5) in the light of the comments made on the question of the definition of moral damage and submit a new text at the next meeting.

92. The CHAIRMAN said that, if he heard no objection, he would take it that members agreed to that proposal.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

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## 2705th MEETING

*Tuesday, 7 August 2001, at 3 p.m.*

*Chairman: Mr. Peter KABATSI*

*Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, 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. Simma, Mr. Tomka, Mr. Yamada.*

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## Draft report of the Commission on the work of its fifty-third session (*continued*)

### CHAPTER V. *State responsibility (continued)* (A/CN.4/L.608 and Corr.1 and Add.1 and Corr.1 and Add.2–10)

#### E. Text of the draft articles on responsibility of States for internationally wrongful acts (*continued*) (A/CN.4/L.608/Add.1 and Corr.1 and Add.2–10)

#### 2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*)

#### PART TWO. CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE (*continued*)

#### CHAPTER I. GENERAL PRINCIPLES (*concluded*)

#### *Commentary to article 31 (Reparation) (concluded)* (A/CN.4/L.608/Add.3)

#### Paragraph (5) (*concluded*)

1. The CHAIRMAN recalled that the Special Rapporteur had offered to provide a new text of paragraph (5), taking into account the concerns expressed by Mr. Goco, Mr. Pellet and Mr. Rosenstock. The text read:

“(5) The responsible State’s obligation to make full reparation relates to the ‘injury caused by the internationally wrongful act’. The notion of ‘injury’, defined in paragraph 2, is to be understood as including any damage caused by that act. In particular, in accordance with paragraph 2, ‘injury’ includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individually unaffected by the breach.<sup>1</sup> ‘Material’ damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. ‘Moral’ damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one’s home or private life. Questions of reparation for such forms of damage are dealt with in more detail in chapter II of this Part.<sup>2</sup>

<sup>1</sup> Although not individually injured, such States may be entitled to invoke responsibility in respect of breaches of certain classes of obligation in the general interest, pursuant to article 48. [Text of the first footnote to paragraph (5) to be added.]

<sup>2</sup> See especially article 36 and commentary.”

2. Mr. PELLET said that, in its new formulation, paragraph (5) admirably addressed all the concerns raised.

3. Mr. LUKASHUK said that moral damage should be defined as non-material damage. In accordance with the “*Rainbow Warrior*” arbitration, reference should be made to “non-material damage of a moral, political and legal nature resulting from the affront to the dignity and prestige of the State”.

4. Mr. CRAWFORD (Special Rapporteur) said that Mr. Rosenstock’s concern regarding exemplary or other non-

compensatory damages was properly dealt with under article 34, and, to a lesser extent, in article 41. The problem was that the injury was compensated for only to the extent of the damage. As to Mr. Lukashuk’s point, while he agreed that something was missing from paragraph (5), the point was discussed in paragraphs (6) to (9).

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

5. Mr. PELLET drew attention to an error in the French text of the third sentence. He also proposed that the last sentence, which did not deal with preconditions to reparation, should be deleted or, if retained, relegated to the introductory commentaries dealing with preconditions to responsibility.

6. Mr. CRAWFORD (Special Rapporteur) said he could accept the deletion of the last sentence.

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

*Paragraph (8) was adopted.*

Paragraph (9)

7. Mr. LUKASHUK said that the second sentence referred to “material, moral and legal injury”. In his view, however, there were only two types of injury. He thus proposed amending the phrase so as to read “material and moral legal injury”.

8. Mr. CRAWFORD (Special Rapporteur) said it was quite clear from chapter II that the forms of reparation included satisfaction for non-financially-assessable loss—“immaterial loss” being the term he had himself favoured. Perhaps a more flexible formulation could be found for the second sentence. As a last resort, he could accept the deletion of paragraph (9) *in toto*. What he could not accept was a statement that reparation did not extend to non-patrimonial or non-material interests of the State.

9. Mr. PELLET said it was clear that article 31, paragraph 2, referred only to “material” and “moral” damage; there was no third category. It was also clear that some members, himself among them, were allergic to the term “legal injury”, whereas others did not wish to limit injury to moral and material injury. Since, in a commentary, the Commission was not obliged to reproduce the exact wording of the article, the solution seemed to be to use different terms, such as “material” and “immaterial” or “patrimonial” and “non-patrimonial”.

10. Mr. SIMMA said that a lack of consensus on that issue seemed to have been “papered over” at some stage. A formulation must be found that satisfied both camps. He himself advocated including some reference to the

concept currently described as “legal injury”. A good solution would be to use the terms “material” and “non-material”.

11. Mr. ECONOMIDES said there was clearly a problem, since three adjectives were used to denote only two categories of injury. In his view, the concept of legal injury should nonetheless be retained. A compromise solution might be to use the wording “injury extends to material injury, on the one hand, and, on the other, to moral and legal injury”. Legal injury had far more in common with moral injury than with material injury.

12. Mr. MELESCANU supported Mr. Simma’s comments. Reference might also be made to “quantifiable” and “non-quantifiable” injury, a term used elsewhere by the Commission.

13. Mr. BROWNLIE said that Mr. Simma seemed to advocate setting the stage for a doctrinal dispute that would then have to be resolved—a course that he personally found utterly pointless. In his view, unless the Special Rapporteur believed that paragraph (9) added something of fundamental importance to the other paragraphs, the paragraph should simply be deleted.

14. Mr. GALICKI said that the second and third sentences classified injury according to two different sets of criteria, which needed to be kept separate. Accordingly, a word such as “Furthermore” should be inserted at the start of the third sentence. The terms “material” and “moral” should nonetheless be retained, since they were the ones used in the adopted text of the article.

15. Mr. CRAWFORD (Special Rapporteur), responding to Mr. Brownlie’s and Mr. Galicki’s comments, said that the only essential sentence in paragraph (9) was the first sentence. Accordingly, he proposed that it be retained as the last sentence of paragraph (8), and that the remainder of paragraph (9) be deleted.

*It was so agreed.*

*Paragraph (9), as amended by the Special Rapporteur, was adopted.*

Paragraphs (10) and (11)

*Paragraphs (10) and (11) were adopted.*

Paragraph (12)

16. Mr. PELLET said that, in the French version, the words *comportement fautif* should read *comportement illicite*.

*Paragraph (12), as amended in the French text, was adopted.*

Paragraphs (13) and (14)

*Paragraphs (13) and (14) were adopted.*

Paragraph (15)

*Paragraph (15) was adopted with a minor editing change to the French text.*

*The commentary to article 31, as amended, was adopted.*

Commentary to article 32 (Irrelevance of internal law)

Paragraph (1)

17. Mr. GAJA said that the State was not itself bound by its internal law. Accordingly, in the last sentence, the words “State confronted” should be amended to read “State organ confronted”.

18. In response to a doubt expressed by Mr. ROSENSTOCK, Mr. CRAWFORD (Special Rapporteur) said that Mr. Gaja’s proposal seemed to be constructive, in that it contrasted the situation of the State in terms of responsibility with that of an individual organ.

19. Mr. ECONOMIDES drew attention to a drafting problem in the French text of the last sentence.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted.*

*The commentary to article 32, as amended, was adopted.*

Commentary to article 33 (Scope of international obligations set out in this Part)

Paragraph (1)

20. Mr. GAJA said he found the fourth sentence obscure. In particular, he was not sure what was meant by the phrase “distinct legal wrongs in themselves”.

21. Mr. CRAWFORD (Special Rapporteur) said that the sentence created more problems than it solved. The simplest course would be to delete it. The word “secondary”, in the last sentence, should also be deleted.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted.*

Paragraph (4)

22. Mr. GALICKI said that the sixth sentence referred to the exercise of specific rights to invoke responsibility “under some specific rule”, with a cross-reference to article 55. That article, however, spoke of “special” rules. The language of the commentary should be harmonized with that of article 55. Likewise, in the seventh and eighth

sentences, the word “entities” should be changed to “persons or entities”, to bring it into line with the text of article 33.

*Paragraph (4), as amended, was adopted.*

*The commentary to article 33, as amended, was adopted.*

## CHAPTER II. REPARATION FOR INJURY

*Commentary to chapter II (A/CN.4/L.608/Add.4)*

*The commentary to chapter II was adopted.*

*Commentary to article 34 (Forms of reparation)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

23. Mr. PELLET said that an example should be inserted in the second sentence. The *Corfu Channel* case sprang to mind, but better examples could no doubt be found.

24. Mr. CRAWFORD (Special Rapporteur) said that an example would be inserted.

*Paragraph (2) was adopted.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

25. Mr. ECONOMIDES said the third sentence gave the impression that States always had a choice in the matter, which was not the case. He wondered if *affecté*, in the French text, was the correct word to use in that context.

26. Mr. CRAWFORD (Special Rapporteur) said that Mr. Economides’s concern was addressed in the fourth sentence, which made it clear that the injured State could choose between different forms of reparation “in most circumstances”. He therefore believed that “affected” was the right word, at least in English, as it was not too dogmatic.

*Paragraph (4) was adopted.*

Paragraph (5)

27. Mr. PELLET said that in the antepenultimate sentence it was not clear what the word “consequential” meant in the phrase “damage which is indirect, consequential or remote”, and it should be deleted.

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

*The commentary to article 34, as amended, was adopted.*

*Commentary to article 35 (Restitution)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

28. Mr. PELLET said that, if possible, the two contrasting definitions should be supported by some references. More importantly, for the sake of completeness, a sentence should be added at the end of the paragraph to read: “It does not exclude that restitution may be supplemented by compensation in order to ensure full reparation for the injury actually suffered.”

29. Mr. CRAWFORD (Special Rapporteur) said that he would endeavour to find up-to-date references in support of the definitions.

Paragraph (3)

30. Mr. PELLET suggested that, in addition to the *Chorzów Factory* case, the *Texaco* case should be cited as an example, as the sole arbitrator in the latter case had made some definitive remarks on the subject.

31. Mr. CRAWFORD (Special Rapporteur) said that as the *Texaco* case was not a State-to-State case and the part of the draft articles they were discussing concerned only restitution in the interests of States, he would prefer to cite the *Texaco* case in a footnote.

*Paragraph (3) was adopted.*

Paragraphs (4) to (6)

*Paragraphs (4) to (6) were adopted.*

Paragraph (7)

32. Mr. GAJA said that the second sentence was virtually identical to the second sentence of paragraph (3) of the commentary to article 34. It could therefore be deleted and the remaining sentence “What may be required . . .” moved to the beginning of paragraph (6).

*Paragraph (7), as amended, was adopted.*

Paragraphs (8) to (11)

*Paragraphs (8) to (11) were adopted.*

Paragraph (12)

33. Mr. PELLET said that, while the reference in the footnote was correct (except for the page number, which was p. 149 of the English text), the original reference (Institut für Internationalen Recht an der Universität Kiel, *Zeitschrift für Völkerrecht* (Breslau, 1930), vol. XV, pp. 359–364) should also be cited.

*Paragraph (12) was adopted.*

*The commentary to article 35, as amended, was adopted.*

*Commentary to article 36 (Compensation)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

34. Mr. PELLET said he disagreed with the contention in the first sentence that compensation had a distinct function compared with satisfaction and restitution. The overall function of compensation, satisfaction and restitution was the same, namely, reparation.

35. Mr. CRAWFORD (Special Rapporteur) said that the sentence could be deleted; the following sentence would then begin: “The relationship with restitution is clarified . . .”.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

36. Mr. ROSENSTOCK asked whether it would be appropriate to speak about exemplary damages in paragraph (4).

37. Mr. CRAWFORD (Special Rapporteur) said that there was a discussion of excessive demands made under the guise of satisfaction in paragraph (8) of the commentary to article 37. In paragraph (5) of the commentary to Part Two, chapter III, of the draft articles (A/CN.4/L.608/Add.8), it was stated that the function of damages was essentially compensatory, and the jurisprudence on the concept of punitive or exemplary damages was referred to in a footnote thereto. The concept was implicit in paragraph (4) but he would draft a new sentence to make it clearer.

Paragraphs (5) and (6)

*Paragraphs (5) and (6) were adopted.*

Paragraph (7)

38. Mr. PELLET, referring to the footnote, said that the most useful reference in French was the work by Personnaz.

39. The CHAIRMAN said the reference would be included in the footnote.

*Paragraph (7), as amended, was adopted.*

Paragraphs (8) to (18)

*Paragraphs (8) to (18) were adopted.*

Paragraph (19)

40. Mr. KAMTO asked what the distinction was between “pain and suffering” (*pretium doloris* in the French text) and the list that followed those words (mental anguish, humiliation, etc.).

41. Mr. CRAWFORD (Special Rapporteur) said there was no real distinction; the list simply gave examples of actual pain and suffering.

*Paragraph (19) was adopted.*

Paragraphs (20) to (23)

*Paragraphs (20) to (23) were adopted.*

Paragraph (24)

42. Mr. PELLET said that, in the French text, it was unclear what was meant by *livres récents*, in the second sentence.

43. The CHAIRMAN said the translation would be checked against the English original.

*Paragraph (24) was adopted.*

Paragraph (25)

*Paragraph (25) was adopted.*

Paragraph (26)

44. Mr. PELLET said that the French translation of “wasting assets” (*actifs défectibles*) should also be checked.

*Paragraph (26) was adopted.*

Paragraphs (27) to (34)

*Paragraphs (27) to (34) were adopted.*

*The commentary to article 36, as amended, was adopted.*

*Commentary to article 37 (Satisfaction)*

## Paragraph (1)

45. Mr. KAMTO said that, for the sake of logic and to match the original English text, the word *souvent* should be deleted from the second sentence of the French text.

*Paragraph (1) was adopted.*

## Paragraph (2)

*Paragraph (2) was adopted.*

## Paragraph (3)

46. Mr. PELLET said that the paragraph should begin “In accordance with article 31, paragraph 2” as that was where the quoted material was taken from, not article 37, paragraph 1, as implied by the current wording.

*Paragraph (3) was adopted.*

## Paragraphs (4) to (6)

*Paragraphs (4) to (6) were adopted.*

## Paragraph (7)

47. Mr. KAMTO said that the second sentence was confusing. The sentence construction made it appear, wrongly, that the apologies in the *Consular Relations* and *LaGrand* cases had been offered to third parties. Perhaps the sentence could be divided into two sentences, one on cases where the apologies were requested by third parties and one on cases where they were requested, and received, by the injured State.

48. Mr. CRAWFORD (Special Rapporteur) agreed that the sentence could give rise to confusion if a reader was not acquainted with the details of the cases cited, and said he would try to find clearer language.

*Paragraph (7) was adopted on that understanding.*

## Paragraph (8)

*Paragraph (8) was adopted.*

*The commentary to article 37, as amended, was adopted.*

*Commentary to article 38 (Interest)*

## Paragraphs (1) to (7)

*Paragraphs (1) to (7) were adopted.*

## Paragraph (8)

49. Mr. PELLET said that “the preponderance of authority”, in the penultimate sentence, could best be translated into French as *la majorité des auteurs et des tribunaux*.

*Paragraph (8), as amended in the French text, was adopted.*

## Paragraph (9)

50. Mr. PELLET said that “given the present state of authorities”, in the third sentence, was too vague and should be replaced by “given the present state of international law”.

*Paragraph (9), as amended, was adopted.*

## Paragraph (10)

51. Mr. PELLET said that “the present unsettled state of practice makes a general provision on the calculation of interest useful”, in the antepenultimate sentence, should be translated by *le caractère anarchique de la pratique actuelle incite à penser qu’une disposition générale sur le calcul des intérêts est utile*; the wording *penser qu’il serait utile* suggested that the commentary was a draft at the first-reading stage.

*Paragraph (10), as amended in the French text, was adopted.*

## Paragraph (11)

*Paragraph (11) was adopted.*

## Paragraph (12)

52. Mr. PELLET said he saw no reason to include “as such” in the first sentence; either the article dealt with post-judgment or moratory interest or it did not. Similarly, in the last sentence, “is better regarded as a matter” should be replaced by, simply, “is a matter”.

*Paragraph (12), as amended, was adopted.*

*The commentary to article 38, as amended, was adopted.*

*Commentary to article 39 (Contribution to the injury)*

## Paragraphs (1) to (6)

*Paragraphs (1) to (6) were adopted.*

*The commentary to article 39 was adopted.*

## CHAPTER III. SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

*Commentary to chapter III (A/CN.4/L.608/Add.8)*

## Paragraph (1)

53. Mr. GAJA proposed that the words “peremptory norms” in the second sentence should be replaced by the phrase “obligations under peremptory norms”.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

Paragraph (3)

54. Mr. ECONOMIDES proposed deleting in the first sentence the phrase “although it has been cautious in applying it”, which referred to the approach taken by ICJ to the notion of obligations to the international community as a whole. An alternative formulation for the French text of “became bound” (*sont devenues liées*) should also be found.

55. Mr. ROSENSTOCK said that the phrase proposed for deletion provided historical background and described the actual situation surrounding the work of the Commission. In his opinion it should be retained.

56. Mr. CRAWFORD (Special Rapporteur) said he agreed with Mr. Rosenstock. Many States were reticent about the notion of obligations to the international community as a whole, and drawing attention to the caution exercised by the Court in that regard was helpful.

*Paragraph (3) was adopted.*

Paragraph (4)

57. Mr. LUKASHUK said that the second sentence misrepresented the terms of the 1969 Vienna Convention, which contained nothing about “a small number of” substantive norms. He proposed that that phrase should be deleted.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

Paragraph (6)

58. Mr. PELLET said the phrase “has recognized the principle”, in the fourth sentence, was unclear. To which principle was reference being made?

59. Mr. CRAWFORD (Special Rapporteur) suggested that the sentence should be deleted.

*It was so agreed.*

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

60. Mr. PELLET suggested that some clarification should be added to the statement in the first sentence that the articles did not recognize any distinction between State “crimes” and “delicts”.

61. Mr. ROSENSTOCK said that the sentence referred to a contentious issue that had been resolved and that perhaps the sentence could be deleted.

62. Mr. PELLET said that some reference to the issue was necessary.

63. Mr. CRAWFORD (Special Rapporteur) said it was true that it was a part of international legal discourse on State responsibility and had to be mentioned. He would prefer not to add anything to the first sentence, however.

64. Mr. LUKASHUK proposed that the word “small” should be replaced by “certain” in the seventh sentence.

*It was so agreed.*

65. Mr. PELLET said that the French texts of the seventh and eighth sentences should be corrected: *à les respecter* should be replaced by *à leur respect*, and *il serait bon* by *il est bon*.

*Paragraph (7), as amended, was adopted.*

*The commentary to chapter III, as amended, was adopted.*

*Commentary to article 40 (Application of this Chapter)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

66. Mr. LUKASHUK pointed out that one might gain the impression from the second sentence that *pacta sunt servanda* did not constitute a peremptory norm. In the third sentence, peremptory norms were described as being concerned with “substantive prohibitions of conduct”, but that was true of all norms. All basic principles of international law had the status of peremptory norms.

67. Mr. CRAWFORD (Special Rapporteur) said that the *pacta sunt servanda* rule was a logical necessity, a framework rule. As long as international law had existed, it had always been the case that *pacta sunt servanda*, irrespective of the existence of article 53 of the 1969 Vienna Convention. The key point of article 53, however, was that it stipulated that there were certain substantive things that could not be done or allowed under treaties: for example, to invade or annex other countries or commit genocide. The points made in paragraph (3) were correct and were substantiated by the citation in the footnote.

68. Mr. PELLET pointed out the ambiguity of the term “norms” in the second sentence, which could refer either to article 53 of the 1969 Vienna Convention or to article 40 of the articles on State responsibility.

69. Mr. ECONOMIDES suggested deleting the sentence and revising the beginning of the third sentence accordingly. The existence of norms of *pacta sunt servanda* that did not constitute solely prohibitions of conduct could not be ruled out.

70. Mr. TOMKA said he was opposed to deleting the second sentence, because it might give the impression

that the Commission was characterizing *pacta sunt servanda* as a peremptory norm. The breach of each and every treaty was a breach of *pacta sunt servanda*, but the intention of the Commission had not been to have chapter III apply in the event of ordinary breaches of treaties.

71. Mr. MELESCANU said he agreed with Mr. Tomka. The commentary must help the reader to understand what the Commission viewed as the difference between breaches of the peremptory norms mentioned in article 40 and other breaches of equally valid international obligations. With some drafting changes, perhaps the second sentence might be improved and retained.

72. Mr. PELLET said he was in favour of keeping the second sentence with some drafting changes, so as to avoid conveying the impression that the Commission was giving a lesson in general international law. For the purposes of State responsibility, it was absolutely immaterial whether or not the rule of *pacta sunt servanda* was a peremptory norm.

73. Mr. CRAWFORD (Special Rapporteur), responding to a query by Mr. HAFNER, proposed that the second sentence should be deleted and that the beginning of the third, "Their concern is with substantive prohibitions of conduct which", should be replaced by "The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what".

*It was so agreed.*

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

74. Mr. Sreenivasa RAO said the right of self-determination must not, he strongly believed, be listed among the examples of peremptory norms. The right of self-determination could be described as a peremptory norm solely in the context of colonial domination: to go any further would be to create a problem by raising a contentious issue.

75. Mr. KAMTO said he endorsed those remarks. To affirm in general terms that self-determination was a right would be completely at variance with other rules and with international practice. He proposed that, in the penultimate sentence, the words "within the framework of decolonization" should be inserted between "self-determination" and "deserves".

76. Mr. ROSENSTOCK, supported by Mr. SIMMA, said he would not be able to go along with that sort of limitation on the right of self-determination.

77. Mr. CRAWFORD (Special Rapporteur) said that the last two sentences in paragraph (5) were very carefully phrased to be as neutral as possible, and they merely paraphrased what ICJ had said in the *East Timor* case. Mr. Sreenivasa Rao had expressed his position but had

not pressed for any amendment. He himself was strongly disinclined to make any change other than to incorporate in the footnote a reference to certain relevant provisions of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,<sup>1</sup> provisions which had stood the test of time.

*It was so agreed.*

*Paragraph (5), as amended, was adopted.*

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

Paragraph (8)

78. Mr. PELLET, referring to the footnote, said that, for the sake of historical accuracy, the words "as cases of serious breaches of fundamental obligations" should be replaced by "of what article 19 as adopted on first reading denominated as 'international crimes'".

79. Mr. CRAWFORD (Special Rapporteur) suggested that the phrase should read "as cases denominated as 'international crimes'".

*It was so agreed.*

*Paragraph (8), as amended, was adopted.*

Paragraph (9)

*Paragraph (9) was adopted.*

*The commentary to article 40, as amended, was adopted.*

*Commentary to article 41* (Particular consequences of a serious breach of an obligation under this Chapter)

Paragraph (1)

80. Mr. PELLET said that the word "scale" should be rendered in French, not as *échelle*, but as *gravité*.

*Paragraph (1), as amended in the French text, was adopted.*

Paragraph (2)

81. Mr. Sreenivasa RAO proposed that the words "could be envisaged" should be replaced by "could possibly be involved".

*Paragraph (2), as amended, was adopted.*

<sup>1</sup>General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

## Paragraph (3)

82. Mr. KAMTO said, in relation to the fifth sentence, that it would be useful to add the phrase “of general scope” after “positive duty of cooperation”, in view of the fact that specific duties of cooperation existed in some areas of international law, such as environmental protection, in which a State was required to take either emergency measures or preventive action. Indeed, a specific reference to environmental protection could be made in the next sentence.

83. Mr. PELLET said that a more economical way of dealing with Mr. Kamto’s concern would be to insert the word “general” before “international law”. Another objection to the sentence was that it bordered on the repetitious. The word “already”, in particular, was redundant and should be deleted. He also asked why, in the last sentence of the paragraph, the restrictive expression “at least” was necessary. States should be required to react. The words “at least some response” should be replaced by a phrase such as “a response appropriate to the measures envisaged”.

84. Mr. ECONOMIDES supported the suggestion. Article 41 established that States must cooperate, but it was for them, not for the Commission, to determine the extent of such cooperation.

85. Mr. LUKASHUK regretted that, while the paragraph referred to the duty to cooperate, it made no mention of the basic principle of the general duty of cooperation.

86. Mr. HAFNER supported Mr. Pellet’s suggestion. He was concerned, however, about the footnote, with its reference to article 54, which gave the impression that measures under article 41 were identical with those under article 54. If that was the case, it should be stated in the commentary itself, and the commentary to article 54 should refer back to article 41.

87. Mr. Sreenivasa RAO said he wished to raise a practical concern. Not all the 189 Member States of the United Nations needed to be involved in a given situation at the same time, all the time or at the same level; much depended on which State had the duty to cooperate. There was no point in protecting countries which could make no possible contribution. It might be that, so long as they were not interfering, that was cooperation enough. As for the suggestions by Mr. Kamto and Mr. Pellet, one solution would be to replace the words “some response” by the words “a suitable response”. Otherwise there was a risk of reducing cooperation to a minimal level.

88. Mr. CRAWFORD (Special Rapporteur) said that paragraph (3) was an exercise in tightrope walking by a person loudly denying that there was a tightrope. From that point of view, the proposals for change were relatively minor, as opposed to the changes demanded by the law of gravity. The difficulty raised by Mr. Hafner could be solved by deleting the footnote. Mr. Kamto’s point was best dealt with by adopting the solution suggested by Mr. Pellet: to insert the word “general” before “international law” in the fifth sentence. As for the word “already”, that too should be deleted, for the reasons given by Mr. Pellet.

On Mr. Lukashuk’s point, he considered that the commentary should not broach general questions about the duty of cooperation in international law; the question at issue was a specific one. As to the issues raised by Mr. Sreenivasa Rao, the element of doubt was expressed in the phrase which opened the fifth sentence. Moreover, in the next sentence mention was made of cooperation in the framework of international organizations, which itself provided a measure of input and control. Lastly, the last sentence spoke of strengthening existing mechanisms of cooperation; and, if a State wanted to do so, existing measures gave ample opportunities for backsliding. He suggested that the last sentence should be reworded in the following terms: “Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40.”

*Paragraph (3), as amended, was adopted.*

## Paragraph (4)

*Paragraph (4) was adopted.*

## Paragraph (5)

89. Mr. Sreenivasa RAO questioned whether the example given in the second sentence—which, along with the third, did not appear in the French text—was worth retaining. A specific example, however, would be of interest.

90. Mr. CRAWFORD (Special Rapporteur) said that the problem had arisen because the original reference had been to non-recognition of the acquisition of territory by the unlawful use of force. Mr. Rosenstock had rightly pointed out that the reference should be to any use of force, since such non-recognition was the basis on which a number of situations were resolved without any agreement on underlying questions of responsibility. He had therefore changed the example but perhaps weakened the point being made.

*Paragraph (5) was adopted.*

## Paragraph (6)

91. Mr. PELLET said that the phrase “US Secretary of State” should read “Secretary of State”.

*Paragraph (6), as amended, was adopted.*

## Paragraphs (7) and (8)

*Paragraphs (7) and (8) were adopted.*

## Paragraph (9)

92. Mr. PELLET said the paragraph was perplexing. Obviously the responsible State had the obligation of non-recognition; that was hardly worth stating. It was far more significant that the injured State was unable to



recognize a situation that resulted from a breach of *jus cogens*. He therefore suggested that the paragraph should be entirely recast along the following lines:

“The obligation of non-recognition applies to all States, including the injured State. There have been cases where the State responsible for a serious breach has sought to consolidate the situation by having it recognized by the injured State. This is conceivable in relation to breaches of obligations arising out of non-peremptory norms, but not when the obligations breached arise out of peremptory norms, which, by definition, concern the international community of States as a whole. [At that point, reference to a footnote referring to article 53 of the 1969 Vienna Convention.] Accordingly, the injured State itself is under an obligation not to accept the continuation of the unlawful situation, an obligation consistent with article 30 on cessation and reinforced by the peremptory character of the norm in question.”

93. Mr. CRAWFORD (Special Rapporteur) said that the Commission was faced with two separate questions: first, whether to retain existing paragraph (9) and, second, whether to adopt Mr. Pellet's suggestion, which might be temporarily termed paragraph 9 (a). The two dealt with different situations. He would prefer, on balance, to retain paragraph (9), for there had been attempts to institutionalize a situation by the recognition of it by the responsible State; it was not a purely abstract or academic situation, although admittedly it could be a matter of some delicacy. As for paragraph 9 (a), he had no difficulty in accepting the substance. It dealt with an issue raised by article 45, which it had been possible to avoid in the earlier context raised by Mr. Economides, in that, whereas chapter II was not at all concerned with *ex post facto* conduct, chapter III was. His only doubt about paragraph 9 (a) was whether it would be acceptable to States. Such issues might well be better dealt with in the framework of article 45. It was, in fact, a question of expediency. If the Commission decided to accept paragraph 9 (a), he would, of course, reword both paragraphs to ensure that there was no repetition.

94. Mr. ECONOMIDES said he was in favour of keeping paragraph (9), which dealt appropriately with the question of the responsible State: the obligation of non-recognition applied to all States, including the responsible State, for reasons that had been explained.

95. He was also in favour of adopting paragraph 9 (a), which dealt with the injured State. The proposal was, indeed, similar to the proposal he had made (2704th meeting), although he did not know whether it should rightly be considered in the framework of article 41 or article 45.

96. Mr. PELLET said he was not in sympathy with Mr. Economides's position. To take a concrete example, Iraq had invaded Kuwait, yet, according to paragraph (9), Kuwait could not recognize the situation arising from its invasion. That was true, but it led nowhere and intellectually was most unsatisfactory. Moreover, it detracted from the specificity of serious obligations. He would therefore prefer to delete existing paragraph (9) altogether and replace it with paragraph 9 (a).

97. Mr. KAMTO said he was for both paragraphs. Paragraph (9) described a situation that was not merely hypothetical, whether the breaches involved were serious or not. It was, indeed, possible for an invasion to be carried out under the control of another State; and the latter would also be covered by article 40. Paragraph 9 (a) was also useful, since article 41, paragraph 2, stated that “No State shall recognize as lawful a situation created by a serious breach . . .”. Hence there was no need to refer to article 45. He considered, however, that to make a distinction, as in paragraph 9 (a), between serious and non-serious breaches would be misleading.

98. Mr. MELESCANU said that the important element of a peremptory norm was that no State could recognize the situation as lawful; paragraph (9) was therefore necessary. Nevertheless, he was also in favour of paragraph 9 (a): as Mr. Economides had said in relation to the chapter on circumstances precluding wrongfulness, it was possible for the injured State to accept the breach, whereas in the case of peremptory norms it must be clearly stated that such acceptance was not possible. A cross-reference to article 45 should be included.

99. Mr. PELLET said he was willing to retain paragraph (9), but there should be an indication, at least in a footnote, that the provision also applied to ordinary breaches. Otherwise, a surreal situation would be created in which a responsible State could never recognize a situation arising from its own breach.

100. Mr. CRAWFORD (Special Rapporteur) said that, if the Commission decided to introduce paragraph 9 (a), it would further need to decide whether it should appear in the framework of article 41 or whether there should be a cross-reference to article 45, which dealt with the loss of the right to invoke responsibility and the corollaries thereto. Obviously, if the injured State, in situations covered by chapter III, validly rectified a situation, for example by entering into a comprehensive peace agreement, the rest of the world was no longer under an obligation of non-recognition. The matter could therefore be dealt with under article 45.

101. Mr. ROSENSTOCK suggested that, from a drafting standpoint, the matter was best dealt with by having a *chapeau* for article 9, followed by two subparagraphs.

102. The CHAIRMAN said that it should be left to the Special Rapporteur to redraft the text of paragraph (9).

*It was so agreed.*

Paragraph (10)

103. Mr. PELLET said, in relation to the first sentence, that it would be more accurate to say that the consequences of the obligation of non-recognition were not unqualified.

104. Mr. ROSENSTOCK said the thrust of the paragraph was the fact that it was possible to recognize a State's activities, even if an occupation was illegal. The quotation in the paragraph established that the recognition was not of a lawful but of a factual nature, giving rise to certain consequences such as the legitimacy of

children, of marriage or of private property transactions. The paragraph must be retained; otherwise, great injustice could be done.

105. Mr. CRAWFORD (Special Rapporteur) concurred. He suggested that the words “as lawful” should be inserted after the word “recognized” in the second sentence.

*Paragraph (10), as amended, was adopted.*

Paragraphs (11) to (14)

*Paragraphs (11) to (14) were adopted.*

106. Mr. CRAWFORD (Special Rapporteur) expressed his gratitude for the patience that members of the Commission had shown in dealing with extremely difficult material.

*The meeting rose at 5.50 p.m.*

## 2706th MEETING

*Wednesday, 8 August 2001, at 10 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, 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. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

### **Draft report of the Commission on the work of its fifty-third session (*continued*)**

**CHAPTER V. State responsibility (*continued*) (A/CN.4/L.608 and Corr.1 and Add.1 and Corr.1 and Add.2–10)**

**E. Text of the draft articles on responsibility of States for internationally wrongful acts (*continued*) (A/CN.4/L.608/Add.1 and Corr.1 and Add.2–10)**

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*)

PART THREE. THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

*Commentary to Part Three (A/CN.4/L.608/Add.6)*

1. Mr. KAMTO said that the word “secondary” in the first sentence should be deleted, as had been done in other paragraphs of the commentaries. If the word “another” in the second sentence was to have any meaning, the word “State” should be added before the word “responsibility”.

*The commentary to Part Three, as amended, was adopted.*

CHAPTER I. INVOCATION OF THE RESPONSIBILITY OF A STATE

*Commentary to chapter I*

Paragraph (1)

2. Mr. SIMMA said that, as had been done in other paragraphs of the commentaries, the words “State or entity” should be replaced by the words “State, person or entity”.

3. Mr. CANDIOTI said that, at the end of the last sentence, the words “article 34” should be replaced by the words “article 33”.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

4. Mr. KAMTO proposed that the words “and which should be considered as injured thereby” at the end of the second sentence should be deleted.

5. Mr. ECONOMIDES said that the beginning of the fourth sentence was wrong because the draft articles covered all international obligations which were not governed by special provisions.

6. Mr. CRAWFORD (Special Rapporteur) said that the comment by Mr. Economides applied only to the French text and that the secretariat would make the necessary correction.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

7. Mr. GAJA said he wondered whether the word “injured” should not be added before the word “State” in the last sentence.

8. Mr. ROSENSTOCK said that, if that were done, the impression would be given that there could be cases where an injured State was not entitled to invoke responsibility.

9. Mr. CRAWFORD (Special Rapporteur) said that it was better to delete the last sentence.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

## Paragraph (5)

10. Mr. SIMMA, referring to the second sentence, said that, in addition to primary rules, reference should also be made to *lex specialis* rules, which could be of a secondary nature.

11. Mr. CRAWFORD (Special Rapporteur) proposed that the words “The primary rules” should be deleted and the words “special rules” inserted before “may also determine”.

*Paragraph (5), as amended, was adopted.*

*The commentary to chapter I, as amended, was adopted.*

*Commentary to article 42* (Invocation of responsibility by an injured State)

## Paragraph (1)

*Paragraph (1) was adopted.*

## Paragraph (2)

12. Mr. PELLET said that the first sentence, which was awkward and not very clear, should be amended to read: “This chapter is expressed in terms of the invocation by a State of the responsibility of another State.” At the end of the fifth sentence the word “specific” should be added before the word “title”.

*Paragraph (2), as amended, was adopted.*

## Paragraph (3)

13. Mr. PAMBOU-TCHIVOUNDA said that the beginning of the fourth sentence, up to the comma, was not at all clear. He proposed that it should be amended to read *La situation d'un État lésé doit être distinguée de celle qui confère à tout État le droit d'invoquer la responsabilité d'un autre État.*

14. Mr. CRAWFORD (Special Rapporteur) proposed that the fourth sentence should be placed in square brackets until the English text of Mr. Pambou-Tchivounda's proposal had been prepared.

*It was so agreed.*

## Paragraph (4)

*Paragraph (4) was adopted.*

## Paragraph (5)

15. Mr. GALICKI said that the word “three” in the first sentence should be deleted because more than three cases were envisaged in article 60.

*Paragraph (5), as amended, was adopted.*

## Paragraphs (6) to (10)

*Paragraphs (6) to (10) were adopted.*

## Paragraph (11)

16. Mr. PELLET said that, in order to avoid any ambiguity, the words “of a functional character” should be added at the end of the paragraph.

*Paragraph (11), as amended, was adopted.*

## Paragraph (12)

17. Mr. GAJA said that, as in other paragraphs of the commentaries, the words “States parties to the obligation” at the end of the paragraph should be replaced by the words “States to which the obligation is owed”.

*Paragraph (12), as amended, was adopted.*

## Paragraph (13)

*Paragraph (13) was adopted.*

## Paragraph (14)

18. Mr. PAMBOU-TCHIVOUNDA proposed that, in the French text of the fourth sentence, the word *vif* should be replaced by the word *réel*.

*Paragraph (14), as amended in the French text, was adopted.*

## Paragraph (15)

*Paragraph (15) was adopted.*

*Commentary to article 43* (Notice of claim by an injured State)

## Paragraph (1)

*Paragraph (1) was adopted.*

## Paragraph (2)

19. Mr. ECONOMIDES said that the words “extinctive prescription” towards the end of the paragraph were awkward because they implied that there was a time limit for prescription.

20. Mr. CRAWFORD (Special Rapporteur) proposed that those words should be replaced by the word “acquiescence”, which was used in article 45.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

21. Mr. PELLET said that he absolutely did not understand the last sentence.

22. Mr. CRAWFORD (Special Rapporteur) said that that sentence was indeed quite obscure and that it could be deleted without any harm.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

23. Mr. PELLET said that, in the fourth sentence of the French text, it would be better, for the sake of accuracy, to replace the words *il n'appartient pas à l'État lésé* by the words *l'État lésé n'est pas tenu*.

*Paragraph (5), as amended in the French text, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

24. Mr. PELLET said that, in the second sentence, the word “should” should be replaced by the word “may”.

*Paragraph (7), as amended, was adopted.*

*The commentary to article 43, as amended, was adopted.*

*Commentary to article 44 (Admissibility of claims)*

Paragraphs (1) to (5)

*Paragraphs (1) to (5) were adopted.*

*The commentary to article 44 was adopted.*

*Commentary to article 45 (Loss of the right to invoke responsibility)*

Paragraph (1)

25. Mr. GALICKI said that the Commission did not usually quote the text of articles of the 1969 and 1986 Vienna Conventions *in extenso*. He therefore proposed that the footnote should be deleted.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted.*

Paragraph (4)

26. Mr. ECONOMIDES proposed that the following sentence should be added at the end of paragraph (4): “In any case, in the event of a serious breach of a peremptory norm, a State cannot unilaterally waive the right to invoke responsibility until the matter has been settled in accordance with international law.”

27. Mr. CRAWFORD (Special Rapporteur), supported by Mr. TOMKA (Chairman of the Drafting Committee), said that he had no objection, provided that that wording did not impose an obligation on the State. He would draft an addition to the paragraph to meet the concern expressed by Mr. Economides.

*It was so agreed.*

Paragraphs (5) to (10)

*Paragraphs (5) to (10) were adopted.*

Paragraph (11)

28. Mr. ECONOMIDES said that the first sentence should be simplified.

29. Mr. PELLET proposed that in the French text the word *réputée* should be deleted and that a term other than *défavorisé* should be used.

30. Mr. BROWNLIE said that the principle was composed of two elements: implied consent on grounds of delay and the fact that the respondent State had been disadvantaged.

31. Mr. CRAWFORD (Special Rapporteur) said that he would redraft the sentence.

*It was so agreed.*

*Commentary to article 46 (Plurality of injured States)*

Paragraphs (1) and (2)

32. Mr. SIMMA, supported by Mr. PELLET, said that the commentary was a bit sketchy. It would be better to add just one sentence relating to a plurality of injured States.

33. Mr. CRAWFORD (Special Rapporteur) said that there were not many examples of that case, but he would try to add a new paragraph to the commentary to article 46.

*It was so agreed.*

34. Mr. GAJA proposed that, in the second sentence of paragraph (2), the words “all the States parties to an interdependent obligation” should be replaced by the words

“all the States to which an interdependent obligation is owed”.

*Paragraphs (1) and (2), as amended, were adopted.*

*Commentary to article 47 (Plurality of responsible States)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

35. Mr. LUKASHUK said he was not sure what was meant by the words “attributable to it” in the third sentence. Did they mean that a State was responsible to the extent to which its conduct was unlawful?

36. Mr. CRAWFORD (Special Rapporteur) said that article 2 was the reference. He therefore proposed that the words “in the sense of article 2” should be added at the end of the sentence.

*Paragraph (3), as amended, was adopted.*

Paragraphs (4) to (10)

*Paragraphs (4) to (10) were adopted.*

*The commentary to article 47, as amended, was adopted.*

*Commentary to article 48 (Invocation of responsibility by a State other than an injured State)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

37. Mr. Sreenivasa RAO said that the first sentence should be redrafted because the words “international law accepts” seemed to indicate that the case in question was exceptional.

38. Mr. PELLET proposed that “international law accepts the invocation of responsibility of States” should be amended to read: “responsibility may be invoked by States”.

39. Mr. CRAWFORD (Special Rapporteur) said that he endorsed Mr. Pellet’s proposal.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

40. Mr. PAMBOU-TCHIVOUNDA proposed that, at the beginning of the French text of the first sentence, the words *parole de* should be replaced by the word *vise*.

*Paragraph (4), as amended in the French text, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

Paragraph (6)

41. Mr. GALICKI proposed that the wording of paragraph (6) should be brought into line with that of article 48 and that, at the end of the first sentence, the words “of the group” should be added after the words “collective interest”.

42. Mr. KAMTO said that the second part of the penultimate sentence should be simplified and amended to read: “may derive from multilateral treaties or general or regional customary international law”.

43. Mr. Sreenivasa RAO said that the distinction drawn by the Special Rapporteur was relevant and that it might be better to leave the text as it stood.

44. Mr. LUKASHUK proposed that the problem might be solved by simply saying: “general customary international law”.

45. Mr. SIMMA said that the problem was caused by the word “hence” in the penultimate sentence, which seemed to introduce a list of sources of international law, something that regional customary regimes obviously were not.

46. Mr. CRAWFORD (Special Rapporteur) said that he agreed to the deletion of the word “hence” and proposed that the rest of the sentence should be amended to read: “obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law”.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

47. Mr. SIMMA said that human rights should be explicitly referred to in paragraph (7).

48. Mr. CRAWFORD (Special Rapporteur) said that he endorsed Mr. Simma’s comment and proposed that the words “or a regional system for the protection of human rights” should be added to the phrase in parentheses at the end of the second sentence.

49. Mr. Sreenivasa RAO said that he would like to know the difference between “a collective interest” and “a group interest”.

50. Mr. PELLET, supported by Mr. BROWNLIE, said that the words “from which article 48 is a deliberate departure” in the last footnote should be deleted.

51. Mr. SIMMA said that he objected to that deletion because it would have the effect of highlighting the questionable decision taken by ICJ in that case. If those words were deleted, it would be better simply to delete the second sentence of the footnote as a whole.

52. Mr. TOMKA (Chairman of the Drafting Committee), supported by Mr. DUGARD, said that the text of the footnote should be retained as it stood.

53. Mr. PELLET said that he would not press for the deletion of the words in question, but requested that his objections should be reflected in the summary record.

54. Mr. Sreenivasa RAO proposed that the third sentence should end after the words “some wider interest” and that the words “and even in matters of universal concern” should be deleted. That would prevent confusion between the concept of “collective interest” and the broader concept of interests of the international community.

55. Mr. SIMMA said that matters of universal concern, such as human rights, could be protected in the context of a group of States. That was the meaning of the phrase in question.

56. Mr. PELLET said that he shared Mr. Sreenivasa Rao’s point of view. Paragraph 1 (a) did not refer to “universal concern”, but paragraph 1 (b) did.

57. Mr. CRAWFORD (Special Rapporteur) said that the only purpose of the sentence was to make it clear that what was involved was not narrow self-interest such as that which might, for example, be invoked in connection with free trade agreements.

58. Mr. SIMMA proposed that account might be taken of Mr. Sreenivasa Rao’s concerns by replacing the words “and even in matters of universal concern” by the words “and even in the general interest”.

59. Mr. CRAWFORD (Special Rapporteur) suggested that that proposal might be adapted to read: “and even in some wider common interest”.

*Paragraph (7), as amended by the Special Rapporteur, was adopted.*

Paragraphs (8) to (11)

*Paragraphs (8) to (11) were adopted.*

Paragraph (12)

60. Mr. SIMMA asked the Special Rapporteur what was meant by the word “general” in the sixth sentence and by the words “if it is in being” in the ninth sentence.

61. Mr. CRAWFORD (Special Rapporteur) said that the word “general” should be deleted. The words “if it is in being” referred to Somalia-type situations, in which there was no State government.

62. Mr. PELLET, pointing out that the definition of the term “State” assumed that there was a government, said that the situation referred to by the words in question was covered by the tenth sentence. He therefore proposed that the words “if it is in being”, as well as the word “themselves”, in the tenth sentence, should be deleted.

63. Mr. DUGARD said that he was in favour of retaining the words “if it is in being” and adding a footnote referring to the situation in Somalia.

64. Mr. BROWNLIE, supporting Mr. Pellet’s proposal that the words “if it is in being” should be deleted, stressed that the Commission had to be cautious in referring to examples of current situations.

65. Mr. ROSENSTOCK said that the words in question were useful, provided that the Commission refrained from referring to specific situations.

66. Mr. Sreenivasa RAO said he agreed with Mr. Brownlie that the Commission must be very careful and not say too much, since it knew what it was talking about.

67. Mr. HE said that he was in favour of the deletion of the words “if it is in being”.

68. The CHAIRMAN proposed that the word “general” in the sixth sentence, the words “if it is in being” in the ninth sentence and the word “themselves” in the tenth sentence should be deleted.

*It was so agreed.*

69. Mr. ECONOMIDES proposed that, in order to use the exact wording of article 30, the words “when necessary” in the first sentence should be replaced by the words “if circumstances so require”.

*Paragraph (12), as amended, was adopted.*

Paragraphs (13) and (14)

*Paragraphs (13) and (14) were adopted.*

*The commentary to article 48, as amended, was adopted.*

## CHAPTER II. COUNTERMEASURES

### *Commentary to chapter II (A/CN.4/L.608/Add.5)*

Paragraph (1)

70. Mr. PELLET proposed that, for the sake of clarity, the beginning of the second sentence should be amended to read *En d’autres termes, il traite de mesures qui seraient contraires aux obligations internationales de l’État lésé vis-à-vis de l’État responsable si elles n’étaient prises par le premier en réaction. . . .*

71. Mr. CRAWFORD (Special Rapporteur) said that, in English, that proposal would read: “In other words, it deals with measures which would otherwise be contrary

to the international obligations of an injured State *vis-à-vis* the responsible State. They were not taken . . . ”.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

72. Mr. ROSENSTOCK proposed that the third sentence should be deleted because, although it was obvious that countermeasures were liable to abuse, it was not certain that they were more liable to abuse by powerful States and the sentence was therefore inappropriate.

73. Mr. SIMMA, supported by Mr. BROWNLIE, said that he could agree to the deletion of the words “Like other forms of self-help”, but he would like the rest of the sentence to be retained because inequalities between States were a fact of life, particularly in the economic sphere.

74. Mr. GOCO, Mr. KATEKA, Mr. LUKASHUK, Mr. PAMBOU-TCHIVOUNDA and Mr. Sreenivasa RAO said that, in view of the importance of the third sentence, they were not in favour of its deletion.

*Paragraph (2) was adopted.*

Paragraph (3)

75. Mr. SIMMA, said that the ninth sentence, beginning with the words “Questions concerning the use of force” gave the impression that there were rules governing the use of force outside of the Charter of the United Nations. The tenth sentence referred to countermeasures as defined in article 23, but it was in fact article 49 which defined countermeasures.

76. Mr. PELLET proposed that, in the tenth sentence, the word “properly” should be deleted because it implied that the other articles dealing with countermeasures did not do so properly.

77. Mr. CRAWFORD (Special Rapporteur) proposed that the words “contrary to the Charter” in the ninth sentence and the word “properly” in the tenth sentence should be deleted and that the word “defined” in the tenth sentence should be replaced by the words “referred to”.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

78. Mr. PELLET said that the footnote should also refer to the judgment of ICJ in the *Gabčíkovo-Nagymaros Project* case, in which the Court clearly distinguished between the law of treaties and the law of responsibility. In the last sentence of the French text, the word *provisoires* should be replaced by the word *temporaires* and that substitution should be made systematically in the other articles.

*Paragraph (4) was adopted with the correction to the French text.*

Paragraph (5)

79. Mr. PELLET proposed that the fifth sentence should be amended to read: “First, for some obligations, e.g. those relating to the protection of human rights, reciprocal reactions are hardly conceivable, since the obligations in question are themselves of a non-reciprocal nature and are owed not to another State, but to individuals.” The sixth sentence should be deleted.

80. Mr. SIMMA proposed that the sixth sentence should be retained and amended to read: “These obligations are owed not only to States, but also to individuals.”

81. Mr. CRAWFORD (Special Rapporteur) suggested that those two proposals should be placed in square brackets and that the Commission should come back to them later.

82. Mr. ECONOMIDES proposed that the tenth sentence should be deleted because he did not see why an injured State would be “descending” by taking reciprocal countermeasures and not “descending” by taking countermeasures other than reciprocal ones. He also proposed that the penultimate sentence should be deleted and that the beginning of the last sentence should be amended to read: “However, reciprocal countermeasures are more likely . . . ”.

83. Mr. CRAWFORD (Special Rapporteur) said that, in his view, the tenth sentence was correct and useful because, if reciprocal countermeasures were the only kind of countermeasures that could be taken, the more serious outrages there were, the more countermeasures there would be. He would, however, not object to the deletion of that sentence. In general, he did not want to rewrite the commentary on countermeasures, on which a great deal of work had been done.

84. Mr. Sreenivasa RAO said that a great deal of effort had indeed gone into the preparation of that commentary and that it would better simply to make minor changes to it.

85. Mr. SIMMA said that it was not fair simply to brush off the problems raised by the members who had not taken part, or who had not been allowed to take part, in the work of the Working Group on the commentaries to the draft articles on State responsibility chaired by Mr. Mellescanu, as was his case. If the tenth sentence was deleted, however, the word “reciprocal” should be added before the word “measures” in the ninth sentence.

86. Mr. PELLET said that, in his view, that sentence should be retained. The word *valoriser* should be replaced by the word *encourager* and the words *à s'abaisser* should be deleted.

87. Mr. CRAWFORD (Special Rapporteur) said that, in the commentary on countermeasures, he had tried to establish a reasonable balance between a wide variety of opinions and he urged the members to be tolerant. He himself was prepared to consider any proposed change. For example, he could agree that the sentence in question should be deleted and that the word “reciprocal” should be added before the word “measures” in the ninth sentence. However, he did not see the need to amend the last

sentence. He stressed that paragraph (5) was intended to indicate that countermeasures must not be limited to reciprocal countermeasures, but that the latter were more likely to satisfy the requirements of necessity and proportionality.

88. The CHAIRMAN proposed that the adoption of paragraph (5) should be postponed until the Special Rapporteur had taken a decision on the two proposals placed in square brackets.

*It was so agreed.*

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

89. Mr. PAMBOU-TCHIVOUNDA proposed that the first sentence should be amended to read: "This chapter also deals to some extent with the conditions of the implementation of countermeasures." He also proposed that the second, third and fourth sentences should be deleted because they had nothing to do with countermeasures and should be moved to the beginning of the commentary in the general introduction to the draft articles.

90. Mr. SIMMA said that, in the second sentence, the words "the articles cannot themselves establish" should at least be replaced by the words "it is not opportune for the articles to establish", but he would also not object to the deletion of the second and third sentences.

91. Mr. CRAWFORD (Special Rapporteur) said he agreed that the second sentence was badly drafted and might be confusing. The idea had been to reflect, in a balanced manner, the various opinions on the question of the link between countermeasures and the settlement of disputes. In the context of draft articles which would not take the form of a treaty, such a link could apparently not be established. It would be up to States to decide what provisions were to be drafted on the settlement of disputes. He nevertheless accepted the deletion of the second, third and fourth sentences and the amendment of the first sentence.

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

92. Mr. GALICKI proposed that the words "in the interests of the victims" at the end of the paragraph should be replaced by the words "in the interest of the injured State or the beneficiaries of the obligation breached", in accordance with the wording of article 54.

*Paragraph (8), as amended, was adopted.*

Paragraph (9)

*Paragraph (9) was adopted.*

*Commentary to article 49 (Object and limits of countermeasures)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

93. Mr. PELLET said that there was no need in paragraph (4) to refer to the continuity of the wrongful act and proposed that the first sentence should be amended. The words "obligations of reparation" should read "obligations of cessation and reparation".

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

94. Mr. KAMTO proposed that the first sentence should be amended to read: "In some cases, however, countermeasures may . . .". The words between dashes in the third sentence and the last sentence should also be deleted.

95. Mr. PELLET said he was also of the opinion that the words between dashes should be deleted because the right of transit was an obligation *erga omnes* that was independent of any special agreement. It was thus not a relevant example.

96. Mr. CRAWFORD (Special Rapporteur) said that the double negative in the first sentence should be retained and that the last sentence should be retained as well so that the paragraph would be balanced. He did, however, accept the deletion of the words between dashes.

97. Mr. Sreenivasa RAO said that, although the indirect or secondary effects of countermeasures on the position of third States could not be avoided altogether, it would be interesting to know what the rights of those States were because they were just as important as the rights of other States.

98. Mr. CRAWFORD (Special Rapporteur) said that the Commission could not provide that a State which had taken countermeasures had an obligation to compensate a third State which had indirectly suffered the effects thereof because that would be contrary to the content of the draft articles. The question was not one of rights, but of the consequences of countermeasures. All the Commission could do was to indicate that countermeasures had to be taken in such a way as to affect third parties as little as possible.

99. Mr. SIMMA proposed that the footnote should be deleted because it might imply that Article 50 of the Charter of the United Nations allowed for the possibility referred to in the sentence to which the footnote referred.



100. Mr. ECONOMIDES pointed out that the indirect or secondary effects in question were in fact collateral effects and he therefore proposed that the word “secondary” be replaced by “collateral” because it was more appropriate.

*Paragraph (5), as amended by Mr. Simma and Mr. Economides, was adopted subject to the deletion of the words between dashes.*

*The meeting rose at 1.05 p.m.*

## 2707th MEETING

*Wednesday, 8 August 2001, at 3.20 p.m.*

*Chairman:* Mr. Peter KABATSI

*later:* Mr. Gerhard HAFNER

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

### Draft report of the Commission on the work of its fifty-third session (*continued*)

#### CHAPTER V. *State responsibility (continued)* (A/CN.4/L.608 and Corr.1 and Add.1 and Corr.1 and Add.2–10)

##### E. *Text of the draft articles on responsibility of States for internationally wrongful acts (continued)* (A/CN.4/L.608/Add.1 and Corr.1 and Add.2–10)

#### 2. *TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (continued)*

#### PART THREE. THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE (*continued*)

#### CHAPTER II. COUNTERMEASURES (*continued*)

##### *Commentary to article 49 (Object and limits of countermeasures) (concluded)* (A/CN.4/L.608/Add.5)

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were adopted.*

Paragraph (8)

1. Mr. LUKASHUK said that it was quite possible for a State to apply for satisfaction, even after obtaining compensation, in cases where its honour, for example, was affected. He therefore suggested that the last sentence should be deleted.

2. Mr. CRAWFORD (Special Rapporteur) said that the commentary addressed the issue discussed in the Drafting Committee, which was whether countermeasures would be available in order to insist on satisfaction in situations in which there was no continuing wrongful act and compensation had been obtained or, at least, tendered. The view had been taken that, although satisfaction had certain special features, it should not be excluded as a matter in relation to which countermeasures might in theory be demanded. He was not opposed to a deletion, but, in that case, the last three sentences should be deleted. The last sentence could not be deleted on its own, since it provided the necessary balance with the penultimate sentence by specifying that countermeasures could be taken only in specific cases where the demand was proportionate.

3. Mr. BROWNLIE said that he was among those who thought the sentence should be retained, since it had been an issue during the discussion. It would be wrong for the Commission to proceed on the principle that material should be deleted because one member felt strongly and the rest stayed silent.

4. Mr. GAJA said that reference should be made to assurances and guarantees of non-repetition. It was not that countermeasures should be allowed in those circumstances, but the commentary should not pass over the matter in silence. He therefore suggested that the following sentence should be inserted, possibly after the second sentence: “However, countermeasures are unlikely to be appropriate in order to obtain assurances and guarantees of non-repetition.”

5. Mr. CRAWFORD (Special Rapporteur) said that such assurances and guarantees had features in common with satisfaction. In both cases, they were supplementary and not always applicable, and in ordinary circumstances it was difficult to conceive that countermeasures would be taken, but the issue was adequately dealt with by the notion of proportionality. He therefore suggested adding a footnote, saying that the same considerations applied to assurances and guarantees of non-repetition.

6. Mr. KAMTO said that, inasmuch as satisfaction was always symbolic, being psychological rather than material, he saw no point in retaining the word “symbolic” in the penultimate sentence. As for the difficulty over the last sentence, a solution might be to replace the phrase “is adequately addressed” by “may be adequately addressed”.

*Mr. Hafner, Vice-Chairman, took the Chair.*

7. Mr. CRAWFORD (Special Rapporteur) said that it would be hard to delete the word “symbolic” and leave the word “nominal”; he would, indeed, prefer to delete the latter. As for the second point, he was happy to adopt Mr. Kamto’s suggested amendment to the last sentence.

*Paragraph (8), as amended, was adopted.*

Paragraph (9)

8. Mr. KAMTO drew attention to the antepenultimate sentence, which began: “In some cases”. He had no objection to the content, but it did not tally with the statement in the third sentence of paragraph (5). He therefore suggested that it should be followed by a sentence reading: “In such cases, the injured State must face the legal consequences of the situation.” The reason was that countermeasures could be detrimental to other States and the responsible State should be aware of the consequences of non-notification.

9. Mr. CRAWFORD (Special Rapporteur) said that, since the issue had already been discussed under paragraph (5), it would be preferable not to revert to it. Obviously, there was no point in notifying in cases where the event on which notification was required had already occurred. The easiest solution would be to delete the antepenultimate sentence; the paragraph would read equally well without it.

*Paragraph (9), as amended, was adopted.*

*The commentary to article 49, as amended, was adopted.*

*Commentary to article 50 (Obligations not affected by countermeasures)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

10. Mr. ROSENSTOCK said that the last sentence bore no relation to article 50, paragraph 1 (a), and should be deleted.

11. Mr. PAMBOU-TCHIVOUNDA said that it dealt with a specific issue, the notion of aggression. The Commission should not close its eyes to what actually took place on the ground. The sentence should be retained.

12. Mr. CRAWFORD (Special Rapporteur) said that the point at issue was not the reality of events but what was covered by paragraph 1 (a). The sentence made it clear that other forms of coercion were not covered by paragraph 1 (a) and Mr. Rosenstock was therefore formally correct. He would support the proposed deletion. The sentence would also be unacceptable to those who took the view that the prohibition of coercion under the Charter of the United Nations went beyond the use of military force.

13. Mr. LUKASHUK said that the sentence was an organic part of the commentary to paragraph 1 (a) and provided a practical answer to an important question.

14. Mr. ROSENSTOCK said that an argument could be made for the sentence to be inserted in some other position, but it was preposterous to tie it to paragraph 1 (a), with which it had no relation.

15. Mr. ECONOMIDES said that the sentence had emerged as a compromise out of the discussions in the Commission. The Special Rapporteur had, after all, stated that such forms of coercion were not covered by paragraph 1 (a) but might be affected by other provisions. It was worth emphasizing the importance of proportionality.

16. Mr. SIMMA said that the question of political or economic coercion did not fit into any of the categories listed in article 50, paragraph 1, with the possible exception of obligations for the protection of fundamental human rights; and that issue was addressed in paragraph (7) of the commentary. There was therefore little point in referring to article 50, paragraph 1, so that was an additional reason to delete the sentence.

17. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to delete the last sentence of paragraph (4).

*It was so agreed.*

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

Paragraph (6)

18. Mr. SIMMA said he was opposed to the use of the word “standards” in the penultimate sentence, for in some contexts standards were used as an alternative to legally binding norms. Secondly, the word “inviolable”, in the last sentence, was superfluous, since the only possible meaning was that the human rights in question were non-derogable.

19. Mr. BROWNLIE said that, while there might be no need to spell out the meaning of inviolability, the commentary was expository in nature and hence there was some point in marshalling various factors.

20. Mr. CRAWFORD (Special Rapporteur) said that, if “standard” presented a problem in human rights terms, it could simply be deleted in the penultimate sentence. In the last sentence, he could agree to delete the words “suspended or”, because the real reference was to derogation. However, he agreed with Mr. Brownlie that it was a useful explanatory point.

21. Mr. SIMMA said that he had continuing objections to the word “inviolable”, which was misleading if the rights were indeed violated. He would prefer “fundamental”.

22. Mr. CRAWFORD (Special Rapporteur) said that he was willing to delete the word “inviolable”.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

23. Mr. ROSENSTOCK said that the whole paragraph bore no relation to the topic and merely constituted a distraction. It should be deleted.

24. Mr. CRAWFORD (Special Rapporteur) said that the paragraph attempted to spell out the possible implications in what was a controversial area. It was true, however, that the Commission had already dealt with the question of human rights elsewhere. The paragraph could be deleted and a reference to General Comment No. 8 (1997) of the Committee on Economic, Social and Cultural Rights incorporated in the footnote at the end of paragraph (6).

25. Mr. SIMMA said that, if countermeasures involving force were excluded under paragraph 1 (b), all that was left was economic countermeasures. The question of whether it was legitimate to apply economic pressure on States, which caused greater suffering to the population than to the leadership, was most important in that it stressed that human rights should be taken into account when economic action was taken against a country.

26. Mr. PELLET said that, since the provision existed, even though it did not rightly belong in the draft article, it was worth expounding. The analogies shown were useful. Mr. Rosenstock's objections might be answered if a phrase were added to the end of the first sentence, reading: “but which presents certain analogies”. The fourth sentence which begins “Analogies could be drawn from other elements of general international law” could then be deleted, because the whole paragraph would be an analogy.

27. Mr. ROSENSTOCK said that the paragraph was concerned only with what General Comment No. 8 (1997) said, why the issue was raised and to what it was directed. It did not concern countermeasures at all, rather the use of the facilities existing within the framework of the Security Council and Charter of the United Nations to take certain actions that might have adverse humanitarian effects or be undesirable in some other way. No possibility of countermeasures or any other legal issue was involved. It might be an important issue, but it did not relate to the draft articles; it was a distraction, not an analogy.

28. Mr. MELESCANU said that he could see no serious argument for deleting the paragraph: it reflected the discussions in the Commission, it had its own logic, it explained certain aspects of human rights and it acted as a kind of preface to paragraph (8), which dealt with humanitarian law, and paragraph (9), on the prohibition of countermeasures. Moreover, the first sentence specifically stated that the subject fell outside the scope of the draft articles.

29. Mr. CRAWFORD (Special Rapporteur) said the problem was that the first sentence discussed a matter that was avowedly outside the terms of the draft articles. He would not have incorporated the reference to General

Comment No. 8 (1997) if it had been concerned only with the effect of Security Council sanctions, but the point was that it referred to unilateral actions by States, which would amount to countermeasures. He suggested that the solution might be to delete the first sentence altogether and to recast the next sentence along the following, more objective lines: “General Comment No. 8 (1997) of the Committee on Economic, Social and Cultural Rights deals with the question of the effects of Security Council resolutions, which is outside the terms of the present articles, as well as with the question of countermeasures, and says:”. There should then follow the quotation from the General Comment. He proposed drafting a new text to submit to the Commission.

*It was so agreed.*

Paragraph (8)

*Paragraph (8) was adopted.*

Paragraph (9)

30. Mr. GALICKI said that the last sentence would be improved by inserting the words “obligations under” before “peremptory norms”.

31. Mr. CRAWFORD (Special Rapporteur) said that even greater accuracy could be achieved by rewording the phrase to read: “peremptory norms creating obligations”.

32. Mr. PELLET regretted that there was no mention of the right of peoples to self-determination. He therefore suggested that the final sentence should be followed by a sentence such as “This would apply to, for example, some infringements of the right of peoples to self-determination”. A footnote could then refer the reader to paragraphs (4) to (6) of the commentary to article 40, which contained relevant examples.

33. Mr. CRAWFORD (Special Rapporteur) said that he had introduced references to self-determination in earlier paragraphs—including references to the discussion of the principle in the *Namibia* and *East Timor* cases—especially with an eye to Mr. Pellet's concern. He was therefore reluctant to enter into further detail of the content of peremptory norms, but he would be happy to include a cross-reference to paragraphs (4) to (6) of the commentary to article 40.

*Paragraph (9), as amended, was adopted.*

Paragraph (10)

*Paragraph (10) was adopted.*

Paragraph (11)

34. Mr. KAMTO said that the parentheses around the words “peremptory or non-derogable” gave the impression that they were somehow equivalent to the substantive character of the obligation.

35. Mr. CRAWFORD (Special Rapporteur) concurred. The text in parentheses should be deleted.

*Paragraph (11), as amended, was adopted.*

Paragraph (12)

*Paragraph (12) was adopted.*

Paragraph (13)

36. Mr. PELLET said that the words “or other agreement” were redundant and should be deleted.

37. Mr. CRAWFORD (Special Rapporteur) said he was prepared to adopt the suggestion, but noted that the principle concerned extended also to international arbitral agreements, which were not treaties. That, however, was not the point being made in the paragraph.

*Paragraph (13), as amended, was adopted.*

Paragraph (14)

38. Mr. ECONOMIDES said that it was not accurate to state that such acts as declaring a diplomat *persona non grata*, terminating or suspending diplomatic relations or recalling ambassadors were specifically permitted. They might be authorized in some circumstances, where specific provision was made in a given agreement, but not in others. A diplomat could be declared *persona non grata* by reason of his personal conduct but not because the State had not observed a treaty unrelated to the embassy. Secondly, the reference to the inviolability of diplomatic or consular agents, in the fourth sentence, was insufficient. Reference should also be made to their jurisdictional immunity, which was an important issue, as well as being closely linked with inviolability.

39. Mr. CRAWFORD (Special Rapporteur) said that the withdrawal of a diplomat’s credentials or declaring him *persona non grata* might not be appropriate or proper, but according to his understanding it was not an unlawful act. He could, however, agree to delete the words “are specifically permitted and”, in the third sentence. The reference to countermeasures should remain, because, although such acts might be unfriendly or even amount to retaliation, they did not constitute countermeasures because they were not contrary to any obligations: there was no obligation to have diplomatic relations with a State or to accept any individual as a diplomat. With regard to the second point, he was willing to add the phrase “including jurisdictional immunity” to the fourth sentence in order to dispel any confusion, although he himself would regard jurisdictional immunity as an aspect of inviolability.

40. Mr. LUKASHUK asked what acts such as declaring a diplomat *persona non grata* were, if they were not countermeasures. It would be useful to add, specifically, that such acts were retaliations.

41. Mr. SIMMA said that the difficulty with the third sentence might be due to the slightly different meanings of the English word “specifically” and the French word *ex-*

*pressément*. In the case of English, it could mean “under specific circumstances”. Secondly, such acts as declaring a diplomat *persona non grata*, terminating or suspending diplomatic relations or recalling ambassadors were not invariably acts of retaliation, although they could be.

42. Mr. GALICKI suggested that the last sentence should refer not only to diplomatic but also to consular agents. If his suggestion were adopted, the reference in the footnote would also need to be extended.

43. Mr. MELESCANU said that in some circumstances declaring a diplomat *persona non grata* might well constitute retaliation. The formulation should be kept as general as possible.

44. Mr. CRAWFORD (Special Rapporteur) proposed the formulation: “To declare a diplomat *persona non grata*, to terminate or suspend diplomatic relations, to recall ambassadors in situations provided for in the Vienna Convention on Diplomatic Relations—such acts do not amount to countermeasures in the sense of this Chapter.” The references to jurisdictional immunity and to consular agents could also be added.

45. Mr. MELESCANU said that the immunity of consular agents was a functional immunity.

46. Mr. CRAWFORD (Special Rapporteur) said that the persons in question were in fact not consular agents, but consular officials. The reference thereto should be the subject of a separate sentence.

*Paragraph (14), as amended, was adopted.*

Paragraph (15)

47. Mr. GAJA said that, given that a State could terminate or suspend diplomatic relations, the third sentence which read: “It is precisely when the relations between States are strained as a result of some dispute over some responsibility that diplomatic channels need to be kept open.” and “Moreover”, the first word of the following sentence, should be deleted.

48. Mr. GALICKI said that the source in the first footnote needed to be checked.

*Paragraph (15), as amended, was adopted.*

*Commentary to article 51 (Proportionality)*

Paragraph (1)

49. Mr. BROWNLIE said that, as article 51 constituted a definition of a purpose with limits, proportionality became superfluous as a separate requirement, the purposive definition carrying with it the precise elements of proportionality in that context. The second sentence, which repeated the first in different terms, could thus be deleted, particularly as the word “proportionality” did not appear in article 51, except as the rubric. Furthermore, in the fourth sentence, the words “principle of proportionality” should be changed to “element of proportionality”.

50. Mr. CANDIOTI pointed out that the term “proportional” figured in the text of the Spanish and French versions.

51. Mr. CRAWFORD (Special Rapporteur) said he could accept the change of “principle” to “element”, and also the deletion of the second sentence, in which case the third sentence would have to begin “This is relevant”.

52. Mr. PELLET said that, if the second sentence was to be deleted, the idea of a “core element” should be transposed to the first sentence, which might then read: “. . . establishes an essential limit on . . .”.

53. Mr. PAMBOU-TCHIVOUNDA said that proportionality was indeed a principle. If the word “principle” was changed to “element”, a number of consequential amendments would be necessary, and the references to jurisprudence and State practice would be called into question.

54. Mr. MELESCANU suggested, as a compromise, deleting the references both to “principle” and to “element”, and beginning the last sentence with the words “Proportionality provides a measure of assurance”.

55. Mr. BROWNLIE said that Mr. Pambou-Tchivounda would no doubt quote the standard authority on proportionality, namely, the “*Caroline*” correspondence,<sup>1</sup> in support of his views. It was clear from that correspondence, however, that the context had been the principle of self-preservation, not that of self-defence.

56. Mr. CRAWFORD (Special Rapporteur) supported Mr. Pellet’s proposal to insert the word “essential” in the first sentence. The second sentence would be deleted; the third would begin “It is relevant . . .”; and the fourth would begin with the word “Proportionality”.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

57. Mr. PAMBOU-TCHIVOUNDA said that some explanation should be given, if only in a footnote, of what constituted “the law relating to countermeasures”.

58. Mr. CRAWFORD (Special Rapporteur) proposed the formulation “Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence.”

59. Mr. PELLET said he found the proposal to eliminate all references to “the principle of proportionality” too radical.

60. Mr. CRAWFORD (Special Rapporteur) said it was a matter of indifference to him whether the commentary referred to “the principle of proportionality” or simply to “proportionality”.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

61. Mr. LUKASHUK said that, purely for the record, the concept of measures “clearly disproportionate” deserved closer scrutiny.

*Paragraph (3) was adopted.*

Paragraph (4)

62. Mr. PELLET said that the last sentence appeared to award points to ICJ and should be deleted.

63. Mr. CRAWFORD (Special Rapporteur) concurred with the proposal.

*Paragraph (4), as amended, was adopted.*

Paragraphs (5) and (6)

*Paragraphs (5) and (6) were adopted.*

Paragraph (7)

64. Mr. PELLET said that the second sentence seemed to lack a conclusion.

65. Mr. ROSENSTOCK supported Mr. Pellet’s comment, and also proposed the addition, in the last sentence, of the words “including the importance of the issue of principle involved” (taken from the *Air Service Agreement* case), after the words “the injury suffered,”.

66. Mr. CRAWFORD (Special Rapporteur) said he could accept Mr. Rosenstock’s proposal. As to Mr. Pellet’s comment, he suggested adding the words “and to fall outside the purpose of countermeasures enunciated in article 49”, after the words “punitive aim”.

*Paragraph (7), as amended, was adopted.*

*The commentary to article 51, as amended, was adopted.*

*Commentary to article 52* (Conditions relating to resort to countermeasures)

Paragraph (1)

67. Mr. LUKASHUK said, for the record, that it would have been better to refer to “certain urgent countermeasures” as “interim measures of protection”.

*Paragraph (1) was adopted.*

Paragraph (2)

68. Mr. PELLET said that the reference in the footnote should be to paragraph (7), not to paragraph (6).

69. Mr. KAMTO proposed deleting from the third sentence the phrase “an acknowledgement of the position of the injured State”, which begged the question. Who acknowledged that position?

<sup>1</sup> *British and Foreign State Papers, 1840–1841*, vol. 29, pp. 1126 *et seq.* and *ibid.*, 1841–1842, vol. 30, pp. 193 *et seq.*

70. Mr. CRAWFORD (Special Rapporteur) said that one of the functions of the commentary was to justify the positions it took; and it took a position on the relationship between countermeasures and dispute settlement. While he was prepared to change the word “acknowledgement”, he nonetheless believed the sentence to be of value as pointing out the reason why, where there was a system of impartial settlement of disputes, countermeasures might be subordinated. He thus proposed the formulation “Countermeasures are a form of self-help, which responds to the position . . .”.

71. In response to a comment by Mr. ECONOMIDES, he said that the phrase “one party”, in the penultimate sentence, should be amended to read “the responsible State”.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

72. Mr. KAMTO said that, in his view, nothing would be lost if the words “even though the time span between the giving of notice and taking countermeasures may be short”, at the end of the first sentence, were deleted.

73. Mr. CRAWFORD (Special Rapporteur) said the formulation was an attempt to strike a balance between different views. Nonetheless, he would not oppose its deletion.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

Paragraph (6)

74. Mr. ECONOMIDES drew attention to a translation error in the French version of the last sentence.

*Paragraph (6) was adopted.*

Paragraph (7)

75. Mr. ECONOMIDES drew attention to a further translation error, affecting the French version of the phrase “a limited tolerance”.

*Paragraph (7) was adopted.*

Paragraph (8)

76. Mr. PELLET said that the phrase “irrespective of whether jurisdiction is accepted by both parties or is in dispute” at the end of the second sentence was inaccurate. If the jurisdiction was disputed by the responsible State, the assertion was false, except where the court or tribu-

nal whose jurisdiction was disputed had the power to order provisional measures. He proposed the formulation “. . . if jurisdiction is accepted by both parties, or, if it is in dispute, where the court or tribunal can order provisional measures pending the decision on its jurisdiction”.

77. Mr. CRAWFORD (Special Rapporteur) conceded that, as formulated, the proposition was too extreme. Mr. Pellet’s alternative formulation was acceptable, but rather long. A preferable formulation might be: “With a standing court or tribunal this will normally be the case immediately.”

78. Mr. GAJA said that entering into too much detail could complicate matters.

79. Mr. PELLET said he could accept the formulation: “With a standing court or tribunal this will normally be the case immediately, if its jurisdiction is accepted.”

80. Mr. SIMMA supported Mr. Pellet’s comments: insertion of the word “normally” would not solve the problem. Since jurisdiction was disputed almost as a matter of course, the claimant State would be prohibited from taking countermeasures at too early a stage in the process.

81. Mr. CRAWFORD (Special Rapporteur) suggested the formulation “With a standing court or tribunal this will be the case if jurisdiction is accepted by both parties.”

82. Mr. GAJA said that, if adopted, the proposed amendment would necessitate some rewriting of the first and third sentences, which should accordingly be placed in square brackets.

83. Mr. CRAWFORD (Special Rapporteur) said he could accept Mr. Gaja’s proposal and would draft a new text.

84. Mr. ROSENSTOCK said that, to cover cases where a court or tribunal had been called into being but not operating, it was important to retain the notion of whether the dispute was pending before the court or tribunal in question.

Paragraph (9)

85. Mr. PELLET said that the first three sentences of the paragraph seemed to him questionable, implying that in all circumstances a court had an inherent power to order provisional measures. All three sentences should be deleted. The paragraph would then begin with the words “Paragraph 3 is based on the assumption”.

86. Mr. LUKASHUK said he had no objection to the first three sentences. There was no need, however, for the specific reference to the Security Council. The antepenultimate sentence should thus end with the words “political organs”.

87. Mr. CRAWFORD (Special Rapporteur) said he could agree to the deletion of the first three sentences. As to Mr. Lukashuk’s proposal, the phrase “political organs such as the Security Council” could be changed to “non-judicial organs of international organizations”.

Personally, he saw no harm in the reference to the Security Council.

88. Mr. ROSENSTOCK expressed a strong preference for retaining the first part of paragraph (9), which performed a useful explanatory function.

89. Mr. PELLET said that, if the first three sentences were to be retained, they should be moved so as to follow the fourth sentence, which postulated that the court or tribunal had jurisdiction over the dispute and also the power to order provisional measures—in his view, a wholly erroneous assumption.

90. Mr. CRAWFORD (Special Rapporteur) said that the sentence in question did not state that the tribunal had such a power, but that the paragraph applied only if it had such a power. Two examples of such tribunals were the Iran–United States Claims Tribunal and the International Tribunal on the Law of the Sea. He was perfectly happy for the fourth sentence to be placed first in the paragraph, in which case, however, the start of the paragraph would require some rewriting, and would need to be placed in square brackets.

91. Mr. SIMMA supported Mr. Pellet's proposal to place the fourth sentence first in the paragraph.

92. The CHAIRMAN said that, if he heard no objection he would take it that the Commission wished to leave the first four sentences of paragraph (9) in abeyance.

*It was so agreed.*

Paragraph (10)

*Paragraph (10) was adopted.*

*Commentary to article 53 (Termination of countermeasures)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

93. Mr. GALICKI said that “article 47”, at the end of the paragraph, should be corrected to “article 49”.

*Paragraph (2), as amended, was adopted.*

*The commentary to article 53, as amended, was adopted.*

*Commentary to article 54 (Measures taken by States other than an injured State)*

Paragraph (1)

94. Mr. PELLET said that the references in the footnote should be put in some order, preferably alphabetical, and that, in the interests of representativeness, Alland and Tomuschat should be added.

95. Mr. GALICKI said that, as the Commission had decided to change “interests” in article 54 to “interest”, the commentary should follow suit and talk, in the third sentence, of the “collective interest of the group”.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

Paragraph (3)

96. Mr. PELLET queried what was presumably a mistaken reference to an “unofficial translation” in the second footnote in the French and, possibly, other non-English versions.

97. The CHAIRMAN said the relevant texts would be corrected.

98. Mr. SIMMA suggested that, “the breach of bilateral aviation agreements”, in the last example, concerning collective measures against Yugoslavia, should be toned down by changing it to “the non-performance of bilateral aviation agreements”.

99. Mr. CANDIOTI said that “Argentinean” should be corrected to “Argentine” in the third example, concerning collective measures against Argentina.

*Paragraph (3), as amended, was adopted.*

Paragraphs (4) and (5)

*Paragraphs (4) and (5) were adopted.*

Paragraph (6)

100. Mr. SIMMA said that, although there were cases in which reference was made to a fundamental change of circumstances, he could not agree that such practice as existed was unclear; the statement should be explained or deleted.

101. Mr. CRAWFORD (Special Rapporteur) said that, as the first sentence mentioned the uncertain state of international law on countermeasures taken in the general or collective interest, the phrase beginning “such practice as exists” at the end of the second sentence could be deleted.

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

102. Mr. GALICKI said that the language at the end of the first sentence should be the same as in articles 48 and 54, so that it read: “in the interest of the injured State or the beneficiaries of the obligation breached”.

103. Mr. ECONOMIDES said that, in the second sentence, it was illogical to talk of “lawful measures” and

then go on to talk of the “lawfulness or otherwise” of measures taken by States.

104. Mr. CRAWFORD (Special Rapporteur) said that the problem could be avoided, without contradicting the language of the article, by changing “on the lawfulness or otherwise of measures” to “concerning measures”.

*Paragraph (7), as amended, was adopted.*

*The commentary to article 54, as amended, was adopted.*

#### PART FOUR. GENERAL PROVISIONS

*Commentary to Part Four (A/CN.4/L.608/Add.9)*

*The commentary to Part Four was adopted.*

*Commentary to article 55 (Lex specialis)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

105. Mr. GAJA said that it was important to be quite clear about how the word “compensation” was used in the articles. Accordingly, in the first footnote, in the sentence starting “For WTO purposes . . .”, the ellipsis should be replaced by “and involves a form of countermeasure”.

106. Mr. GALICKI said that there was no need to specify that article 41 of the European Convention on Human Rights was formerly article 50, especially as the practice of giving the former numbers of the articles was not followed throughout the commentary. Otherwise, the number of the former article would have to be mentioned every time, for the sake of consistency.

107. Mr. PELLET said that he found the inclusion of the former numbers of the articles useful. In the second footnote, in the interests of clarity, the words “of the federal State” should be inserted after “limiting obligations”.

108. Mr. ECONOMIDES said that there was a footnote to the first but not to the second hypothesis discussed in the paragraph. For the sake of balance and to help the reader, a footnote could be added that cited the text of article 41; the former number of the article could also be mentioned in the new footnote.

109. Mr. CRAWFORD (Special Rapporteur) said that article 41 was already cited in the commentary on the relationship between restitution and compensation, as the article dealt with that issue. However, he would insert a cross-reference to it, and incorporate the changes suggested by Mr. Gaja and Mr. Pellet.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

110. Mr. GAJA said that, in the last sentence, it would be more accurate to speak of “remedies for abuse of diplomatic and consular privileges”, rather than “remedies for breaches of diplomatic and consular immunity”.

111. Mr. PELLET said he was not sure that Mr. Gaja’s assertion was correct and also queried whether the notion of a “self-contained regime” was contained in the *S.S. “Wimbledon”* case.

112. Mr. CRAWFORD (Special Rapporteur) confirmed that the *S.S. “Wimbledon”* case referred to a self-contained regime and said he would make sure that the correct wording was used in the last sentence of the paragraph.

*Paragraph (5) was adopted on that understanding.*

Paragraph (6)

*Paragraph (6) was adopted.*

*The commentary to article 55, as amended, was adopted.*

*Commentary to article 56 (Questions of State responsibility not regulated by these articles)*

Paragraph (1)

113. Mr. LUKASHUK said that article 56 contained a fundamental legal principle establishing the pre-eminence of the articles over the norms of customary international law. In paragraph (2), analogies were drawn between the article and a preambular paragraph of the 1969 Vienna Convention. The Commission was dealing with a complex point of law but the provision was, unfortunately, not adequately clarified in the commentary. At least, it should be pointed out that the articles were the result of the codification and progressive development of international law.

114. Mr. CRAWFORD (Special Rapporteur) said that Mr. Lukashuk was perhaps overstating the significance of the article. It was quite common in the texts of the Commission dealing with the codification and progressive development of international law to include a provision similar to article 56. Such provisions could be found, for example, in the conventions on State succession and the preambular paragraph referred to by Mr. Lukashuk. It was difficult to find further examples—the commentary was already twice as long as its equivalent at the first-reading stage—but he would be happy to consider any specific proposals for additions and he would prepare a text in response to the concern expressed by Mr. Lukashuk.

Paragraph (2)

115. Mr. PELLET said that, in the last sentence, it would be more precise to speak of “some treaties”.

116. Mr. BROWNLIE said that, with regard to the principle of “approximate application”, mentioned in the footnote, he suspected that some of the separate and dissent-



ing opinions in the *Gabčíkovo-Nagymaros Project* case were less sceptical than ICJ appeared to be.

117. Mr. CRAWFORD (Special Rapporteur) said that, as a general rule, separate and dissenting opinions were not referred to unless there was some discussion which was consistent with that in the majority opinion and which added significantly to it. If that was true in the *Gabčíkovo-Nagymaros Project* case, he would alter the footnote accordingly.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

118. Mr. PELLET said that in the first sentence it was unclear what was meant by “preserve any legal effects”. He suggested that the second function of article 56 could better be described as “to make it clear that the present articles are not concerned with any legal effects”. Moreover, the word “proper” could be omitted from the first sentence.

119. Mr. CRAWFORD (Special Rapporteur) said that he agreed with Mr. Pellet’s suggestions.

*Paragraph (3), as amended, was adopted.*

*Commentary to article 57* (Responsibility of an international organization)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

120. Mr. PELLET said that he would appreciate a reference for the *State Border Service* case, referred to in the footnote.

121. Mr. CRAWFORD (Special Rapporteur) said that the only reference he had for the moment was a reference to a website.

*Paragraph (3) was adopted.*

Paragraph (4)

122. Mr. BROWNLIE proposed that the footnote should include a reference to the reports of Judge Higgins on the subject, from the *Annuaire de l’Institut de droit international*.

*Paragraph (4) was adopted.*

Paragraph (5)

123. Mr. PELLET said that the paragraph should be deleted. It took a very firm position on a complicated matter which the Commission was due to deal with at its next session. Paragraph (4) rightly said that the issues involved raised controversial substantive questions as to the functioning of international organizations but he was not persuaded that the change of tack in paragraph (5) clarified

matters. Nor was he sure that Judge Higgins’s report was as categorical as it was made out to be, while other excellent work was not cited. It was irksome to prejudge such a vexatious problem of contemporary international law in the space of a dozen lines.

124. Mr. CRAWFORD (Special Rapporteur) said that the Higgins report actually dealt with a subject that had been deliberately left out of paragraph (5), namely, the so-called question of derivative liability of member States of an international organization for its acts, which article 57 clearly intended to exclude. What article 57 did not exclude from the scope of the draft articles were acts carried out by a State acting through its own organs, even when it was acting at the behest of an international organization. Such conduct by a State was not excluded by the language of article 57 because it was not the conduct of an international organization. That issue had been discussed in the panel report referred to in the last footnote to the paragraph, on whether Turkey was entitled to evade its responsibility towards WTO by claiming it had acted in the way it had pursuant to an association agreement with the European Union. The answer had been an unequivocal “No”.

125. It was important to make a clear distinction between cases where a State, in a sense, stood behind an international organization, even voting for a particular course of action which the international organization carried out, and cases where the State itself, through its own organs acting under its authority, performed an act, even under the authority of an international organization. In the latter case, the charter of the organization might render the act lawful. However, that was not a question of exclusion but one of authority and would be covered by, for example, consent.

126. He was convinced that the principle stated in paragraph (5) was an accurate reflection of article 57, and while he would prefer to retain it in full, given that the context was a developing area of international law, he would be prepared to omit some of the detail in the second half of the paragraph by deleting the last sentence.

127. Mr. SIMMA said the “problem” with the second half of the paragraph was that it made such a strong statement on an issue that was central to two cases concerning NATO and Yugoslavia (*Legality of Use of Force (Yugoslavia v. Spain; Yugoslavia v. United States of America)*) currently before international courts, and that statement was, for good or bad, not in line with the arguments put forward by the defendants in those cases.

128. Mr. GAJA said that in view of concerns about the position of the defendant States in the *Senator Lines* and *Banković* cases, it might be possible to make the paragraph somewhat less categorical, perhaps by omitting the last sentence as suggested by the Special Rapporteur. However, there could be no doubt that when it came to attribution of conduct, no exceptions had been made in the draft articles, and that needed to be made clear.

129. Mr. BROWNLIE made the point that it would be strange if States could avoid responsibility by acting through an organization.

130. Mr. CRAWFORD (Special Rapporteur) said it was important to remember that the principle embodied in article 57 had been adopted before the cases mentioned had arisen. The Commission could not pretend that the article excluded acts of a State carried out at the behest of an international organization. The article drew a distinction between the conduct of an international organization and the conduct of a State; no conduct of a State was excluded except where it was said that a State was responsible for an act of an international organization. A question of principle was at stake and had been confronted squarely in the WTO case he had mentioned earlier. He believed the WTO panel had got it right.

131. Provided that the principle was left intact, he would be prepared to delete the last two sentences, merging the two footnotes.

132. Mr. PELLET said that he could go along with such a course of action. While the *Matthews* case before the European Court of Human Rights could be usefully included, as well as the other cases referred to in the discussion, the matter was extremely complex, and perhaps the less said, the better. In any case, it would be going too far to take a categorical position on points that were not yet very clear.

133. Mr. SIMMA sought guidance on the precise meaning of “at the behest of”, in which he saw a parallel with “direction and control”. If an organization directed and controlled the activities of its member States, the organs of the member States might well remain under the authority and control of the State but the State would still be acting under the direction and control of the international organization. The draft article that dealt with direction and control attributed the illegality to the organization as such. He concluded that the questions raised were too difficult to be dealt with adequately in just a few lines, and he would therefore prefer to omit the text after the call-out for the first footnote.

134. Mr. CRAWFORD (Special Rapporteur) said that neither the minority nor the majority in the *Mathews* case had had the slightest difficulty in attributing responsibility for the conduct of the United Kingdom to the State, even though its conduct was a result of its membership of the European Union. In any event, those questions were questions of justification, not preliminary questions, and had been treated as such in the *Mathews* case.

135. Lastly, if, as proposed, the last two sentences were omitted and the two footnotes merged, the second sentence of the second footnote would have to be omitted too.

*Paragraph (5), as amended, was adopted.*

*The commentary to article 57, as amended, was adopted.*

*Commentary to article 58 (Individual responsibility)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

*The commentary to article 58 was adopted.*

*Commentary to article 59 (Charter of the United Nations)*

Paragraph (1)

136. Mr. KAMTO suggested the inclusion of additional examples of the *Lockerbie* cases and of a sentence in the corresponding footnote to elucidate the references thereto in order to give greater precision to the paragraph.

137. Mr. CRAWFORD (Special Rapporteur) pointed out that portions of those cases were *sub judice*. The issue discussed in paragraph (1), application of Article 103 of the Charter of the United Nations, had already been the subject of voluminous writings. In the final analysis, brevity seemed the best course of action.

*Paragraph (1) was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

*The commentary to article 59 was adopted.*

PART ONE. THE INTERNATIONALLY WRONGFUL ACT OF A STATE  
(continued)\*

CHAPTER II. ATTRIBUTION OF CONDUCT TO A STATE

*Commentary to chapter II (A/CN.4/L.608/Add.10)*

Paragraph (1)

138. Mr. CRAWFORD (Special Rapporteur), responding to a comment by Mr. KAMTO, said that conduct had first to be attributable to a State before it could be qualified as wrongful.

*Paragraph (1) was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

Paragraph (3)

139. Mr. CRAWFORD (Special Rapporteur), responding to a question by Mr. KAMTO, said that the word “attribution” was used in preference to “imputation” deliberately and that usage had been inaugurated by former Special Rapporteur Roberto Ago.

*Paragraph (3) was adopted.*

Paragraphs (4) to (7)

*Paragraphs (4) to (7) were adopted.*

\* Resumed from 2704th meeting.

## Paragraph (8)

140. Mr. PELLET pointed to the need to delete the third and fourth sentences of the French text in order to align it with the English.

*Paragraph (8), as amended in the French text, was adopted.*

*The commentary to chapter II, as amended, was adopted.*

## Commentary to article 4 (Conduct of organs of a State)

## Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

## Paragraph (5)

141. Mr. BROWNLIE suggested the insertion, at the beginning of the second sentence, of the phrase “It goes without saying that”.

*Paragraph (5), as amended, was adopted.*

## Paragraph (6)

142. Mr. PELLET asked whether there were any examples of *acta jure gestionis* that had engaged the responsibility of a State. If so, it would be interesting to include them.

143. Mr. CRAWFORD (Special Rapporteur) said examples could be found in the context of government procurement—discrimination in the purchase of goods and services—and the operation by States of commercial radio stations. After consulting experts in trade law, however, he had concluded that giving such examples would lead into difficult terrain.

144. The CHAIRMAN pointed out that another example was the wartime broadcasts from Switzerland by the national radio.

*Paragraph (6) was adopted.*

## Paragraph (7)

145. Mr. BROWNLIE, referring to the phrase “‘subordinate’ officials” in the first sentence, pointed out that in the decisions on both preliminary objections and on merits in the *Loizidou* case, the European Court of Human Rights had referred to Turkey’s responsibility for the “subordinate” local administration in northern Cyprus.

*Paragraph (7) was adopted.*

## Paragraphs (8) to (10)

*Paragraphs (8) to (10) were adopted.*

## Paragraph (11)

146. Mr. PELLET drew attention to a discrepancy in the wording in French of the sixth sentence: “bodies” was translated as *structures*.

*Paragraph (11), as amended in the French text, was adopted.*

## Paragraph (12)

*Paragraph (12) was adopted.*

## Paragraph (13)

147. Mr. PELLET said that the bulk of the paragraph and the examples in the footnotes to it would be better placed in the commentary to article 7, which could benefit from the additional material.

148. Mr. CRAWFORD (Special Rapporteur) said that such cross-referencing should be feasible.

*Paragraph (13), as amended, was adopted.*

*The commentary to article 4, as amended, was adopted.*

## Commentary to article 5 (Conduct of persons or entities exercising elements of governmental authority)

## Paragraphs (1) to (7)

*Paragraphs (1) to (7) were adopted.*

*The commentary to article 5 was adopted.*

## Commentary to article 6 (Conduct of organs placed at the disposal of a State by another State)

## Paragraphs (1) to (7)

*Paragraphs (1) to (7) were adopted.*

## Paragraph (8)

149. Mr. PELLET proposed deleting the paragraph, which cited a case involving the Cook Islands. The Cook Islands were not a sovereign State and hence the example was not relevant. It would be better placed in a footnote.

150. Mr. CRAWFORD (Special Rapporteur) said that the Cook Islands had been treated as a foreign State in the case cited but he could go along with the deletion of paragraph (8) and the incorporation of the footnote in the footnote at the end of paragraph (7).

*It was so agreed.*

*Paragraph (8) was deleted.*

Paragraph (9)

*Paragraph (9) was adopted.*

Paragraph (10)

151. Mr. CRAWFORD (Special Rapporteur), responding to a remark by the CHAIRMAN, suggested that the phrase “legal proceedings are transferred”, in the penultimate sentence, should be replaced by “accused persons are transferred”.

*Paragraph (10), as amended, was adopted.*

*The commentary to article 6, as amended, was adopted.*

*Commentary to article 7 (Excess of authority or contravention of instructions)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

152. Mr. CRAWFORD (Special Rapporteur), responding to a comment by Mr. PELLET, suggested that the last sentence should be deleted and that the footnote should be maintained at the end of the paragraph.

*It was so agreed.*

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

153. Mr. PELLET pointed out that in the first sentence “article 9” should be corrected to read “article 7”.

*Paragraph (7), as amended, was adopted.*

Paragraphs (8) to (10)

*Paragraphs (8) to (10) were adopted.*

*The commentary to article 7, as amended, was adopted.*

*Commentary to article 8 (Conduct directed or controlled by a State)*

Paragraph (1)

154. Mr. PELLET proposed the inclusion of a cross-reference to an earlier article to which it had been decided to add a footnote describing the linguistic difficulty of putting the phrase “direction or control” into French.

155. Mr. CRAWFORD (Special Rapporteur) said that, in the earlier article, the phrase used had been “direction and control”, but he had no objection to the proposal.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) to (5)

*Paragraphs (2) to (5) were adopted.*

Paragraph (6)

156. Following a query by Mr. PELLET, Mr. MELESCANU and Mr. CRAWFORD (Special Rapporteur) drew attention to the mistranslation into French of the term “seizure”, which should be *saisie*, not *expropriation*.

*Paragraph (6), as amended in the French text, was adopted.*

Paragraphs (7) to (9)

*Paragraphs (7) to (9) were adopted.*

*The commentary to article 8, as amended, was adopted.*

*Commentary to article 9 (Conduct carried out in the absence or default of the official authorities)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

157. Mr. PELLET said the paragraph seemed somewhat weak and might be improved by a discussion of whether the conduct of Governments in exile could be deemed to be covered by article 9.

158. Mr. CRAWFORD (Special Rapporteur) said that there might well be situations in which for certain purposes a Government in exile was covered by article 9: for example, if it disposed of the property of the State in whose territory it was acting as a Government in exile. Those situations were extremely varied, however, and he was reluctant to detail them. The fact that the reader was left looking for more was not necessarily a disadvantage in commentaries, especially those of the present length.

159. Mr. PELLET cited actions of the Government in exile of Poland in London that fell within the scope of article 9.

160. Mr. CRAWFORD (Special Rapporteur) said that it was a moot point whether the post-war Government of Poland had acknowledged the application terms such as those of article 9 by considering the London Government to have functioned on behalf of Poland.

161. Mr. ECONOMIDES said that article 9 applied in cases where there was an absence of official authority. That was not true of Governments in exile, however, since the State continued to exist, and he had doubts as to whether Governments in exile fell within the purview of article 9.

162. Mr. GALICKI pointed out that the Polish Government in exile had been recognized by the Western allies, had concluded treaties with the former Union of Soviet Socialist Republics and had even signed the Convention on International Civil Aviation.

163. Mr. CRAWFORD (Special Rapporteur) said that, in those examples, the actions of the Government in exile were covered by article 4, not article 9. Article 9 would apply only vis-à-vis States that did not recognize a Government in exile as constituting a Government. The discussion illustrated the very fine line between the workings of the two articles and explained his reluctance to get into such issues. He said that he would add some clarification of the position of Governments in exile.

*It was so agreed.*

Paragraphs (5) and (6)

*Paragraphs (5) and (6) were adopted.*

*Commentary to article 10* (Conduct of an insurrectional or other movement)

Paragraphs (1) to (16)

*Paragraphs (1) to (16) were adopted.*

*The commentary to article 10 was adopted.*

*Commentary to article 11* (Conduct acknowledged and adopted by a State as its own)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

164. Mr. PELLET proposed that the paragraph should be deleted. He could not see the relevance of the Tellini case to article 11.

165. Mr. CRAWFORD (Special Rapporteur) said that the case had been cited because it had established the general rule that the acts of private parties were not attributable to the State. It had been agreed that some reference to that rule would be included in the commentary. If paragraph (3) was read in conjunction with paragraph (4), the sense was clearer.

*The meeting rose at 6.10 p.m.*

## 2708th MEETING

*Thursday, 9 August 2001 at 10.05 a.m.*

*Chairman:* Mr. Peter KABATSI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, 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. Simma, Mr. Tomka, Mr. Yamada.

### Draft report of the Commission on the work of its fifty-third session (*continued*)

#### CHAPTER V. *State responsibility* (*continued*) (A/CN.4/L.608 and Corr.1 and Add.1 and Corr.1 and Add.2–10)

##### E. *Text of the draft articles on responsibility of States for internationally wrongful acts* (*continued*) (A/CN.4/L.608/Add.1 and Corr.1 and Add.2–10)

##### 2. *TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO* (*continued*)

##### PART ONE. *THE INTERNATIONALLY WRONGFUL ACT OF A STATE* (*continued*)

##### CHAPTER II. *ATTRIBUTION OF CONDUCT TO A STATE* (*continued*)

*Commentary to article 11* (Conduct acknowledged and adopted by a State as its own) (*continued*) (A/CN.4/L.608/Add.10)

Paragraph (3) (*continued*)

1. The CHAIRMAN recalled that Mr. Pellet had proposed that paragraph (3) should be deleted.

2. Mr. CRAWFORD (Special Rapporteur) said that he wanted paragraph (3) to be retained. He was prepared to move it or, if that was not possible, merge it with paragraph (2). He proposed that any decision on that paragraph and the place which might be assigned to it should be postponed until the following meeting.

*It was so agreed.*

Paragraphs (4) to (6)

*Paragraphs (4) to (6) were adopted.*

Paragraph (7)

3. Mr. GALICKI proposed that the words “by third parties” at the end of the first sentence should be deleted and that the words “third State” should be replaced by the words “a State” in the corresponding footnote.

*Paragraph (7), as amended, was adopted.*

Paragraphs (8) to (10)

*Paragraphs (8) to (10) were adopted.*

#### **CHAPTER VI. Reservations to treaties (concluded)\* (A/CN.4/L.609 and Add.1–5)**

##### **C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (concluded)\* (A/CN.4/L.609/Add.2–5)**

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO ADOPTED AT THE FIFTY-THIRD SESSION (concluded)\* (A/CN.4/L.609/Add. 3–5)

*Commentaries to guidelines 2.4.3* (Time at which an interpretive declaration may be formulated), *2.4.4 [2.4.5]* (Non-requirement of confirmation of interpretative declarations made when signing a treaty), *2.4.5 [2.4.4]* (Formal confirmation of conditional interpretative declarations formulated when signing a treaty), *2.4.6 [2.4.7]* (Late formulation of an interpretative declaration) and *2.4.7 [2.4.8]* (Late formulation of a conditional interpretative declaration) (A/CN.4/L.609/Add.5)

*The commentaries to guidelines 2.4.3 to 2.4.7 were adopted.*

*Section C.2, as amended, was adopted.*

*Section C, as amended, was adopted.*

*Chapter VI, as amended, was adopted.*

#### **CHAPTER VIII. Unilateral acts of States (A/CN.4/L.611)**

##### **A. Introduction**

*Section A was adopted.*

##### **B. Consideration of the topic at the present session**

Paragraphs 11 to 13

*Paragraphs 11 to 13 were adopted.*

Paragraph 14

4. Mr. PELLET proposed that, in the last sentence, the words “for the time being” should be added before the word “feasible” and that the words “in other areas” should be replaced by the words “on particular categories of unilateral acts”.

*Paragraph 14, as amended, was adopted.*

Paragraphs 15 to 22

*Paragraphs 15 to 22 were adopted.*

Paragraph 23

5. Mr. GAJA proposed that the words “and effects” should be added after the words “legal validity” at the end of the paragraph.

*Paragraph 23, as amended, was adopted.*

Paragraph 24

*Paragraph 24 was adopted.*

Paragraph 25

6. Mr. GAJA said that, in the second sentence, the word “States” should be replaced by the words “the acts”.

*Paragraph 25, as amended, was adopted.*

Paragraphs 26 to 28

*Paragraphs 26 to 28 were adopted.*

Paragraph 29

7. Mr. BROWNLIE proposed that the following new sentence should be added at the end of the paragraph: “It was also stated that the jurisprudence did not reflect the categories of unilateral acts which tend to feature in doctrine.”

*Paragraph 29, as amended, was adopted.*

Paragraphs 30 to 35

*Paragraphs 30 to 35 were adopted.*

Paragraph 36

8. Mr. GAJA proposed that the end of the paragraph should be amended to read: “although a clear distinction between the two questions cannot always be made.”

*Paragraph 36, as amended, was adopted.*

Paragraph 37

9. Mr. GAJA proposed that, at the end of the second sentence, the words “but which had not interpreted” should be replaced by the words “without interpreting” and that the end of the third sentence should be amended to read: “not on the intention which might be subjective and, in many cases, quite elusive”. He found the last sentence confusing and proposed that it should be deleted.

*Paragraph 37, as amended, was adopted.*

\* Resumed from the 2701st meeting.

## Paragraph 38

*Paragraph 38 was adopted.*

## Paragraph 39

10. Mr. GAJA, supported by Mr. ECONOMIDES, proposed that the first sentence should be deleted because it was confusing.

*Paragraph 39, as amended, was adopted.*

## Paragraph 40

11. Mr. MELESCANU, supported by Mr. PELLET, pointed out that paragraph 40 did not faithfully reflect the points of view which had been expressed during the discussions of that question. It should therefore be indicated that objections or reservations had been formulated in connection with the reference to the preparatory work as a supplementary means of interpreting a unilateral act.

*Paragraph 40, as amended, was adopted.*

## Paragraph 41

12. Mr. PELLET said it should also be indicated that the members of the Commission had requested the Special Rapporteur to submit a consolidated version of the draft articles as a whole.

13. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) proposed that he would provide a text to the secretariat.

*It was so agreed.*

*Paragraph 41 was adopted.*

## Paragraphs 42 to 45

*Paragraphs 42 to 45 were adopted.*

## Paragraph 46

14. Mr. GOCO, referring to the end of the paragraph, said that it should be explained what was meant by "the relevant circumstances".

15. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), supported by Mr. PELLET and Mr. CANDIOTI, said that what was meant were circumstances within the meaning of article 32 of the 1969 Vienna Convention, the idea being that, if the preparatory work was not taken into account as a supplementary means of interpreting unilateral acts, it could be at least taken into account as a circumstance in which the unilateral act had been adopted. He therefore proposed that the end of the paragraph should be amended to read: "part of the relevant circumstances under which the unilateral act took place".

*Paragraph 46, as amended, was adopted.*

## Paragraph 47

*Paragraph 47 was adopted.*

*Section B, as amended, was adopted.*

*Chapter VIII, as amended, was adopted.*

# CHAPTER IX. *Other decisions and conclusions of the Commission (A/CN.4/L.612)*

## A. *Programme, procedures and working methods of the Commission, and its documentation*

## Paragraphs 1 to 5

*Paragraphs 1 to 5 were adopted.*

## Paragraph 6

16. Mr. CRAWFORD said that the Working Group on the commentaries to the draft articles on State responsibility referred to in paragraph 6 had carried out very useful work and that that should be indicated by amending the last sentence to read: "The Working Group, chaired by Mr. Melescanu, was composed of only 12 members of the Commission and engaged in a useful preliminary review of commentaries on the topic of State responsibility."

*Paragraph 6, as amended, was adopted.*

*Section A, as amended, was adopted.*

## B. *Date and place of the fifty-fourth session*

## Paragraph 7

*Paragraph 7 was adopted.*

*Section B was adopted.*

## C. *Cooperation with other bodies*

## Paragraphs 8 and 9

*Paragraphs 8 and 9 were adopted.*

## Paragraph 10

17. Mr. TOMKA proposed that the words "of the Council of Europe" should be added after the words "Public International Law" in the first sentence.

*Paragraph 10, as amended, was adopted.*

## Paragraphs 11 and 12

*Paragraphs 11 and 12 were adopted.*

*Section C, as amended, was adopted.*

**D. Representation at the fifty-sixth session of the General Assembly**

Paragraph 13

*Paragraph 13 was adopted.*

Paragraph 14

18. The CHAIRMAN said that, since paragraph 14 was not complete, the Commission might adopt it at a later meeting.

*It was so agreed.***E. International Law Seminar**

Paragraphs 15 to 27

*Paragraphs 15 to 27 were adopted.**Section E was adopted.***CHAPTER VII. Diplomatic protection (A/CN.4/L.610)****A. Introduction**

Paragraph 1

19. Mr. PELLET proposed that the last sentence should be deleted.

*Paragraph 1, as amended, was adopted.*

Paragraphs 2 to 6

20. Mr. PELLET said that the terms “articles” and “draft articles” were used indiscriminately throughout the text. For the sake of consistency, the same term should always be used. The term “draft articles” would probably be preferable.

21. The CHAIRMAN said that the secretariat would make the necessary corrections.

*Paragraphs 2 to 6 were adopted.**Section A, as amended, was adopted.***B. Consideration of the topic at the present session**

Paragraphs 7 to 11

*Paragraphs 7 to 11 were adopted.*

Paragraph 12

22. Mr. PELLET, supported by Mr. BROWNLIE, said that the words “since the *Nottebohm* case” should be replaced by the words “the Court noted in the *Nottebohm* case”. That doctrine had existed well before the case in question.

*Paragraph 12, as amended, was adopted.*

Paragraphs 13 and 14

*Paragraphs 13 and 14 were adopted.*

Paragraph 15

23. Mr. RODRÍGUEZ CEDEÑO said that, in the second sentence of the Spanish text, the word *forzosamente* should be replaced by the word *solamente*.

24. Mr. BROWNLIE said too frequent references to Vattel should be avoided. He therefore proposed that the reference to the “Vattelian” approach should be deleted.

*Paragraph 15, as amended, was adopted.*

Paragraph 16

25. Mr. GAJA said that the words “when that obligation was not opposable to it” at the end of the paragraph should be replaced by the words “when that obligation was not owed to it”.

*Paragraph 16, as amended, was adopted.*

Paragraph 17

*Paragraph 17 was adopted.*

Paragraph 18

26. Mr. PELLET proposed that, in order to reflect the discussion faithfully, the following sentence should be added at the end of the paragraph: “It was stated that in fact only the nationality at the time of the claim mattered.”

*Paragraph 18, as amended, was adopted.*

Paragraph 19

27. Mr. GOCO proposed that the end of the second sentence and the beginning of the third sentence should be merged to read: “. . . diplomatic protection was not a human rights institution or the best mechanism for the protection of human rights . . .”.

28. Mr. DUGARD (Special Rapporteur), supported by Mr. CANDIOTI, Mr. TOMKA, Mr. BROWNLIE and Mr. RODRÍGUEZ CEDEÑO, said that it was better to keep the wording as it stood.

29. Mr. SIMMA proposed that the words “the structure of” in the fourth sentence should be deleted.

*Paragraph 19, as amended by Mr. Simma, was adopted.*

Paragraph 20

30. Mr. PELLET proposed that the second part of the second sentence should be amended to read: “. . . situations where, as a result of its implementation, the



individual would otherwise have no possibility of obtaining protection by a State”.

31. Mr. BROWNLIE said that he supported that proposal. He also proposed that, in the third sentence, the word “should” should be added before the word “relate”.

32. Mr. SIMMA proposed that, in that same sentence, the word “exemption” should be replaced by the word “exception”.

33. Mr. DUGARD (Special Rapporteur) said that he accepted the three proposed amendments, but noted that the word “exception” should read “exceptions”.

34. Following an exchange of views in which Mr. CANDIOTI, Mr. CRAWFORD, Mr. ECONOMIDES, Mr. GAJA, Mr. GALICKI, Mr. GOCO, Mr. MELESCANU, Mr. PELLET, Mr. Sreenivasa RAO, Mr. RODRÍGUEZ CEDEÑO, Mr. ROSENSTOCK, Mr. SIMMA, Mr. DUGARD (Special Rapporteur) and Mr. TOMKA (Chairman of the Drafting Committee) took part, the CHAIRMAN said that the structure of the third sentence should be looked at again because, as it stood, it confused involuntary changes of nationality with involuntary transfers of claims. He therefore proposed that the members of the Commission should invite the Special Rapporteur to amend the wording of that sentence, which could perhaps be split in two. In the meantime, he proposed that it should be left in square brackets and that the adoption of paragraph 20 should be deferred.

*It was so agreed.*

Paragraph 21

*Paragraph 21 was adopted.*

Paragraph 22

35. Mr. PELLET proposed that the following sentence should be added at the end of the paragraph: “Serious doubts were also expressed on whether the concept of assignment was well founded.”

*Paragraph 22, as amended, was adopted.*

Paragraphs 23 to 25

*Paragraphs 23 to 25 were adopted.*

Paragraph 26

36. Mr. GAJA proposed that, at the beginning of the sentence, the words “before moving on to the question of exhaustion of local remedies” should be deleted. In subparagraph (c), the word “power” should be replaced by the word “right” and the words “on behalf” should be deleted.

*Paragraph 26, as amended, was adopted.*

Paragraph 27

37. Mr. BROWNLIE, referring to the first sentence, asked the Special Rapporteur whether the words “the Vattelian legal fiction” could not be replaced by more explicit wording that it would be easier for ordinary readers to understand.

38. Mr. DUGARD (Special Rapporteur) said that he was prepared to discuss that wording with Mr. Brownlie.

39. The CHAIRMAN proposed that the members of the Commission should postpone the adoption of paragraph 27 until the Special Rapporteur had proposed new wording for the first sentence.

*It was so agreed.*

Paragraphs 28 to 37

*Paragraphs 28 to 37 were adopted.*

Paragraph 38

40. Mr. PELLET, referring to paragraphs 38 and 41 of the French version, proposed that the word *argument* should be replaced by the word *moyen* in accordance with the decision taken earlier by the Commission. In order to reflect the idea, as expressed during the discussions, that arguments in international law and in internal law might not be the same, he proposed that the words “and vice versa” should be added at the end of the last sentence of paragraph 38.

*Paragraph 38, as amended in the French text, was adopted.*

Paragraphs 39 to 50

*Paragraphs 39 to 50 were adopted.*

*The meeting rose at 12.45 p.m.*

## 2709th MEETING

*Thursday, 9 August 2001, at 3.10 p.m.*

*Chairman: Mr. Peter KABATSI*

*Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Melescanu, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.*

## Draft report of the Commission on the work of its fifty-third session (*continued*)

### CHAPTER VII. *Diplomatic protection (concluded)* (A/CN.4/L.610)

#### B. Consideration of the topic at the present session (*concluded*)

Paragraph 20 (*concluded*)

1. The CHAIRMAN drew attention to a revised version of the third sentence proposed by the Special Rapporteur, which read:

“It was proposed that the basic exceptions should relate to involuntary changes of nationality of the protected person, arising from succession of States, marriage and adoption. It was also proposed to extend this rule to other cases where different nationalities were involved as a result of changes to the claim arising from, for example, inheritance and subrogation.”

2. If he heard no objection, he would take it that the Commission wished to adopt the revised version of the third sentence.

*It was so agreed.*

*Paragraph 20, as amended, was adopted.*

Paragraph 27 (*concluded*)

3. The CHAIRMAN drew attention to a proposal from the Special Rapporteur to replace the first part of the first sentence, “The Special Rapporteur reiterated his view that the Vattelien legal fiction was not . . .”, with the phrase: “The Special Rapporteur reiterated his view that the Vattelien legal fiction, according to which the State protected its own interest when it acted on behalf of its national, was not . . .”.

4. If he heard no objection, he would take it that the Commission wished to adopt that proposal.

*It was so agreed.*

*Paragraph 27, as amended, was adopted.*

*Chapter VII, as amended, was adopted.*

### CHAPTER V. *State responsibility (concluded)* (A/CN.4/L.608 and Corr.1 and Add.1 and Corr.1 and Add.2–10)

#### E. Text of the draft articles on responsibility of States for internationally wrongful acts (*concluded*) (A/CN.4/L.608/Add.1 and Corr.1 and Add.2–10)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*concluded*)

5. Mr. CRAWFORD (Special Rapporteur), introducing portions of the commentaries that had been revised following the earlier discussion in the Commission, said that well over 150 alterations, mostly of an editorial nature, were to be made to the text. He would bring to the attention of the Commission only those that, in his judgement, raised questions of substance.

### PART ONE. THE INTERNATIONALLY WRONGFUL ACT OF A STATE (*continued*)

#### CHAPTER I. GENERAL PRINCIPLES (*concluded*)\*

*Commentary to article 1* (Responsibility of a State for its internationally wrongful acts) (*concluded*)\*\* A/CN.4/L.608/Add.2)

Paragraph (3) (*concluded*)\*\*

6. Mr. CRAWFORD (Special Rapporteur) proposed the insertion of the following footnote, in response to a request from Mr. Pellet, after the words “flowing directly from the wrongful act”, at the end of the fourth sentence: “See H. Kelsen, *Principles of International Law*, 2nd ed., R. W. Tucker, ed. (New York, Holt, Rinehart and Winston, 1966), p. 22.”

*The footnote was adopted.*

7. Mr. CRAWFORD (Special Rapporteur) proposed the insertion of the following footnote after the words “reparation or to a ‘sanction’”, at the end of the penultimate sentence: “See, for example, R. Ago, ‘Le délit international’, *Recueil des cours* . . . , 1939-II (Paris, Sirey, 1939), vol. 68, p. 417, at pp. 430–440; L. Oppenheim, *International Law: A Treatise*, vol. I, *Peace*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green and Co., 1955), pp. 352–354.”

*The footnote was adopted.*

*Paragraph (3), as amended, was adopted.*

*The commentary to article 1, as amended, was adopted.*

#### CHAPTER III. BREACH OF AN INTERNATIONAL OBLIGATION (*concluded*)\*

*Commentary to article 12* (Existence of a breach of an international obligation) (*concluded*)\*\* (A/CN.4/L.608/Add.7)

Paragraph (2) (*concluded*)\*\*

8. Mr. CRAWFORD (Special Rapporteur) said he had been asked to check for accuracy a series of references in the fourth sentence to ways in which ICJ had formulated the concept of a breach. He had done so, and was also proposing for the sake of clarity the insertion of the words “of a State” between the words “obligations” and “acts”, in the fourth sentence.

*Paragraph (2), as amended, was adopted.*

Paragraph (7) (*concluded*)\*\*

9. Mr. CRAWFORD (Special Rapporteur) said the first sentence dealt with the question whether certain fundamental rules of international legal order had any special features from the perspective of article 12. It should read: “Even fundamental principles of the international legal

\* Resumed from the 2703rd meeting.

\*\* Resumed from the 2702nd meeting.

order are not based on any special source of law or specific law-making procedure, in contrast again with internal legal systems.”

10. Mr. PELLET said he was grateful to the Special Rapporteur for making concerted efforts to address his concerns, but he was still troubled by the phrase “in contrast again with internal legal systems”. As he understood it, the paragraph was saying that in internal law, fundamental principles were of a constitutional character. Why not simply say that?

11. Mr. CRAWFORD (Special Rapporteur) proposed that the phrase should read: “in contrast with rules of a constitutional character in internal legal systems”.

*It was so agreed.*

*Paragraph (7), as amended, was adopted.*

*The commentary to article 12, as amended, was adopted.*

*Commentary to article 14 (Extension in time of the breach of an international obligation) (concluded)\**

Paragraph (4) (concluded)\*

12. Mr. ROSENSTOCK said that the word “expropriation”, in the third sentence, should be replaced by “taking”.

*Paragraph (4), as amended, was adopted.*

Paragraph (5) (concluded)\*

13. Mr. CRAWFORD (Special Rapporteur) said that, in response to a request from Mr. Pellet for additional explanations of the treatment to be given to a continuing wrongful act, he was proposing the addition of the following two sentences at the end of the paragraph: “Where a continuing wrongful act has ceased, for example by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue. In this respect it is covered by paragraph 1 of article 14.”

*Paragraph (5), as amended, was adopted.*

*The commentary to article 14, as amended, was adopted.*

*Commentary to article 15 (Breach consisting of a composite act) (concluded)\**

Paragraphs (2) to (4) (concluded)\*

14. Mr. CRAWFORD (Special Rapporteur) said that the use of the word “systematically” had caused problems, and he had accordingly reworded the first two sentences of paragraph (2) to read: “Composite acts covered by article 15 are limited to breaches of obligations which

concern some aggregate of conduct and not individual acts as such. In other words their focus is ‘a series of acts or omissions defined in aggregate as wrongful’.” In the third sentence, the words “prohibitions against” should be replaced by “obligations concerning”.

15. Mr. PELLET pointed out that the word “systematic” recurred in paragraphs (3) and (4).

16. Mr. CRAWFORD (Special Rapporteur) suggested that the word should be replaced by the term “composite” in paragraphs (3) and (4).

*It was so agreed.*

*Paragraphs (2) to (4), as amended, were adopted.*

*The commentary to article 15, as amended, was adopted.*

CHAPTER IV. RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE (concluded)\*

*Commentary to chapter IV (concluded)\* (A/CN.4/L.608/Add.1)*

Paragraph (1) (concluded)\*

17. Mr. CRAWFORD (Special Rapporteur) said the use of the phrase “independent responsibility” had been said to require some explanation. He therefore proposed that the second sentence should be replaced by three sentences, reading: “The principle that State responsibility is specific to the State concerned underlies the present articles as a whole. It will be referred to as the principle of independent responsibility. It is appropriate since each State has its own range of international obligations and its own correlative responsibilities.”

*Paragraph (1), as amended, was adopted.*

*The commentary to chapter IV, as amended, was adopted.*

PART TWO. CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE (concluded)\*\*\*

CHAPTER II. REPARATION FOR INJURY (concluded)\*\*\*

*Commentary to article 35 (Restitution) (concluded)\*\*\* (A/CN.4/L.608/Add.4)*

Paragraph (2) (concluded)\*\*\*

18. Mr. CRAWFORD (Special Rapporteur) recalled that, with reference to the discussion of the broad and narrow conceptions of restitution, Mr. Pellet had requested the addition of a reference to the relationship between restitution and compensation. An addition at the end of the paragraph was accordingly being proposed, to read: “Restitution in this narrow sense may of course have to be completed by compensation in order to ensure full reparation for the damage caused, as article 36 makes clear.”

*Paragraph (2), as amended, was adopted.*

\* Resumed from the 2703rd meeting.

\*\* Resumed from the 2702nd meeting.

\*\*\* Resumed from the 2705th meeting.

*The commentary to article 35, as amended, was adopted.*

*Commentary to article 36 (Compensation) (concluded)\*\*\**

Paragraph (4) (concluded)\*\*\*

19. Mr. CRAWFORD (Special Rapporteur) said that Mr. Rosenstock had pointed to the need to make it clear that article 36 dealt with compensation and did not allow for aggravated damages or other forms of damages. A footnote to the commentary to chapter III covered that point and a cross-reference to it would be inserted, along with three sentences to follow the first sentence of the paragraph, reading: “In other words, the function of article 36 is purely compensatory, as its title indicates. Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character, this being the function of satisfaction.”

20. Mr. GAJA proposed deleting the words “this being the function of satisfaction”.

21. Mr. CRAWFORD (Special Rapporteur) said he accepted that proposal.

*Paragraph (4), as amended, was adopted.*

*The commentary to article 36, as amended, was adopted.*

CHAPTER III. SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (concluded)\*\*\*

*Commentary to article 41 (Particular consequences of a serious breach of an obligation under this Chapter) (concluded)\*\*\* (A/CN.4/L.608/Add.8)*

Paragraph (9) (concluded)\*\*\*

22. Mr. CRAWFORD (Special Rapporteur) said Mr. Pellet had made a proposal that, it had been decided, should be merged with the existing text of paragraph (9). The paragraph would read:

“Under article 41, paragraph 2, no State shall recognize the situation created by the serious breach as lawful. This obligation applies to all States, including the responsible State. There have been cases where the responsible State has sought to consolidate the situation it has created by its own ‘recognition’. Evidently the responsible State is under an obligation not to recognize or sustain the unlawful situation arising from the breach. Similar considerations apply even to the injured State: since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the international community interest in ensuring a just and appropriate settlement. These conclusions are consistent with article 30 on cessation and are reinforced by the peremptory character of the norms in question.”

23. Mr. PELLET said that on the whole he endorsed the proposal but regretted the lack of wording to indicate that the injury to the State must result from a breach of obligations arising from peremptory norms. An injured State could choose to ignore a breach of obligations arising from norms that were not peremptory, but could not do so in the case of peremptory norms.

24. Mr. CRAWFORD (Special Rapporteur) pointed out that the final sentence referred specifically to “the peremptory character of the norms in question”. The subject of article 41 was not the entire field of breaches of obligations arising under peremptory norms, but serious breaches of such obligations. The area, exemplified by *Namibia*-type situations, was an extremely complex one and the paragraph as it stood was accurate. He volunteered, however, to put in a cross-reference to the discussion elsewhere in the draft of loss of the right to invoke responsibility and valid consent.

*It was so agreed.*

*Paragraph (9), as amended, was adopted.*

*The commentary to article 41, as amended, was adopted.*

PART THREE. THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE (concluded)\*\*\*\*\*

CHAPTER I. INVOCATION OF THE RESPONSIBILITY OF A STATE (concluded)\*\*\*\*\*

*Commentary to article 42 (Invocation of responsibility by an injured State) (concluded)\*\*\*\*\* (A/CN.4/L.608/Add.6)*

Paragraph (3) (concluded)\*\*\*\*\*

25. Mr. CRAWFORD (Special Rapporteur) proposed the following revision of the fourth sentence, to meet the concerns expressed by Mr. Pambou-Tchivounda: “The situation of an injured State should be distinguished from that of any other State which may be entitled to invoke responsibility, e.g. under article 48 which deals with the entitlement to invoke responsibility in some shared general interest.”

*Paragraph (3), as amended, was adopted.*

*The commentary to article 42, as amended, was adopted.*

*Commentary to article 45 (Loss of the right to invoke responsibility) (concluded)\*\*\*\*\**

Paragraph (4) (concluded)\*\*\*\*\*

26. Mr. CRAWFORD (Special Rapporteur) said that he had drafted an addition to the paragraph to meet the concern expressed by Mr. Economides, taking care not to overstate the case. The following text should be added at the end of paragraph (4):

\*\*\*\* Resumed from the 2707th meeting.

\*\*\*\*\* Resumed from the 2706th meeting.

\*\*\* Resumed from the 2705th meeting.

“Of particular significance in this respect is the question of consent given by an injured State following a breach of a peremptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.”

27. Mr. GALICKI said that, for accuracy's sake, the phrase “breach of a peremptory norm” in the first sentence should be replaced by “breach of an obligation arising from a peremptory norm”.

*Paragraph (4), as amended, was adopted.*

Paragraph (11) (concluded)\*\*\*\*\*

28. Mr. CRAWFORD (Special Rapporteur) said his proposed amendment had been drafted in response to Mr. Brownlie's comment that the matter concerned more than mere disadvantage as the result of a delay which gave rise to the loss of the right to invoke responsibility. The first sentence should be replaced by the following: “To summarize, a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of the claim or the respondent State has been irretrievably disadvantaged.”

29. Mr. ROSENSTOCK said that it would be almost impossible to prove that a State had been irretrievably disadvantaged. He would suggest replacing the word “irretrievably” by “substantially” or “seriously”.

30. Mr. BROWNLIE said that “disadvantaged” on its own, without qualification, would be sufficient. He agreed that “irretrievable” was too rigorous.

31. Mr. CRAWFORD (Special Rapporteur) said that over the course of time a State would invariably be disadvantaged to a certain extent. He would therefore favour replacing the word “irretrievably” by the word “seriously”.

*Paragraph (11), as amended, was adopted.*

*The commentary to article 45, as amended, was adopted.*

*Commentary to article 46 (Plurality of injured States) (concluded)\*\*\*\*\**

New paragraphs (3) and (4)

32. Mr. CRAWFORD (Special Rapporteur) said it had been found that not enough had been said in the commentary about the plurality of injured States and the capacity of each State to bring a claim on its own. Mr. Gaja, Mr. Pellet and others had supplied him with more material, which had filled two paragraphs. The proposed text was the following:

“(3) It is by no means unusual for claims arising from the same internationally wrongful act to be brought by several States. For example in the *S.S. “Wimbledon”* case, four States brought proceedings before PCIJ under article 386, paragraph 1, of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), which allowed ‘any interested Power’ to apply in the event of a violation of the provisions of the Treaty concerning transit through the Kiel Canal. The Court noted that ‘each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags’. It held they were each covered by article 386, paragraph 1, ‘even though they may be unable to adduce a prejudice to any pecuniary interest’.<sup>1</sup> In fact only France, representing the operator of the vessel, claimed and was awarded compensation. In the cases concerning the *Aerial Incident of 27 July 1955*, proceedings were commenced by the United States, the United Kingdom and Israel against Bulgaria concerning the destruction of an Israeli civil aircraft.<sup>2</sup> In the *Nuclear Tests* cases, Australia and New Zealand each claimed to be injured in various ways by the French conduct of atmospheric nuclear tests at Mururoa Atoll.<sup>3</sup>

“(4) Where the States concerned do not seek compensation on their own account as distinct from a declaration of the legal situation, it may not be clear whether they are claiming as injured States or as States invoking responsibility in the common or general interest under article 48. Indeed in such cases it may not be necessary to decide into which category they fall, provided it is clear that they fall into one or the other. Where there is more than one injured State claiming compensation on its own account or on account of its nationals, evidently each State will be limited to the damage actually suffered. Circumstances might also arise in which several States injured by the same act made incompatible claims. For example, one State may claim restitution whereas the other may prefer compensation. If restitution is indivisible in such a case and the election of the second State is valid, it may be that compensation is appropriate in respect of both claims.<sup>4</sup> In any event, two injured States each claiming in respect of the same wrongful act would be expected to coordinate their claims so as to avoid double recovery. As ICJ pointed out in its advisory opinion on *Reparation for Injuries*, ‘International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case.’<sup>5</sup>

<sup>1</sup> *Judgments, 1923, P.C.I.J., Series A, No. 1*, at p. 20.

<sup>2</sup> The Court held that it lacked jurisdiction over the Israeli claim (*Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, *Judgment, I.C.J. Reports 1959*, p. 127), after which the United Kingdom and United States claims were withdrawn. In its Memorial, Israel noted that there had been active coordination of the claims between the various claimant Governments, and added: ‘One of the primary reasons for establishing co-ordination of this character from the earliest stages was to prevent, so far as was possible, the Bulgarian Government being faced with double claims leading to the possibility of double damages’ (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, p. 106).

\*\*\*\*\* Resumed from the 2706th meeting.

<sup>“3</sup> See *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, at p. 256; *Nuclear Tests (New Zealand v. France)*, *ibid.*, p. 457, at p. 460.

<sup>“4</sup> Cf. *Forests of Central Rhodopia*, where the arbitrator declined to award restitution *inter alia* on the ground that not all the persons or entities interested in restitution had claimed (UNRIAA, vol. III (Sales No. 1949.V.2), p. 1405, at p. 1432).

<sup>“5</sup> *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 186.”

33. He added that the sixth sentence in proposed paragraph (4), beginning “If restitution is indivisible”, had been formulated in response to calls that that point should be made somewhere in the draft articles. The sentence referred the reader to footnote 4, which contained the only case he had been able to find in which the issue had been broached. He would be grateful to be informed of any other relevant cases.

34. Mr. GALICKI suggested that the word “seek” in the first sentence of new paragraph (4) should be replaced by the word “claim”.

35. Mr. PELLET, supported by Mr. HAFNER, said the two paragraphs were a fine demonstration of the Special Rapporteur’s flexibility, knowledge and patience, even when faced with requests for change unaccompanied by specific proposals.

36. Mr. ROSENSTOCK queried whether it was correct in paragraph (3) to describe the claims by the United Kingdom and the United States as concerning the destruction of the Israeli aircraft or the loss of life attendant thereon.

37. Mr. CRAWFORD (Special Rapporteur) said that the latter interpretation was correct. The phrase “concerning. . . aircraft” in the penultimate sentence should be replaced by: “concerning the destruction of an Israeli civil aircraft and the loss of lives involved”. He added that, interestingly, Israel had said it would claim only for its own citizens and for stateless persons on the aircraft.

38. Mr. PELLET said, with regard to footnote 4, that there might well have been cases where a plurality of claimants had caused problems in the framework of the Iran-United States Claims Tribunal.

39. Mr. CRAWFORD (Special Rapporteur) said that he was not aware of any case before the Iran-United States Claims Tribunal in which different claimants had made incompatible claims. There had been hundreds of cases of multiple claims, but they had been brought not on a formal State-to-State basis but by claimants on their own account within the framework of the Tribunal.

*New paragraphs (3) and (4), as amended, were adopted.*

*The commentary to article 46, as amended, was adopted.*

## CHAPTER II. COUNTERMEASURES (concluded) \*\*\*\*

*Commentary to chapter II (concluded)\*\*\*\*\* (A/CN.4/L.608/Add.5)*

\*\*\*\* Resumed from the 2707th meeting.

\*\*\*\*\* Resumed from the 2706th meeting.

Paragraph (5) (concluded)\*\*\*\*\*

40. Mr. CRAWFORD (Special Rapporteur) said that, in response to Mr. Pellet’s suggestion that a comment should be made on reciprocal countermeasures in relation to non-reciprocal rights, especially human rights, it was proposed that the fifth and sixth sentences of the paragraph should be replaced by the following:

“First, for some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable. The obligations in question have a non-reciprocal character and are not only due to other States but to the individuals themselves.”<sup>a</sup>

<sup>“a</sup> Cf. European Court of Human Rights, *Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A No. 25.*”

*Paragraph (5), as amended, was adopted.*

*The commentary to chapter II, as amended, was adopted.*

*Commentary to article 50 (Obligations not affected by countermeasures) (concluded)\*\*\*\*\**

Paragraph (7) (concluded)\*\*\*\*\*

41. Mr. CRAWFORD (Special Rapporteur) said that, as the original paragraph had also stated, members had pointed out that the reference to the Security Council was irrelevant to the draft articles. In order to focus the text more on the issue in hand, the first three sentences should be replaced by the following:

“In its General Comment No. 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present articles,<sup>x</sup> as well as with countermeasures imposed by individual States or groups of States. It stressed that ‘whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights’,<sup>y</sup> and went on to state that:

<sup>“x</sup> See article 59 and commentary.

<sup>“y</sup> E/C.12/1997/8, para. 1.”

The rest of the paragraph would remain unchanged.

42. Mr. ROSENSTOCK said that countermeasures, according to the terminology of the draft articles, by definition constituted a legal act. It would therefore be more accurate to replace the word “countermeasures” in the second sentence with the word “measures”.

*Paragraph (7), as amended, was adopted.*

*The commentary to article 50, as amended, was adopted.*

*Commentary to article 52 (Conditions relating to resort to countermeasures) (concluded)\*\*\*\**

Paragraph (8) (*concluded*)\*\*\*\*

43. Mr. CRAWFORD (Special Rapporteur) said that the new text, which related to how far the commentary should discuss questions of jurisdiction and the existence of standing as distinct from ad hoc courts and tribunals, would read:

“(8) A dispute is not ‘pending before a court or tribunal’ for the purposes of paragraph 3 (b) unless the court or tribunal exists and is in a position to deal with the case. With a standing court or tribunal this will normally be the case immediately. On the other hand, for these purposes a dispute is not pending before an ad hoc tribunal established pursuant to a treaty until the tribunal is actually constituted, a process which will take some time even if both parties are cooperating in the appointment of the members of the tribunal.”

44. Mr. PELLET said that the main point of the discussion on the original version of paragraph (8) was that it should contain some such phrase as “provided both parties accept its jurisdiction”. It was important to include that proviso.

45. Mr. CRAWFORD (Special Rapporteur) said that, in fact, that need not be the case. A State could consistently reject the jurisdiction of a tribunal and simultaneously comply with an interim measures order issued by that tribunal. Thus, in the *Southern Bluefin Tuna* cases, Japan had said from the outset that it did not accept that the ad hoc tribunal would have jurisdiction. Nonetheless, there had been a tribunal, with the appearance of having jurisdiction, which had had the power to issue interim measures orders; it had done so and Japan had complied with them. If a State did comply with interim measures, there was no room for countermeasures, even if eventually it decided that there was no jurisdiction. Later developments were another question: provided that the tribunal had the power to indicate interim measures, that power took precedence over the unilateral act.

46. Mr. ROSENSTOCK said that a tribunal might well have the power to issue interim measures orders and might actually do so. It was quite another matter if it was apparent to all concerned that the tribunal was not going to ask for interim measures, because it was apparent that there was no jurisdiction. In that case, it seemed unduly harsh to force the injured State to give up the frozen assets, the ship or the plane concerned. Some action needed to be taken to ensure that baseless claims, which had no chance of success, could not be brought. Moreover, ICJ would not be so unwise as to issue preliminary orders, since it knew that it had no jurisdiction to enforce them in such a case.

47. Mr. PELLET concurred. Paragraph (8) was acceptable only if both parties accepted the tribunal’s jurisdiction or if the tribunal had the power to indicate binding interim measures. He would not revert to the latter issue,

because it was adequately dealt with in the proposed revision of paragraph (9).

48. Mr. CRAWFORD (Special Rapporteur) suggested that the second sentence should be deleted, together with the words “On the other hand” in the third sentence. The point being made in paragraph (8) was that, in the case of a jurisdictional clause, there was no tribunal until it had been constituted. The Commission was at one on that point and it was, in any case, further addressed in paragraph (9).

49. Mr. GAJA said that even greater clarity would be achieved if paragraphs (8) and (9) were merged, since it was important for the tribunal to have the power to provide for interim measures in order to ensure that paragraph 3 (b) of the article operated in the way indicated in the draft.

50. Mr. PELLET said he supported the deletion proposed by the Special Rapporteur, but would nonetheless ask the Special Rapporteur and Mr. Gaja to suppose that two parties agreed to appear before a tribunal which did not have the power to issue interim measures orders but whose jurisdiction they did not reject. Could a State persist with interim measures in those circumstances? He himself would say it could not, because it would have recognized that the problem would be resolved under the law by a tribunal whose jurisdiction was acknowledged by both parties.

51. Mr. GAJA noted that a tribunal that had the possibility of ordering binding interim measures could authorize a State to freeze assets, which was a vital move if there was a prospect of the tribunal eventually ordering compensation to be paid. After a certain time, however, whatever the tribunal did, unilateral measures would have to cease. In the case of an arbitral tribunal between private parties, it would not be acceptable simply to wait for a binding decision. In the case of States, however, the position was different: States were presumed to abide by binding decisions.

52. Mr. CRAWFORD (Special Rapporteur) said paragraph 3 (b) of article 52 stipulated that countermeasures could not be taken if the dispute was pending before a court or tribunal which had the authority to make decisions binding on the parties. The question of what should happen where an underlying dispute was before a tribunal as between a private party and the State was dealt with later elsewhere. Clearly, the State was not bound to refrain from countermeasures, although the fact that the matter was *sub judice* might be relevant. The real question was what would happen in the hypothetical situation that a case was being heard by a tribunal without the power to issue an interim measures order, but all sides accepted that the case was before the tribunal. In reality, although there might be arbitral tribunals to which that applied, the situation was fairly exceptional. Standard rules for State-to-State arbitration did provide for provisional measures, however, in the case of the International Tribunal for the Law of the Sea, ICJ and the International Criminal Court. In using the word “decisions”, the Drafting Committee had had in mind—at least, before the *LaGrand* case—that the tribunal had the power to issue interim measures orders. Understandably, the injured State would not be

\*\*\*\* Resumed from the 2707th meeting.

content to delay any possibility of redress for four or five years in a situation in which it had been seriously injured, particularly if the responsible State accepted that the case was before a tribunal but contested the case on all possible grounds, and there was no ultimate guarantee that the responsible State would comply with any order. He would therefore prefer to retain paragraph (9) with its current wording. He saw no problem in merging paragraphs (8) and (9).

*Paragraph (8), as amended, was adopted.*

Paragraph (9) (concluded)\*\*\*\*

53. Mr. CRAWFORD (Special Rapporteur) said the Commission had agreed that the paragraph was broadly acceptable but would need to be restructured. Leaving aside the question of its joinder to paragraph (8), the start of the paragraph would read:

“Paragraph 3 is based on the assumption that the court or tribunal to which it refers has jurisdiction over the dispute and also the power to order provisional measures. Such power is a normal feature of the rules of international courts and tribunals. The rationale behind paragraph 3 is that once the parties submit their dispute to such a court or tribunal for resolution, the injured State may request it to order provisional measures to protect its rights. Such a request, provided the court or tribunal is available to hear it, will perform a function essentially equivalent to that of countermeasures. Provided the order is complied with it will make countermeasures unnecessary pending the decision of the tribunal. The reference to a ‘court or tribunal’ is intended to refer to any third party dispute settlement procedure, whatever its designation. It does not, however, refer to political organs such as the Security Council.”

The rest of the paragraph remained unchanged.

54. Mr. GALICKI suggested that, in the third sentence, the verb “protect” should read “preserve”, reflecting the wording of the article.

55. Mr. GAJA said that his own preference was for “protect”.

56. Mr. SIMMA asked for confirmation that the antepenultimate sentence implied that, if the order was not complied with, the right to take countermeasures continued. Did the State meanwhile retain the right to take urgent countermeasures within the meaning of paragraph 2?

57. Mr. CRAWFORD (Special Rapporteur) said that, under article 52, paragraph 4, if a State failed to comply with provisional measures orders, that was the end of the matter. The question of urgent countermeasures was relevant only in relation to paragraph 1 (b)—the prior notification and negotiation requirement. Assuming that urgent measures—such as freezing of assets—had been taken and the case was then submitted to a tribunal with the power to indicate interim measures, the meas-

ure would have to be suspended without undue delay. The injured State would thus have some time in which to decide on a further course of action. It could not, however, refrain from requesting interim measures and take unilateral measures of its own. That was his interpretation of the article.

58. His answer to Mr. Pellet’s question—an answer which, in his view, constituted a reasonable interpretation of the plural word “decisions”, was that the suspensive effect of article 52, paragraph 3 (b), was triggered only in respect of a dispute procedure in existence that involved an interim measures authority.

59. Mr. PELLET said that the interpretation proposed by the Special Rapporteur was not the one that would immediately spring to mind. The antepenultimate sentence presupposed that the court or tribunal had indeed ordered provisional measures. ICJ might decide, as in the *Great Belt* case, that there were no grounds for ordering provisional measures. In such a case, it seemed unreasonable for the State to be permitted to continue to take countermeasures. Similarly, if the State omitted to request provisional measures, it seemed unreasonable that it should be permitted to maintain its countermeasures. Those problems were not dealt with in the commentary.

60. Mr. CRAWFORD (Special Rapporteur) said that Mr. Pellet had raised a quite different question, one to which the articles provided a clear answer. That question was whether, where the tribunal had no interim measures power, the mere referral of a dispute to such a tribunal required the suspension of countermeasures. His answer to that question was in the negative, but the problem was in any case abstract in the extreme, as all inter-State tribunals of which he was aware had that power. Where the tribunal had that power, under paragraph 3 the countermeasures must be suspended without undue delay once the matter was referred to the tribunal and the tribunal was in being. Thus, if the tribunal refused to order interim measures, the countermeasures must be suspended. If the matter was referred to a tribunal by another State and the claimant declined to request provisional measures, then the countermeasures must be suspended. In the standard case, the power to indicate provisional measures took over from the unilateral power to take countermeasures as soon as the tribunal was in existence and was in a position to exercise that power, whether or not it was asked to do so. The more arguable problem that the Commission had been discussing, relating to one’s interpretation of what was intended by the word “decisions”, was the very exceptional case where there was no tribunal with that power.

61. Mr. ECONOMIDES said that the Special Rapporteur’s interpretation of the point raised by Mr. Simma concerning the application of article 52, paragraph 2, was entirely correct, as was Mr. Pellet’s interpretation of the application of paragraph 3 (b). Whether or not the court took a binding decision, any countermeasures already taken must be suspended as soon as possible.

*Paragraph (9), as amended, was adopted.*

*The commentary to article 52, as amended, was adopted.*

\*\*\*\* Resumed from the 2707th meeting.



PART FOUR. GENERAL PROVISIONS (*concluded*)\*\*\*\*

*Commentary to article 56* (Questions of State responsibility not regulated by these articles) (*concluded*)\*\*\*\* (A/CN.4/L.608/Add.9)

Paragraph (1) (*concluded*)\*\*\*\*

62. Mr. CRAWFORD (Special Rapporteur) said that the first sentence of paragraph (1) had been reformulated in response to a concern expressed by Mr. Lukashuk, and would read: "The present articles set out by way of codification and progressive development the general secondary rules of State responsibility. In that context, article 56 has two functions."

*Paragraph (1), as amended, was adopted.*

*The commentary to article 56, as amended, was adopted.*

PART ONE. THE INTERNATIONALLY WRONGFUL ACT OF A STATE (*concluded*)CHAPTER II. ATTRIBUTION OF CONDUCT TO A STATE (*concluded*)\*\*\*\*

*Commentary to article 9* (Conduct carried out in the absence or default of the official authorities) (*concluded*)\*\*\*\* (A/CN.4/L.608/Add.10)

Paragraph (4) (*concluded*)\*\*\*\*

63. Mr. CRAWFORD (Special Rapporteur) said that, in response to requests for some clarification of the position of Governments in exile, he had expanded the footnote to paragraph (4), to include a reference to what was still the leading modern work on *de facto* Governments. The new footnote would read:

"See, e.g., the award by Arbitrator Taft in the *Aguilar-Amory and Royal Bank of Canada Claims (Tinoco case)*, of 18 October 1923 (UNRIAA, vol. I (Sales No. 1948.V.2), p. 371 at pp. 381–382). On the responsibility of the State for the conduct of *de facto* Governments, see also J. A. Frowein, *Das de facto-Regime im Völkerrecht* (Cologne, Heymanns, 1968), pp. 70–71. Conduct of a Government in exile might be covered by article 9, depending on the circumstances."

64. Mr. BROWNLIE said he had serious doubts as to the appropriateness of quoting Frowein's work on the question. It was a thesis; it was out of date; and its perspective was extremely eccentric. The concept of *de facto* regime did not equate to that of *de facto* Government, and the work drew together a series of related but disparate legal subjects. Frowein was thus by no means the most appropriate citation.

65. Mr. SIMMA said he took the opposite view. The book remained a fundamental work on *de facto* entities, of whatever status. Its main thesis was not eccentric, but pragmatic. The citation should be retained.

66. Mr. BROWNLIE said that the book was, as Mr. Simma conceded, not about *de facto* Governments; nor

was it primarily a book about State responsibility: it was about the legal status of a whole series of entities, including, for example, Taiwan, and was not part of the mainstream literature on those problems.

67. Mr. CRAWFORD (Special Rapporteur) said that the reference was drawn from the commentary to the article adopted on first reading,<sup>1</sup> and referred to particular pages of the work in question. However, it might be best to delete it.

68. Mr. SIMMA said it was unacceptable that a reference should simply be deleted without proper scrutiny on the insistence of one member, despite strong support for its retention by another member.

69. Mr. CRAWFORD (Special Rapporteur) proposed placing the reference in square brackets. If the pages cited proved to be relevant, the reference would be retained.

*It was so agreed.*

*Paragraph (4), as amended, was adopted.*

*The commentary to article 9, as amended, was adopted.*

*Commentary to article 11* (Conduct acknowledged and adopted by a State as its own) (*concluded*) (A/CN.4/L.608/Add.10)

Paragraph (3) (*concluded*)

70. Mr. CRAWFORD (Special Rapporteur) said that, in response to a concern voiced by Mr. Pellet, he proposed to relocate the discussion of the Tellini case, contained in paragraph (3) of the commentary to article 11, as a new paragraph (2a) of the commentary to chapter II. That would entail a few minor editing changes.

*Paragraph (3), as amended, was adopted.*

*The commentary to article 11, as amended, was adopted.*

*The commentaries to the draft articles on responsibility of States for internationally wrongful acts, as a whole, as amended, were adopted.*

## C. Recommendation of the Commission

71. The CHAIRMAN invited the Commission to consider the proposed text of a recommendation to the General Assembly. The text read:

"At its 2709th meeting, on 9 August 2001, the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly that it take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution, and that it annex the draft articles to the resolution.

\*\*\*\* Resumed from the 2707th meeting.

<sup>1</sup> *Yearbook* . . . 1974, vol. II (Part One), p. 286, document A/9610/Rev.1, paragraph (12) and footnote 599.

“The Commission decided further to recommend that the General Assembly consider, at a later stage, and in light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles on responsibility of States for internationally wrongful acts with a view to concluding a convention on the topic. The Commission was of the view that the question of the settlement of disputes could be dealt with by the above-mentioned international conference, if it considered that a legal mechanism on the settlement of disputes should be provided in connection with the draft articles.”

72. Mr. GAJA proposed changing the word “concluding”, in the penultimate sentence, to “adopting”.

*Section C was adopted.*

#### D. Tribute to the Special Rapporteur

73. The CHAIRMAN invited the Commission to consider the proposed text of a tribute to the Special Rapporteur on the topic of State responsibility, Mr. James Crawford. The text read:

“At its 2709th meeting, on 9 August 2001, the Commission, after adopting the text of the draft articles on responsibility of States for internationally wrongful acts, adopted the following resolution by acclamation:

*‘The International Law Commission,*

*‘Having adopted the draft articles on responsibility of States for internationally wrongful acts,*

*‘Expresses to the Special Rapporteur, Mr. James Crawford, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft articles on responsibility of States for internationally wrongful acts.’*

“The Commission also expressed its deep appreciation to the previous Special Rapporteurs, Messrs. Francisco V. García Amador, Roberto Ago, Willem Riphagen and Gaetano Arangio-Ruiz, for their outstanding contribution to the work on the topic.”

*Section D was adopted.*

*The members of the Commission gave Mr. Crawford, Special Rapporteur, a standing ovation.*

74. Mr. CRAWFORD (Special Rapporteur) expressed gratitude to the Commission for its vote of thanks, and for the extraordinary support it had given him over the previous four years. He wished to pay particular tribute to the four consecutive Chairmen of the Drafting Committee, namely, Mr. Simma, Mr. Candioti, Mr. Gaja and Mr. Tomka; and also to Mr. Melescanu for his helpful work on the commentaries. The outcome of that collec-

tive endeavour was a work of which the Commission could be proud.

*Chapter V, as amended, was adopted.*

*The meeting rose at 4.30 p.m.*

## 2710th MEETING

*Friday, 10 August 2001, at 10.05 a.m.*

*Chairman: Mr. Peter KABATSI*

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

### Draft report of the Commission on the work of its fifty-third session (concluded)

#### CHAPTER I. Organization of the session (A/CN.4/L.604)

Paragraphs 1 to 7

*Paragraphs 1 to 7 were adopted.*

Paragraph 8

1. Mr. TOMKA said that mention should also be made in paragraph 8 (a) of the open-ended working group to consider the main issues pending, chaired by the Special Rapporteur.

2. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to Mr. Tomka's proposal and said that the secretariat would insert the necessary addition.

*It was so agreed.*

*Paragraph 8 was adopted on that understanding.*

Paragraphs 9 and 10

*Paragraphs 9 and 10 were adopted.*

*Chapter I, as amended, was adopted.*

**CHAPTER II. Summary of the work of the commission at its fifty-third session (A/CN.4/L.605)**

Paragraphs 1 and 2

3. The CHAIRMAN said that paragraphs 1 and 2 would be supplemented by the secretariat in accordance with the decisions taken by the Commission.

4. Mr. TOMKA proposed that the order of paragraphs 1 and 2 should be reversed, like that of the chapters of the draft report to which they referred, so as to take into account the fact that the bulk of the work of the Commission at the current session had been on the topic of State responsibility, that the topic had been on the agenda of the Commission for more than 40 years and the work had finally been completed. He had consulted the Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), who had expressed his agreement.

5. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to Mr. Tomka's proposal.

*It was so agreed.*

6. Mr. PELLET proposed that the Commission should state in paragraphs 1 and 2 that it had also adopted all of the corresponding commentaries.

7. Mr. ECONOMIDES said it was surprising that the activities of the Planning Group, which had met several times in the course of the current session, were not mentioned. He proposed that a sentence should be added to make good that oversight.

*Paragraphs 1 and 2, as amended, were adopted.*

Paragraph 3

8. Mr. PELLET proposed that the second sentence should be simplified and made less clumsy by deleting the phrase "as well as late reservations and interpretation of declarations", in the second sentence.

*Paragraph 3, as amended, was adopted.*

Paragraphs 4 to 6

*Paragraphs 4 to 6 were adopted.*

Paragraph 7

9. Mr. PELLET said that the International Law Seminar should not be mentioned in the chapter of the report concerning the work of the Commission. The Seminar was not organized by the Commission, whose members were in no way associated with selecting the participants or preparing the programme for the Seminar. He therefore proposed that paragraph 7 should simply be deleted.

10. Mr. SIMMA, supported by Mr. GALICKI, Mr. GOCO, Mr. RODRIGUEZ CEDEÑO and Mr. KATEKA, said he was opposed to omitting paragraph 7 for two reasons, namely, the International Law Seminar, held at the annual session of the Commission, had always been mentioned in the report, and the Seminar was referred to in the annual resolution of the General Assembly on the report of the Commission on the work of its session.

11. Further to an exchange of views in which Mr. BROWNLIE, Mr. KAMTO, Mr. MELESCANU and Mr. ROSENSTOCK took part, Mr. TOMKA proposed that the text of paragraph 7 should be reworded as follows: "A training seminar organized by the United Nations Office at Geneva was held with 24 participants of different nationalities. Some members of the Commission gave lectures at the Seminar."

12. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to Mr. Tomka's proposal.

*It was so agreed.*

*Paragraph 7, as amended, was adopted.*

Paragraph 8

*Paragraph 8 was adopted.*

*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.606 and Add.1 and 2)**

Paragraph 1 (A/CN.4/L.606)

*Paragraph 1 was adopted.*

**A. Reservations to treaties**

Paragraphs 2 to 4

*Paragraphs 2 to 4 were adopted.*

Paragraph 5

13. Mr. SIMMA said that the word "condemned", in the penultimate sentence, was too strong. It should be replaced by "discouraged".

14. Mr. GAJA pointed out that "all" members of the Commission and not "some" members regarded it as a practice to be discouraged.

15. Mr. MELESCANU proposed that the word "condemned" should simply be deleted.

16. Mr. HAFNER said he endorsed Mr. Melescanu's proposal and suggested that "should not be embodied in the Guide" should be replaced by "should not be dealt with in the Guide".

17. Mr. MELASCANU proposed the following wording: “. . . should not be encouraged and should not, therefore, be embodied in the Guide”.

18. Mr. ROSENSTOCK proposed another formulation, namely, “Nevertheless, some members of the Commission consider that this practice should not be dealt with in the Guide to Practice, so as not to encourage it.”

19. Mr. KAMTO proposed it should simply be said that the practice was contrary to international law or to the 1969 and 1986 Vienna Conventions.

20. Mr. PELLET (Special Rapporteur), supported by Mr. AL-BAHARNA said that the explanations appeared in the report. The text under consideration was a summary and hence it should not enter into details. He proposed the following wording: “Nevertheless, some members of the Commission consider that including this practice in the Guide to Practice could unduly encourage the late formulation of reservations.”

*Paragraph 5, as amended, was adopted.*

Paragraph 6

*Paragraph 6 was adopted.*

Paragraph 7

21. Mr. GAJA said that the word “unlawful” should be replaced by “inadmissible” in the last sentence.

22. Mr. PELLET (Special Rapporteur) said that the proper term in French was *illicite* and it should therefore be maintained in the French text.

*Paragraph 7, as amended, was adopted.*

Paragraph 8

*Paragraph 8 was adopted.*

*Section A, as amended, was adopted.*

#### **B. Diplomatic Protection (A/CN.4/L.606/Add.1)**

*Section B was adopted.*

#### **C. Unilateral acts of States (A/CN.4/L.606/Add.2)**

23. Further to an exchange of views in which Mr. AL-BAHARNA, Mr. BROWNLIE, Mr. CANDIOTI, Mr. CRAWFORD, Mr. ECONOMIDES, Mr. GOCO, Mr. MELESCANU, Mr. PELLET, Mr. Sreenivasa RAO, Mr. RODRÍGUEZ CEDEÑO and Mr. SIMMA took part, the CHAIRMAN noted that most members considered that the issues were too theoretical and too complex for States to respond and it would be better to invite States to

provide information on their practice in regard to unilateral acts through the questionnaire on unilateral acts of States. He therefore suggested a paragraph to read: “The Commission drew attention to a questionnaire prepared by the Special Rapporteur which will be circulated to Governments. The Commission encourages Governments to reply to the questionnaire as soon as possible.”

24. If he heard no objection, he would take it that the Commission agreed to that suggestion.

*It was so agreed.*

*Section C, as amended, was adopted.*

*Chapter III, as amended, was adopted.*

#### **CHAPTER IX. Other decisions and conclusions of the Commission (concluded)\* (A/CN.4/L.612)**

#### **D. Representation at the fifty-sixth session of the General Assembly (concluded)\***

Paragraph 14

25. The CHAIRMAN said it was his understanding that the Commission agreed that the Special Rapporteur on the topic of State responsibility, Mr. James Crawford, should attend the discussion in the Sixth Committee when it came to take up the report of the Commission on the work of its fifty-third session.

*It was so agreed.*

*Paragraph 14 was adopted.*

*Section D, as amended, was adopted.*

*Chapter IX, as amended, was adopted.*

*The draft report of the Commission on the work of its fifty-third session, as a whole, as amended, was adopted.*

#### **Closure of the session**

26. After the customary exchange of courtesies, the CHAIRMAN declared the fifty-third session of the International Law Commission closed.

*The meeting rose at 11.35 a.m.*

\* Resumed from the 2708th meeting.

