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Summary record of the 2553rd meeting

Topic:
State responsibility

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52. Simplifications that complicated matters should, however, be avoided: the definition of interpretative declarations was not the place to describe the legal regime applicable to them, and it seemed premature to transpose to interpretative declarations article 19 of the 1969 Vienna Convention, on the formulation of reservations.

53. Similarly, the warnings given about the verb “attributed” and the concerns expressed about limiting the power of interpretation went back to the question of the legal regime for interpretative declarations. On the other hand, the remark that an interpretative declaration purported to clarify, not the meaning or scope of a treaty, but the position of the declarant State in respect of the treaty, was relevant at the stage of definition. To introduce the term “interpret” into the definition would make it somewhat repetitive.

54. On the other hand, to indicate that an interpretative declaration could apply to the treaty in its entirety was well in line with practice, and it would not be wise to rule out the solution of transverse interpretative declarations by retaining the limitations wrongly imposed by the 1969 Vienna Convention.

55. Lastly, to have the definition say that an interpretative declaration also purported to clarify the conditions for implementing a treaty would be to introduce into the definition the problem of relations between international law and internal law, a problem that actually related to draft guideline 1.2.6.

56. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.2 to the Drafting Committee.

It was so agreed.

The meeting rose at 12.05 p.m.

2553rd MEETING

Friday, 31 July 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Yamada.

State responsibility¹ (*continued*)* (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,² A/CN.4/490 and Add.1-7,³ A/CN.4/L.565, A/CN.4/L.569)

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. CRAWFORD (Special Rapporteur), introducing chapter II, section C, of his first report on State responsibility (A/CN.4/490 and Add.1-7) concerning part one, chapter II, of the draft articles (The “act of the State” under international law), said that draft articles 5 to 15, which made up chapter II, related to the first of the two conditions for State responsibility set in article 3 (Elements of an internationally wrongful act of a State), that is to say, that the conduct in question must be attributable to the State, the other condition being that it must constitute a violation of an international obligation of the State. Since the adoption of the articles on first reading in the 1970s the jurisprudence on the topic had grown considerably, as a result of the work both of ICJ and of various other arbitral or human rights courts. Some of the draft articles were cited in that jurisprudence and must therefore be handled with care, but for others the room for manoeuvre was greater. The comments of Governments on the chapter had certainly come from a small number of States but were no less substantial for that. Generally speaking, the main concern of Governments was to ensure that attribution could be made on a sufficiently broad basis to prevent a State from escaping its responsibility by means of formal definitions of its organs or agents and to prevent the recent tendency for privatization of the public sector from leading to any reduction of the scope of the rules of attribution. The Commission had to take the comments of Governments into account as it continued its work on the topic. However, no Government was proposing any change to the basic structure of the positive-attribution articles; thus his own few proposed changes were essentially for clarification. There were two distinct groups of articles in that basic structure: articles 5 to 8 and 10, which dealt with attribution in general, and articles 9 and 11 to 15, which dealt with specific problems; he had added a draft article 15 *bis* on a special case which had not been addressed in the articles.

ARTICLES 5 TO 8 AND 10

2. The “general” articles on attribution gave rise to two problems of terminology. The first was that the Commission had preferred the term “attribution” to the term “imputability”⁴ used at the outset by the former Special Rapporteur, Mr. Roberto Ago.⁵ ICJ had continued to use “imputability” in later cases. The Commission’s choice

* Resumed from the 2547th meeting.

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

² Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

³ *Ibid.*

⁴ See *Yearbook . . . 1971*, vol. II (Part One), p. 214, document A/CN.4/246 and Add.1-3, para. 50.

⁵ See *Yearbook . . . 1970*, vol. II, pp. 187 et seq., document A/CN.4/233.

was nevertheless right, since “imputability” introduced an element of fiction where none existed. Moreover, in the title of chapter II of the draft articles the term “act of the State” appeared in inverted commas in order to prevent any confusion with the similar language found in various national legal systems. He proposed eliminating both the inverted commas and the risk of confusion by adopting the more informative title “Attribution of conduct to the State under international law”. Notwithstanding those terminological questions, the “general” articles on attribution gave effect to the fundamental principles of the notion of attribution described in paragraph 154 of the report, the main point being the distinction between attribution and violation of an obligation: even when there was a close link between the grounds of the attribution and the obligation which appeared to have been violated, the attribution of the conduct to the State did not in itself imply in any way that the conduct constituted a violation of the obligation in question. The main articles in the first group were article 5 (Attribution to the State of the conduct of its organs), article 7 (Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority), article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State), and articles 6 (Irrelevance of the position of the organ in the organization of the State) and 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity), which had an explanatory function, with respect to article 5 alone in the case of article 6 and to three articles (5, 7 and 8) in the case of article 10.

ARTICLES 5 AND 6

3. Article 5 dealt with the attribution to the State of the conduct of its organs; the problems to which it gave rise turned essentially on the concept of organ. For example, in the comments and observations received from Governments on State responsibility (A/CN.4/488 and Add.1-3), the French Government had proposed adding “or agent” after “any State organ”; however, apart from the fact that the concept of agent was dealt with in article 8, article 5 addressed only entities forming part of the organic structure of the State. According to article 5, an organ of the State was any entity having that status under the State’s internal law. Since internal law was not always sufficient for determining such status, it was sometimes necessary to refer to practice, conventions, and so forth. It was also rare for the meaning attached to “organ” in national legal systems to correspond exactly to the meaning which it must have for the purposes of State responsibility. In some systems the term covered only the higher levels of the State apparatus, whereas for the topic under consideration it could cover all levels. He therefore proposed, in line with many Governments, to delete the reference to internal law and to state clearly in the commentary that internal law, while particularly pertinent, did not constitute the sole criterion.

4. Several aspects of the notion of organ were explained in article 6, which pointed out first of all that the organ could belong to the constituent, legislative, executive, judicial or other power. The point was an important one, prompting some commentators to ask whether it did not introduce in article 5 a limitation on the exercise of the

powers of the public authorities found in article 7 with respect to parastatal entities, or indeed the limitations found for example in the law of State immunity in the distinction between governmental and non-governmental functions. That had not been the Commission’s intention when it had drafted article 6, and it was clear that the conduct of any organ having that status was attributable to the State and that the classification of the functions was irrelevant. The second clarification contained in article 6—“whether its functions are of an international or an internal character”—stated a self-evident fact in connection with attribution and seemed all the more superfluous in that it posited a dichotomy whose existence was not at all clear in reality. The third clarification—“whether it holds a superior or a subordinate position in the organization of the State”—described a well-established practice but its formulation might exclude organs which were intermediate, autonomous or independent. It would be preferable to say “whatever position it holds in the organization of the State”.

5. He therefore proposed to retain the substance of articles 5 and 6, to delete the reference to internal law, and to combine the two articles into the new article 5 which he suggested at the end of his first report in chapter II, section C.3.

ARTICLE 7

6. Paragraph 1 of article 7 introduced the notion of territorial governmental entity. However, both the comments made by Czechoslovakia in 1981⁶ and the commentary to article 7⁷ itself showed clearly that the structure of the State under its internal law did not affect the principle of “the unity of the State” for the purposes of international law, including the case of federal States. Accordingly, the paragraph merely restated article 5 in more confusing terms and should be deleted. Paragraph 2, on the other hand, addressed the very interesting and important problem of the exercise of public powers by entities which were not part of the structure of the State itself: airlines exercising control of immigration, private companies managing prisons, and so forth. The comments of Governments revealed no opposition to the rule of attribution stated in the paragraph, but one government had requested the Commission to define the notion of public power. The Commission could of course clarify the notion by means of examples and commentary, but it should not try to define it. Public power was not defined only in terms of content but also in terms of its treatment in internal law. Furthermore, it was not for international law to prescribe a priori what conduct should be regarded as public.

ARTICLE 8

7. Like article 7, article 8 had a dual structure: subparagraph (a) dealt with the normal situation in which a person or group of persons acted in fact on behalf of the State; and subparagraph (b) dealt with the more unusual

⁶ *Yearbook* . . . 1981, vol. II (Part One), p. 72, document A/CN.4/342 and Add.1-4.

⁷ *Yearbook* . . . 1974, vol. II (Part One), pp. 277 et seq., document A/9610/Rev.1.

situation in which a person or group of persons in fact exercised elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of that authority. Subparagraph (a) gave rise to two problems. First, it began with the formula “it is established that”, which singled article 8 out from articles 5 and 7 without any valid reason: the requirement that it must be established that the conduct was attributable to the State was set out in article 3 as a general principle and held good for all three articles. There was therefore no reason to repeat that formula for article 8 alone. The second problem was more important since it concerned the scope of the term “on behalf of”: whether it was limited to cases in which there were express instructions or whether it went further than that. In his dissenting opinion in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see page 189, footnote 1), Mr. Ago had criticized ICJ for its use of the criterion of “effective control”, which went beyond the criterion of “express instructions” (para. 198 of the first report). The concept of “control” had been used in various forms in several subsequent cases, for example by the International Tribunal for the Former Yugoslavia to determine whether the conduct of the Bosnian Serbs could be attributed to the Federal Republic of Yugoslavia (paras. 201 et seq.); of course, that was not exactly a problem of State responsibility, but the criterion used had indeed been the criterion of control. It had also been used by the Iran-United States Claims Tribunal (paras. 205-206) and by the European Court of Human Rights (paras. 207-208).

8. It thus seemed that article 8 contained an ambiguity which must be removed and that it should be stated clearly that the conduct was attributable to the State not only when it was the result of express instructions but also when it occurred in a situation in which the State exercised powers of direction and control. However, it was also necessary to prevent the expansion of the scope of the term “on behalf of” so as to extend the rule of attribution to any conduct of a corporation owned by a State and therefore under its control, for that would introduce an inconsistency between article 8 and paragraph 2 of article 7. A formulation must therefore be found which would also make it clear that the State must not exercise merely general control and that the direction and control should be related to the conduct in respect of which the claim was made. The new wording for article 8, subparagraph (a), which he proposed in chapter II, section C.3, met those conditions by inserting the new phrase “or under the direction and control of, that State in carrying out that conduct”. In view of the ambiguity of the original language of article 8, the proposed new wording was perhaps in the end only a clarification and not an expansion of the scope of the rule of attribution.

9. The second situation, addressed in article 8, subparagraph (b), was the one in which the organs of the State could not operate (revolution, collapse of government) and the powers of the public authority were exercised by individuals or groups in the absence of the official authorities. That situation could be likened to the famous institution of the *levée en masse* in the law of armed conflicts. The principle did not come into play often but it could have an important role, as shown by the use made of it by

the Iran-United States Claims Tribunal. It should therefore be retained, but its formulation posed a problem: the original wording stated that the elements of the governmental authority should be exercised “in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority”. But if the conduct was held to be unlawful, it was difficult to “justify” it. That was a simple drafting problem which could be solved by saying instead “in circumstances which called for the exercise of those elements of authority”.

10. The choice of the verb “call for” certainly implied that the situation required that the elements of the governmental authority should be exercised, but not necessarily that the conduct in question should take place. If article 8, subparagraph (b), was left unchanged, that inconsistency would remain. The last and extremely important point to be taken up was that of article 10, on attribution to the State of the conduct of organs acting outside their competence or contrary to instructions concerning their activity. That was a classic problem of *ultra vires* conduct; it meant that the conduct of an organ of the State was considered to be an act of the State itself if the organ had acted without authorization, if it had exceeded its competence, or if it had acted contrary to instructions concerning its activity. The principle was also found in the law of treaties, which regulated very strictly the extent to which a State could rely on its internal law to escape its obligations. If the principle was valid in the law of treaties, which was concerned with the existence of an obligation, it was valid a fortiori in the law of State responsibility, which addressed cases in which an obligation had been violated. Furthermore, the jurisprudence subsequent to 1975 and the comments of governments left no doubt as to the validity of article 10.

ARTICLE 10

11. However, article 10 did give rise to a problem of formulation, also found in other articles, that is to say, the meaning of the notion of “capacity” when applied to an entity or organ. The case law had attached a rather broad meaning to the language in question. The commentary cited as a virtually definitive formulation the language derived from the decision of the French-Mexican Claims Commission in the *Caire* case, in which it was stated that the officers guilty of unlawful acts had acted “under cover of their official character” or had “availed [themselves] of [their] official status”.⁸ The notion of “capacity” remained very vague, and the problem was to determine whether any person invoking his capacity of agent of the State was in fact acting in his official capacity even when it was quite obvious that his conduct was outrageously unlawful. It must therefore be determined whether the wording of article 10 and other articles in chapter II was sufficient or whether “under cover of his official capacity” needed further clarification. It might be possible to include the phrase “acting in or under cover of that official capacity” in article 10 in order to make it clear that the earlier jurisprudence was being preserved. Since there had been no objections to article 10 and since the rules which it contained had been applied in several instances,

⁸ Decision No. 33 of 7 June 1929 of the French-Mexican Claims Commission (UNRIAA, vol. V (Sales No. 1952.V.3), pp. 529 et seq.).

he was not sure that the case for that change had been made out, but it nevertheless merited the attention of the Drafting Committee.

12. To sum up, he proposed retaining unchanged most of the draft articles concerning the central question of attribution, that is to say, articles 5 to 8, and 10, subject to some minor and mostly drafting changes. The most important amendments would be to delete the reference to internal law in article 5, delete article 8, subparagraph (a), on the grounds of redundancy, and add the phrase “or under the direction and control of, that State in carrying out that conduct”. Except for those few changes the draft articles should remain as they were, for they had stood the test of time.

13. Mr. BROWNLIE said that he welcomed the work done by the Special Rapporteur and supported his proposals. It was satisfactory that, generally speaking, the Special Rapporteur had retained the text of the draft articles as they were, for it should not be forgotten that they had existed for several decades and had been included in several compendiums of international law, and that important decisions had been based on them. Although the Special Rapporteur had not been given the mandate of confirming the status quo, it was not a bad thing to ensure a degree of continuity, subject to a few improvements.

14. Several comments had to be made. First, it was impossible to solve the many problems of State responsibility by deploying an armoury of legal concepts. The draft articles tended to reflect the empirical nature of the sources of international law, in particular the useful experience of courts and commissions which had dealt with difficult situations. He had taken particular interest in the content of articles 8 and 10. Article 8 concerned cases in which an entity acted in fact on behalf of the State. In order to rule on that type of situation it was sufficient to have evidence that an entity was acting in the capacity of agent of the State; that applied equally to the cases of *ultra vires* conduct addressed in article 10.

15. On the other hand, the question of the delegation of State functions was much more difficult, for example when the running of the prison system was entrusted to the private sector or when some of the functions of the army were privatized. Such situations did not fit very well with the wording of paragraph 2 of article 7. By mentioning the delegation of State functions he was merely trying to initiate the debate using conventional terms. In fact, the term “elements of the governmental authority” raised many questions: its scope, for example, not to mention ideological considerations. The real difficulty of the delegation of functions hitherto belonging to the State, for example the running of prisons, could be resolved only if an obligation of result was imposed on the State, that is to say, if the State was obliged to guarantee compliance with the rules for prison maintenance. In that case it was irrelevant whether the prisons were regarded as organs of the State: the problem was no longer one of attribution but of substantive law.

16. A second point, of less importance, concerned the Iran-United States Claims Tribunal, whose decisions the Special Rapporteur had cited. A degree of caution was required in that connection, for the rules applied by the

Tribunal were not purely rules of public international law, so that the principles of law had not necessarily been applied in the Tribunal in the same way as elsewhere.

17. The Special Rapporteur, perhaps unintentionally, had set the notion of “control” in opposition to a specific authorization from the State. He had since proposed much more satisfactory language which linked the notions of control and direction, the very existence of control presupposing that the conduct was approved. That situation could be likened to the one in which a State endorsed the conduct of entities not acting on its behalf. In the one case there was a direct causal relationship, and in the other the acts of third entities were endorsed once they had been carried out.

18. Lastly, the views of Mr. Ago in the case concerning *Military and Paramilitary Activities in and against Nicaragua* were presented as if he had been trying to “protect his turf”. The arguments submitted by the Nicaraguan side were based on general international law. The Commission’s draft articles, far from being ignored or sidelined, had been cited together with other materials. If the notion of control was to be approached from the standpoint of the decisions taken in that case, it should be borne in mind that the Court had been required to rule in a very specific context, and to determine in particular whether the United States of America had the sort of connections with the contras and their command structure which rendered it responsible for the violations of international humanitarian law alleged against the contras. The Court had rightly taken a conservative view, for the question of primary rules also came into play—the notion of sufficient control varying according to the legal context.

19. Mr. LUKASHUK said that in his introduction the Special Rapporteur had raised a whole series of very complicated problems to which he would respond after studying the report in detail. However, he wished at the outset to raise a question which had not been addressed with sufficient clarity in the oral presentation. There were in fact two forms of State responsibility: direct responsibility for acts carried out by the State itself, and indirect responsibility for acts carried out by physical or moral persons under its jurisdiction. He would be grateful if the Special Rapporteur could give his opinion on that question.

20. Mr. CRAWFORD (Special Rapporteur), replying to Mr. Lukashuk, said that the State could not be regarded as indirectly responsible on the sole ground that the unlawful act had been committed on its territory; an additional factor was necessary, for example an act or an omission of an organ of the State, physical or moral person, or other entity. The draft articles did not provide that the State could be held indirectly responsible, and there was always an interaction between the rules of attribution and other rules. The State was responsible only for the acts or omissions of its organs.

21. Mr. BENNOUNA said that in general terms he endorsed the approach taken by the Special Rapporteur, although it did prompt the question of the definition of the organs of the State and of the reference to internal law. Draft articles 8 and 10 drew the consequences of the exercise of elements of the governmental authority, but he wondered whether that concept was already well estab-

lished or still in the process of development. In fact, States increasingly delegated functions regarded, only a few years ago, as inseparable from the State.

22. Mr. CRAWFORD (Special Rapporteur) said that paragraph 2 in articles 7 and 8 relied on the notion of elements of the governmental authority to determine whether an entity was indeed an organ of the State. The question could in fact be answered only in the context of each specific case; while international law had to define what the State was for the purposes of responsibility, it did not do so a priori, and it was for each State to decide on its own internal organization, even if some areas such as the judicial and prison systems and the parliament were regarded a priori as pertaining to the State. The situation was certainly evolving, and procedural questions, such as the extent to which the internal system regarded a given activity as part of the exercise of public power, were of particular importance.

23. Mr. PAMBOU-TCHIVOUNDA said that he wished to congratulate the Special Rapporteur on the very constructive work which he had done in chapter II.C of his report and for his effort to simplify the text, focusing on the idea that the harm must be attached to an entity of the State. But he wondered why the draft articles repeatedly used the term “be considered”. He asked by whom or by what was the act in question to “be considered” as an act of the State, by international law or by the Commission. The term was an unhappy one, and it would be preferable to replace it by “is” an act of the State.

24. He profoundly regretted that the Special Rapporteur also wished to delete any reference to internal law. It was in fact primarily internal law which determined which organs were organs of the State, and the entities or physical or moral persons referred to in the draft articles operated within the territorial framework of the State. Internal law was moreover implicitly present, for example when article 7 spoke of an entity “empowered by the law of that State” or when article 8 spoke of “instructions” given by the State: those situations were clearly governed by internal law. It might therefore be necessary to stipulate in a general clause that the international law had to be interpreted in the light of the internal law.

25. Lastly, he was astounded to see the words “in fact” in article 8: if a person was acting on the instructions or under the control of the State he was acting in law and not in fact. He therefore proposed that the two words should be deleted.

26. Mr. CRAWFORD (Special Rapporteur) said that he accepted that the words “in fact” used in article 8 were not ideal, but they were much more emphatic in French than in English. The Drafting Committee would certainly be able to solve the problem. He denied that he had wished to delete all references to internal law. He had certainly done so in article 5 but not in paragraph 2 of article 7, and his purpose was only to indicate that internal law was not decisive. It sometimes happened that the internal legal system did not reflect the organization of the State. He was not opposed to restoring the reference to internal law in article 5, provided that internal law was not presented as decisive for the purposes of attribution.

27. Mr. GOCO said that the term “act of the State” might be ambiguous. It was sometimes invoked as a defence by ousted leaders claiming immunity for acts committed when they were in power. Perhaps “act of the Government” would be preferable.

28. Mr. CRAWFORD (Special Rapporteur) said that the act of State doctrine available in the laws of certain States and referred to by Mr. Goco was not at issue in the draft articles. It was in fact a question of internal law, but the draft articles concerned the attribution of an unlawful act to the State under international law.

29. Mr. PELLET said that he was grateful to the Special Rapporteur for having preserved the general structure of the draft articles but that he was opposed to two of the main changes introduced: the deletion of the reference to internal law in article 5 and the deletion of paragraph 1 of article 7. The Special Rapporteur had given two reasons in support of the first of those “innovations”: international law could be relevant in determining what was an organ of the State; and most national laws did not use the word “organ”. On the first point, it was difficult to conceive of an internal law which did not take account of the fact that international law prevailed in that area; and the second point was of little importance, the main thing being to know whether national laws were sufficient for determining whether an organ was considered to be an organ of the State. For him, the reference to internal law was the very *raison d'être* of article 5. As the Special Rapporteur himself said in paragraph 174 of his first report, the position of separate entities was different; in order to determine whether an entity was “separate” it was necessary to refer to internal law, for to have recourse to international law for that purpose would run counter to the principle of the freedom of the State to organize itself as it wished. International law was subordinate to internal law on that point, and that was why a reference to internal law was indispensable.

30. In note 3 to draft article 5, in paragraph 284 of the first report, the Special Rapporteur explained that a reference to internal law amounted to giving the State the possibility of escaping its responsibility by denying that an entity which had acted contrary to international law was an organ of the State. That fear was unjustified since the internationally unlawful act must be assessed as at the time of its commission, as indicated in article 24 and subsequent articles. Furthermore, the very function of articles 7, 8 and 10, in particular article 8, subparagraph (a), was to prevent such solutions of continuity in State responsibility.

31. The second proposed change—the deletion of paragraph 1 of article 7—stemmed from the same a priori concept of what the State was or ought to be in the eyes of international law. For the purposes of State responsibility, the State must be regarded as a juridical person and not as a sociological subject. The deletion of the specific reference to “territorial governmental entities” produced an amalgam of different juridical persons. A territorial governmental entity, a commune for example, was not the State even though its acts could of course trigger the international responsibility of the State. The notion of attribution was particularly interesting in that respect, for it allowed an entity to be held responsible for an act com-

mitted by another entity which had a separate legal personality. It thus seemed essential to state that such entities, which were not the State under internal law, or even international law, could trigger State responsibility. He was particularly astonished by the deletion of paragraph 1 of article 7 because all the States which had submitted comments on the subject had stressed the importance of that provision, and some of them had even requested that it should be spelled out in greater detail. It would be possible for example to add at the end of article 5 “and regardless of whether it is a central or decentralized organ” or another phrase to the same effect. However that might be, it did seem essential to restore the reference to internal law in article 5 and to retain the idea expressed in paragraph 1 of the earlier version of article 7.

32. The other comments which the report called for were less important. He agreed with Mr. Pambou-Tchivounda with respect to the words “be considered”. Furthermore, the phrase “for the purposes of the present articles” was not justified at the current stage, but it could always be restored if the draft articles became a treaty. He also proposed that “acting in that capacity” should be deleted from articles 5, 7 and 10 and that the current text of article 10 should be preceded by a new paragraph stating that the responsibility of the State came into play when its organs or entities acted “in that capacity”.

33. He agreed with the Special Rapporteur that “attribution” was preferable to “imputability” since attribution covered both imputability to the State of an act committed by another entity and the fact that a State’s responsibility could be triggered by its own act. Furthermore, it had been argued in the commentaries to the draft articles⁹ that the concept of attribution kept things at a safe distance from internal law. He also endorsed the deletion of article 6.

34. The Special Rapporteur had said that the Drafting Committee would be able to make the meaning of article 8 clearer. He was himself not sure that it was always necessary to clarify what was not clear. With reference to the various cases considered by international legal bodies—*Military and Paramilitary Activities in and against Nicaragua, United States Diplomatic and Consular Staff in Tehran* and *Tadić*¹⁰—he thought that the Commission would gain by not being too specific. The changes proposed by the Special Rapporteur, which were certainly intended to clarify the law, tended to harden the rules of attribution and might inconvenience some States and make it more difficult to establish responsibility at the international level. He could not embrace the underlying philosophy of that approach and he had reservations about the restrictive interpretation of the decision in the case concerning *Military and Paramilitary Activities in and against Nicaragua* used by the International Tribunal for the Former Yugoslavia in the *Tadić* case. When the law was not entirely stabilized the Commission must avoid taking sides. With regard to the Special Rapporteur’s pro-

posal to replace “justified” by “called for” in article 8, subparagraph (b), he felt that “justified” was preferable in French.

35. Lastly, he totally disagreed with a comment made by Mr. Pambou-Tchivounda at the beginning of his statement to the effect that attribution was designed to determine whether “harm” could be attributed to a person. Attribution was in no way intended to determine the author of the harm but rather the author of the internationally unlawful act. The question of harm was addressed at a later stage. That was an extremely important point because it went to the heart of the very philosophy of the draft articles.

36. Mr. CRAWFORD (Special Rapporteur) said that he was not opposed to Mr. Pellet’s proposal to refer to territorial governmental entities in article 5, provided that there was no duplication between article 5 and article 7, paragraph 1. Although he had himself initially intended to delete the phrase “for the purposes of the present articles”, he had decided to retain it in order to make clear the difference between the law of attribution for the purposes of State responsibility and for other purposes, such as the law of treaties or the law of multilateral acts. Mr. Pellet’s proposal for article 10, which would avoid the repetition of “acting in that capacity”, was useful and helped to clarify the draft articles.

37. He did not share Mr. Pellet’s opinion on the concept of the State in international law. “State” must be understood to mean not only the governmental organs but also all the subdivisions established by internal law. In that connection, and in contrast to what Mr. Pellet seemed to think, it was not unusual for States to rely on their internal law to escape their international responsibility. For example, in the arbitration between Texaco Overseas Petroleum Company and California Asiatic Oil Company and the Government of the Libyan Arab Republic, the Government of the Libyan Arab Republic had claimed that it was not responsible for a contract concluded by its Minister of Oil and Gas.¹¹ In another arbitration in which he had himself participated recently, a State had asserted that only the acts of its Government—under its internal law only the acts of the President and Council of Ministers—could be imputed to that State. Such a definition of State was unacceptable for the purposes of international responsibility. He did not deny the importance of internal law or the freedom of a State to organize itself as it wished, but international law did have a complementary role to play. He could agree to restore a reference to internal law in article 5 if the majority of the members of the Commission so desired, provided that internal law was not presented as the decisive criterion, for that would contradict article 10 and would be inconsistent with international law.

The meeting rose at 12.50 p.m.

⁹ For the commentaries to articles 1 to 6, see *Yearbook . . . 1973*, vol. II, pp. 173 et seq., document A/9010/Rev.1; for the commentaries to articles 7 to 9, see *Yearbook . . . 1974* (footnote 7 above).

¹⁰ *Prosecutor v. Duško Tadić a/k/a/ “Dule”*, International Tribunal for the Former Yugoslavia, case No. IT-94-1-T, Trial Chamber II, opinion and judgment of 7 May 1997.

¹¹ See *International Law Reports* (Cambridge), vol. 53 (1979), preliminary award of 27 November 1975, pp. 392 et seq., in particular, p. 415, para. 23 (a).