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Summary record of the 2554th meeting

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2554th MEETING

Monday, 3 August 1998, at 10.20 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, 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. Rosenstock, Mr. Simma, Mr. Yamada.

Cooperation with other bodies (*continued*)*

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN invited Mr. Jonathan T. Fried, Observer for the Inter-American Juridical Committee, to address the Commission.

2. Mr. FRIED (Observer for the Inter-American Juridical Committee) said that his statement would deal with the Inter-American Juridical Committee's recent activities and current work, its working methods and procedures, its contributions to the progressive development and codification of international law in America, and the difficulties which it encountered in discharging its mandate.

3. The first area on which the Committee focused its work was international trade law. Over the past two years it had made a comparative study of dispute-settlement systems in subregional trade agreements in America (such as the North American Free Trade Agreement (NAFTA), the Southern Cone Common Market (MERCOSUR) the Central American Common Market (CACM) and the Andean Pact) and had publicized and disseminated the results. More recently it had undertaken a legal analysis of the most-favoured-nation clause and its implications for inter-American trade agreements such as the Latin American Integration Association (LAIA). It had also made a detailed analysis of the initial text of the draft inter-American convention to combat corruption. The Inter-American Convention against Corruption adopted by the General Assembly of OAS took into account most of the observations and changes which the Committee had put forward.

4. The second main area of the Committee's activities was the promotion of democracy. Amongst other things, it had been requested by the OAS General Assembly to study questions connected with the administration of justice in America, in particular the question of the protection of judges and lawyers in the performance of their duties. It had produced a comparative study and an analysis, from the standpoint of international law, of the individual and institutional guarantees which were or ought to be accorded to judges, lawyers and all other persons working in the judicial system, on the basis of the international and inter-American human rights instruments. The Committee's report had led to the establishment of the Working Group on Enhancement of the Administration of Justice in the Americas, which was reporting directly to the OAS Committee on Juridical and Political Affairs.

5. Another aspect of the Committee's work in the field of democracy was the right to information, which included the protection of the privacy of persons detained by official administrations and institutions, and of the information held by such persons, and the right of access to such information and verification of its accuracy. The Committee had studied the existing legislation, particularly that of Brazil, the United States of America and Canada, and had tried to identify common principles with a view to drafting standard legislation which could be used in other countries of America. The Committee had made an exhaustive study of the legal aspects of democracy in the inter-American system, drawing in particular on the practice of States since the creation of OAS in 1948. Its report had been published and widely disseminated, and it had recommended that the political organs of OAS should follow up the report by means of educational activities and technical assistance.

6. The third area of the Committee's work was human rights. Amongst other things, it had been asked to consider the draft Inter-American Convention on the Elimination of All Forms of Discrimination by Reason of Disability proposed by the Government of Panama and Costa Rica. It had examined the text clause by clause, proposed changes, and reported on it to the OAS political organs, which were currently using those proposals in their work on the draft Convention. In March 1998 the OAS General Assembly had submitted to the Committee a text which might serve as the basis for a draft convention or declaration on the rights of the indigenous peoples of America. The Committee had made a detailed analysis of the text and had formulated comments dealing in particular with the different legal status of a declaration and a convention.

7. The OAS General Assembly had also requested the Committee to take up the question of cooperation among the countries of the region in the fight against terrorism. The Committee had studied the various multilateral conventions dealing with specific aspects of terrorism. It had concentrated its efforts, *inter alia*, on the production of legal tools which States might use to combat that scourge, such as agreements on reciprocal legal assistance and extradition treaties.

8. Turning to a comparison of the methods and procedures of the Commission with those of the Committee, he said that in its work the Committee gave greater

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* Resumed from the 2538th meeting.

emphasis to comparative law. It was apparent from its work on the development of democracy that the Committee studied national legal systems not only to determine whether they reflected principles which might be regarded as forming the foundation of State practice or which might be common to several legal systems and, as such, constitute general principles of international law, but also from the standpoint of the codification and progressive development of internal law in certain areas.

9. With regard to corruption, for example, the OAS General Assembly had requested the Committee to draft a standard law which could be used both in the common law and in the Roman law countries.

10. The Committee maintained close and regular links with the Inter-American Specialized Conference on Private International Law (CIDIP) and was currently taking part in the preparations for its sixth session (CIDIP VI), the agenda for which would include a number of questions connected with private international law and comparative law.

11. The Committee had only 11 members, and its meetings were noteworthy for their relaxed atmosphere and the frankness of the exchanges of views. In accordance with the Charter of OAS,[1] the Committee expressed its conclusions exclusively in the form of opinions and resolutions. It had no opportunity, unlike the Commission at the annual debate in the Sixth Committee of the United Nations General Assembly, to conduct a true dialogue with the States members of OAS. Its annual report was submitted to the OAS Committee on Juridical and Political Affairs, but few of the missions in Washington had staff members with the necessary legal skills to participate in the debates at the level of the interventions in the Sixth Committee.

12. As part of its educational and publicity functions with respect to international law the Committee maintained relations with the Inter-American Bar Association and other similar bodies. It had established libraries and made other arrangements with a number of Brazilian universities, as well as organizing conferences, seminars and workshops for its members.

13. The Committee made a big contribution to the codification of law—especially with respect to reciprocal legal assistance, extradition and corruption—and to the progressive development of law. It made an equally big contribution to comparative law: in particular, it had drafted a standard law on the suppression of corruption and had participated in the codification of the basic principles concerning the independence of judges and lawyers and the principles governing the protection of privacy and access to information in that field.

14. The Committee encountered many difficulties in discharging its mandate. Only a short time ago the OAS General Assembly had entrusted to it a number of difficult problems, such as the question of the Falkland Islands (Malvinas), or more recently the Cuban Liberty and Democratic Solidarity (Libertad) Act (Helms-Burton Act), signed into law by the United States. Important debates had taken place both in the Committee and in the political organs to which it reported as to the usefulness of entrusting such studies to the Committee. That was why, when drafting comments and resolutions, it took good care to state that it was not a court and did not exercise any judicial or State function. Another difficulty stemmed from the fact that the OAS budget was subject to pressure similar to that weighing on the United Nations finances, for the OAS political organs did not always attach due importance to the work of an independent advisory body.

15. The Committee would like to develop exchanges with the Governments of member States and of civil society in general, in particular bodies concerned with the study, progressive development and codification of international law. Every year for the past 25 years it had organized in Rio de Janeiro an intensive training course on international law, attended by lawyers, diplomats, teachers and law practitioners nominated by the States members of OAS. The network of relations established during the training courses helped to strengthen the dialogue with legal circles in the countries concerned.

16. Since much of the Committee's work was concerned with international trade law, it endeavoured to bring public international law and international trade law closer into line with each other or even to produce a synthesis of them. Its work on international trade law in America had persuaded it that trade law was progressing much quicker than any other branch of public international law. That development had unexpected consequences in some areas of classical public international law. For example, international trade law had a fully codified regime of State responsibility, even covering situations of non-violation, in accordance with the principle of cancellation or reduction of advantages without violation in the framework of the General Agreement on Tariffs and Trade.

17. He invited the Commission to consider in conjunction with the Committee means of strengthening their relations and, in particular, to have regular exchanges of views on the topics on which they worked. In that connection the members of the Commission and the Committee might strengthen their personal relations with each other and consider the possibility of institutionalizing such exchanges.

18. Mr. CANDIOTI responded to the statement by the Observer for the Inter-American Juridical Committee by describing for him the progress of the Commission's work on the six topics on its agenda. Like the Committee, the Commission continually reviewed its methods of work. Every year it re-examined its long-term programme of work and proposed new topics to the General Assembly. Whatever the topic under consideration, the Committee had always had very useful contributions to the Commission's work; hence the need to find means of securing practical improvements in the contacts, links and exchanges of information, testimony and ideas between the two bodies.

19. Mr. LUKASHUK said that the Committee did very important work, with very high professional standards, on topics of interest to many countries, such as the fight

[1] Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the "Buenos Aires Protocol" of 27 February 1967 (ibid., vol. 721, p. 324).

against corruption or the consolidation of democracy. However, the documents resulting from that work did not reach the persons who might be interested in them sufficiently promptly. The shortage of resources, a problem which the Committee shared with the Commission, was partly responsible for that situation, but there was also the fact that the communication between the two bodies often operated at the purely formal level; it ought therefore to be reorganized on the basis of genuine working relations.

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

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 5 TO 8 AND 10 (*continued*)

20. Mr. HERDOCIA SACASA said that in what was a fundamental matter for the development of international law, the Special Rapporteur had succeeded, with rigour and accuracy, both in preserving what the Commission had already achieved and in introducing the necessary modifications and clarification. The task was not an easy one, for to define the conditions in which the conduct of an organ or entity of the State was attributable to the State meant dealing with the tensions caused by four polarities: internal law or international law; limits of State responsibility or more specific and flexible means of control, with respect to anti-pollution measures in particular; centralized State or decentralized State; and the law of the real world or fictional law.

21. With regard to the relations between internal and international law, article 3 (Elements of an internationally wrongful act of a State), the cornerstone of the draft articles, posited that the attribution of conduct to the State was governed by international law, with important consequences for article 5 (Attribution to the State of the conduct of its organs), which concerned internal law. To rely on internal law alone to determine what was an organ of the State meant undermining the fundamental principle that State responsibility was governed by the rules of international law adopted by the community of States. It thus meant accepting rules which opened the door to every kind of interpretation. That being the case, internal law did have a role to play, but that role should not be exaggerated, or taken out of its context, or set aside in favour of international law.

22. The clarification and balance provided by article 6 (Irrelevance of the position of the organ in the organization of the State) with respect to the definition given in article 5 confirmed the need to amend the title of chapter II (The "act of the State" under international law) in order to make it clear that it was not a question of defining the act of the State but rather the conditions for attribution of that act in international law. That would make it possible to eliminate the artificial dichotomy between international law and internal law which might be used as a means of escaping international obligations. The end of article 5 ("provided that organ was acting in that capacity in the case in question") could lead to many different interpretations or even bring internal law into play, even though the conduct in question was conduct of organs of the State. The Special Rapporteur had been wise to propose more neutral wording in that connection.

23. The reference to internal law in article 7 (Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority) was justified, however, for a causal link was needed in that case: the entities in question were not part of the formal structure of the State, and only internal law could authorize them to exercise elements of the governmental authority. The reference to internal law should be retained not only for considerations of form but because it imposed a substantial restriction on the scope of the rule of attribution by excluding acts whose attribution to the State was not permitted by internal law. On the other hand, article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State) expanded the scope by rendering the conduct of persons or groups of persons acting in fact on the instructions or under the direction of the State attributable to that State. The question then arose as to whether that expansion introduced the desired degree of flexibility.

24. The Commission's task was to contribute to the elaboration of international law which addressed the realities and all possible concrete situations. From that standpoint the abandonment of the concept of "imputability" in favour of "attribution" was not merely a terminological change. It provided a way out of the "fiction" and a means of filling gaps which might provide grounds for impunity or non-responsibility. The new approach taken by the draft articles went in that direction, for it rendered the conduct not only of the official organs of the State but also of any entity acting on its behalf attributable to that State. A concern for transparency and morality was apparent in the wish to subject to the authority of law the conduct of persons or groups of persons whose legal link with the State was sometimes difficult to determine. A balance must be found which would make it possible to attribute such conduct to the State, not on an arbitrary basis but without ambiguity either.

25. Several decisions of ICJ, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, for example, were relevant in that connection, but the criterion of "control" which those decisions advanced, although very important, could not be the only criterion. Moreover, the case concerning *Military and Paramilitary Activities in and against Nicaragua* must be placed in a broader context than the context of humanitarian law alone. Having lived through an era, happily past, in which some States had connections with paramilitary groups responsible for thousands of forced disappearances, Latin America had equipped itself, under the auspices of OAS, with an important convention on the subject, the Inter-American Convention on the Forced Disappearance of Persons, which assimilated forced disappearance to

[2] 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.

[3] Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

[4] Ibid.

deprivation of freedom, regardless of whether the agent of that deprivation was an agent of the State or a person or group of persons acting with the authorization, support or consent of the State. That approach provided other criteria which allowed greater flexibility.

26. With regard to the effects of decentralization, the Special Rapporteur had been right to reaffirm the unity and singularity of the State with respect to international law, as well as the indivisibility of its responsibility. To proceed in any other way would mean undermining the integrity of international law. Having analysed and defined all the elements stemming from all those polarities, the Special Rapporteur would certainly succeed in the future, with the aid of the Commission, in solving the last of the difficulties—that of giving concrete expression to the will of the State in the legal framework which the Commission had undertaken to define.

27. Mr. HAFNER said that he was glad that the Special Rapporteur had highlighted in his first report on State responsibility (A/CN.4/490 and Add.1-7) all of the problems raised by the draft articles; he would himself comment only on the changes which the Special Rapporteur had made in articles 5 to 8 and 10.

28. In article 5 the Special Rapporteur proposed deleting the reference to internal law in connection with an organ. It was obvious that an organ of the State could be described as such only in terms of internal law since, as Mr. Pellet had already noted, the term "organ" was itself a legal term used in internal law: it was not international law which defined what an organ was but rather the national law of the State concerned. If the article spoke of "organ" without any qualification, it might easily be asserted that the type of organ referred to in the article was different from the type of organ defined by international law. The text would end up by saying that an act was attributable to the State because it was the act of an organ and that it was the act of an organ because it was attributable to the State—not a very satisfactory situation.

29. The argument put forward by some States to the effect that the reference to internal law authorized States to escape their responsibility was neither relevant nor applicable in the current case. If a State established a separate entity in order to entrust State functions to it, the State remained responsible for the acts of that entity pursuant to article 7. One example was that of central banks: in many countries they had a separate legal status and were sometimes not even bound by the policies of the State, which they were not obliged to carry out. But it remained true that the acts of such entities were attributable to the State, as had already been established in several cases. The case in question did fall within the scope not of article 5 but of article 7. Furthermore, if a State adopted a law according an entity the status of organ, its responsibility was triggered by the acts of that entity; hence the need to refer to internal law. Article 7 contained another reason for retaining that reference, for it mentioned the "formal structure of the State". The reference to internal law in article 5 would facilitate the interpretation of that term in article 7.

30. The Special Rapporteur was partly right to make a distinction between acts *de jure imperii* for the purposes of the law of State immunities and the acts of the State for the purposes of State responsibility. However, it should not be forgotten that there were links between those two legal concepts, since an act could not be regarded as *de jure gestionis* or *imperii* unless it was an act of the State. As to the term "in that capacity", the Special Rapporteur had said that he would make his intentions clear in connection with article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity), but the commentary to article 10[5] did not really give an explanation: the case cited there did not really clarify article 5.

31. However, he approved of the merging of articles 5 and 6 into a new article 5 but thought that the "federal clause" should be retained in article 7. There again, a parallel could be drawn with the rules of State immunities, which were very similar to the rules of State responsibility.

32. During its consideration of the topic of jurisdictional immunities of States and their property the Commission had itself defined the State by the criterion of territorial unity.[6] It might therefore be asked why that reference was justified with respect to immunities but not with respect to responsibility. It could also be argued that for the purposes of immunities, a State was nothing other than a State and required no further definition.

33. The Austrian Länder (provinces) illustrated the question of territorial governmental entities enjoying independence within a State, for they could conclude treaties with other States provided that the subject matter fell within their competence as independent entities. That prompted the further question of deciding against whom the other contracting States should take countermeasures in the event of a violation: the province or the State? In his view, it was the whole State which was responsible for the implementation of treaties. It might therefore be useful to refer to territorial governmental entities in article 7 in order to clarify which rules were to be applied in situations of that kind.

34. He did not subscribe fully to the interpretation of "elements of the governmental authority" given in the first report. The comments of the Special Rapporteur seemed to assimilate the content of that term to "State function". There were in fact two different concepts in play, for "elements of the governmental authority" referred to the practice and "function" referred to the content. According to paragraph 190, the current case was concerned with the content and not with the practice.

35. The term in question posed another problem by referring only to elements of the governmental authority although it certainly implied much more than that. The elements of the governmental authority were only a part of the powers of the State. It was interesting to note that the draft articles on the jurisdictional immunities of States and their property used the same term in article 11, when the acts of an agent of the State triggered its responsibility

[5] For the commentaries to articles 10 to 15, see *Yearbook . . . 1975*, vol. II, document A/10010/Rev.1, pp. 61 et seq.

[6] For the draft articles and the commentaries thereto, see *Yearbook . . . 1991*, vol. II (Part Two), document A/46/10, pp. 13 et seq.

only if the agent performed functions closely linked with the exercise of governmental authority. Those functions were obviously limited to acts *de jure imperii*, so that the term "elements" in article 8 encompassed only the acts *de jure imperii* of the State.

36. If the term "functions" was not acceptable, an explanation should be given in the commentary, for example by citing the use of that term in the context of jurisdictional immunities of States and their property. Apart from those considerations, which were discussed in paragraph 190 of the first report, he generally approved of the content of draft article 7.

37. In paragraph 198 of the first report, with reference to article 8, the Special Rapporteur proposed deleting the phrase "it is established that". Those words might in fact be necessary, since there was a difference between organs created by law and other agents, as was clear from the terminology used by France. In the first case, the existence of a law creating the organ was sufficient to establish responsibility. In the second case, the applicant State must approve that the author of the act had acted on behalf of the State. The procedure for the establishment of proof would be quite different in the case of an organ.

38. The problem raised by the Special Rapporteur in connection with the *Loizidou* v. *Turkey* case was very important, because it came up much more often than was desirable. There was, for example, the case in which the House of Lords had characterized the German Democratic Republic as a dependent or subordinate entity created by the Union of Soviet Socialist Republics for the purposes of exercising indirect control. Given the political and legal implications of that type of situation, it would be better not to disregard the possibility. Before invoking a State's responsibility, the other States should first provide irrefutable proof of the existence of such a situation in the context of the particular case.

39. There was another question of more recent relevance: whether an organ of the State acting on the instructions of the International Tribunal for the Former Yugoslavia fell within the scope of article 8. Without going so far as to say that the acts of the organ were attributable to the Tribunal and not to the State concerned, that case or other similar examples could be mentioned in the commentary to article 8.

40. Turning finally to article 10, he said that it was not very wise to replace "competence" by "authority". As he had just pointed out, "authority" covered exclusively acts *de jure imperii* and was not defined in terms of content, in contrast to what was envisaged in article 10. The result was to assign an excessively narrow meaning to terminology which should be applicable to ordinary organs. It would perhaps be better to retain "competence" and include an explanation in the commentary.

41. Mr. GOCO said that he was not sure about the exact definition of "Government". It had been said that the Government was only a part of the State or that it was an institution composed of all the agents responsible for the conduct of public affairs. The Special Rapporteur would appear to be advancing a new qualification of the term. In his own opinion, the Government represented the whole of the State and, as such, was of great importance in connection with the attribution of responsibility.

42. Mr. HAFNER said that Montesquieu had been the first to speak about the separation of powers. Of course, the Government was only a part of the State. The judiciary, for example, was independent of the Government but it was also part of the State. That was why a broader definition of the term must be adopted. Unfortunately, it was difficult to find an alternative term and the only way of solving the problem was to give an explanation in the commentary.

43. Mr. CRAWFORD (Special Rapporteur) said that "Government" should be understood to mean the executive, the legislature and the judiciary; the phrase "elements of the governmental authority" was just as widely accepted.

44. Mr. DUGARD said that he shared the Special Rapporteur's dissatisfaction with the term "act of the State" and with its inverted commas in the title of chapter II of the draft articles. It might cause confusion among common law specialists accustomed to the act of State doctrine. The term should be retained with the inverted commas removed, but it would then be a good idea to adopt the new title "Attribution of conduct to the State under international law" as proposed in paragraph 147 of the first report.

45. The reference to internal law in article 5 might also cause confusion in the commentary, which stated on the one hand that States might take refuge in internal law to escape their obligations and then went on to state the opposite. It was interesting in that connection to compare the statements of the former Special Rapporteur, Mr. Roberto Ago, in paragraphs (7) and (8) of the commentary to that article:[7] in paragraph (7) he said that every State was entitled to organize itself as it saw fit, and in paragraph (10), that that had no effect on international law—which was the more relevant position. Nevertheless, he could himself agree to delete the reference to internal law, and the Special Rapporteur should rework the commentary to clarify the issue.

46. Most of the difficulties arose in connection with unlawful entities. The Special Rapporteur had mentioned the situation of the Turkish Republic of Northern Cyprus ("TRNC") in the *Loizidou* v. *Turkey* case. Mr. Hafner had mentioned the case of the German Democratic Republic. The case of South Africa might also be added. Accordingly, the concept of direction and control should be mentioned in article 8, subparagraph (*a*), in order to cover the case of the "TRNC", a State created following a military intervention.

47. On the other hand, that move was not certain to cover situations in which military control was less obvious, as in the case of the Bantustans, the homelands in South Africa. At the time several Governments had considered that the South African Government was responsible for the acts of the governments of the homelands although no military control was actually exercised there and under the internal law of South Africa they were

[7] Ibid.

totally independent (which had not been entirely the case in the political reality). Internal law had been cleverly manipulated to conceal the subordination of the Bantustans. Nevertheless, in 1987 the French Government had protested to the South African Government after a French national, Pierre Albertini, had been imprisoned by the Government of Ciskei and sentenced to four years' imprisonment for having refused to testify in a political trial.[8] The South African Government had replied that it had no control over the executive or judiciary of Ciskei and that the French Government should therefore address its complaints to the Government of the State in question. The French Government had refused to do so, stating that it would not accept the credentials of the new Ambassador of South Africa to France as long as Pierre Albertini remained in prison in Ciskei. Following that protest the French national had been quickly released.

48. The British Government had also held the South African Government responsible for the practices of the homelands in a trade dispute with the Trust Bank of South Africa. In 1992 the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa set up by ILO to consider South Africa's labour practices had found the South African Government responsible for ensuring compliance with international labour law in the Bantustans.[9]

49. It was not certain that the provisions proposed by the Special Rapporteur would cover cases in which a State created a puppet entity, concealing the fact that it exercised political authority over that entity, and its internal law freed it from any responsibility for the acts of its puppet. The language of article 5 was particularly unfortunate owing to its double reference to internal law. The reference should therefore be deleted. The proposed amendments to article 8 would no doubt cover cases in which control, in particular military control, was clearly exercised, as in the case of the "TRNC". But if the State which was pulling the strings exercised only political control and if its internal law freed it from any responsibility, it was not certain that the provisions as drafted would regulate the problem of attribution of responsibility in a satisfactory manner.

50. Mr. CRAWFORD (Special Rapporteur) said that he concluded from the statements just made that the concept of "territorial governmental entities" should be retained in article 5, for no distinction was made between the acts of such entities exercising some elements of governmental power and other acts. Such entities were currently referred to in paragraph 1 of article 7 in the same terms as organs of the State were referred to in article 5. He endorsed the proposal to have those entities appear in article 5.

51. If adopted, that solution would cover the case in which the State which had constituted the territorial governmental entities escaped its responsibilities. It would be noted in that connection that if a State created a territorial governmental entity which then obtained its independence and set up a new State, the new State would become responsible for its own acts. In contrast, as in the case of the Bantustans, when the entity did not acquire independence and remained a territorial governmental entity, the State which had established it remained responsible for its conduct. Thus the solution would be to insert paragraph 1 of article 7 in article 5 in order to deal with the problems flagged by Mr. Dugard and other members of the Commission.

52. Mr. KABATSI said that the Commission might well adopt Mr. Pellet's proposal and send the draft articles to the Drafting Committee, for they were based on principles broadly accepted by the greatest experts in public law. In any event, he wished to make two comments.

53. The first concerned terminology. The Special Rapporteur had said that he preferred "attribution" to "imputability", for the reasons given in paragraph 146 of his first report. The terms were in fact interchangeable, but "imputability" had already entered into the usage and was used by ICJ. "Attribution" was no doubt more suitable in some cases, especially the ones addressed in article 10.

54. His second comment related to the proposal to merge article 5 with article 6, a move recommended by the requirements of textual economy. But the topic in question was so important that the draft articles should be made as transparent as possible, and that consideration took precedence over the requirements of economy.

55. Mr. SIMMA said that the text under consideration was remarkably clear, a quality enhanced by the pertinence of the analysis contained in the commentary.

56. At the previous meeting the Commission had been unsure whether the phrase "shall be considered as an act of the State" should be retained in article 5. The language of the French version was in fact very cumbersome and should certainly be amended.

57. Article 5 raised the very important question of whether to refer to "internal law". In paragraph 163 of his first report, the Special Rapporteur placed too much emphasis on his distinction between law and practice. He explained that one reason for deleting the reference to internal law was that in many systems the status of some entities was determined not by the law but by practice or tradition. But that did not seem too problematical. On the other hand, the reasons for the retention of the reference were rather convincing. In fact, considerations of legal certainty came into play and tended to limit the scope of general references to internal law. The same tendency could be seen in the law of treaties. Article 7 of the 1969 Vienna Convention, for example, showed that international law itself provided that certain acts connected with the conclusion of treaties, if committed by certain persons, were regarded as being committed by the State. The best thing would be not to mention internal law in the

[8] See J. Charpentier and E. Germain, "Pratique française du droit international", *Annuaire français de droit international, 1987* (Paris), vol. 33, pp. 1009-1010.

[9] See ILO Governing Body: *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa*, document 253/15/7 (International Labour Office, Geneva) May-June 1992.

body of the article but to discuss it instead in the commentary. It was a good idea to merge the main points of article 6 with new article 5.

58. With regard to the "federal clause" in article 7, he noted that he was himself originally from a subdivision of a federal State, and he was astonished to find himself in the same boat as the inhabitants of the Bantustans mentioned by Mr. Dugard. Most speakers had rightly stressed the need to restore the reference to federal entities. But the Special Rapporteur had in fact explained in his introduction that such a reference would not be absolutely necessary since article 5 referred to "any State organ". But federal entities might risk not being regarded as merely "organs". Furthermore, federal entities were the only category of organ, within the meaning of article 5, having an international legal capacity, that is to say, the capacity to act on their own authority. Mr. Hafner had already given the Commission examples from the Austrian practice.

59. With regard to violations of treaties concluded by federal entities, it was not clear that the Special Rapporteur was right in thinking that it was the responsibility of the entity which was triggered and not that of the whole federal State. In Germany, for example, the Länder could conclude treaties with the consent of the central Government. The responsibility of the federal State was clearly involved. For example, in the late 1970s funds had been collected in several German universities to arm African liberation movements. Germany's international responsibility had then been invoked on the ground of friendly relations among States. The Ministry of Foreign Affairs had replied that the Federal Government did not have the constitutional power to compel the Länder to stop the collections but that Germany would regard itself as responsible for any act or omission of its component units. One last reason for retaining the reference to federal entities in article 5 was the deletion of article 2.

60. In paragraph 188 of the report the Special Rapporteur recommended that article 7, paragraph 1, and the reference to territorial governmental entities in article 7, paragraph 2, should be deleted. He then added in the footnote to that statement that the deletion was consistent with the position taken in the 1969 Vienna Convention, and with the literature on federal States in international law. But the reason for the elimination of article 6 from the 1969 Vienna Convention, which dealt with the case of federal entities, had been connected with the historical circumstances of the time, more specifically with the relations between the Province of Quebec and Canada. Was it still necessary to defer to events which had taken place more than 30 years ago? The literature on federal States mentioned by the Special Rapporteur dealt not with the case of territorial governmental entities but rather with the capacity to conclude treaties invested in federal entities.

61. The new wording proposed by the Special Rapporteur for article 8, subparagraph (*a*), in paragraph 284 of the first report, circumscribed more closely the person or group of persons in question. Several speakers had already noted that that wording, which was perhaps too restrictive, might leave some situations outside the scope of the draft articles. They were certainly disregarding a number of additional considerations. First of all, there was the language of proposed new article 15 *bis* (Conduct of persons not acting on behalf of the State which is subsequently adopted or acknowledged by that State) which was designed to cover some of those situations. Then there was the fact that the text in question spoke only of "attribution"; in other words, if the acts of groups or entities were regarded as acts of the State pursuant to article 8, subparagraph (*a*), there would be a legal void into which some concrete situations might disappear.

62. Mr. ROSENSTOCK said that he too was ready to send the draft articles to the Drafting Committee and that he was totally in agreement with the Special Rapporteur's recommendations. Those who had raised some doubts about the Special Rapporteur's work on draft article 5 were not in disagreement with him on the substance. Since no objection had been raised to article 4, which defined the nature of the act in question, it would be odd to create a legal loophole by defining the identity of the authors of that act too loosely.

63. The importance of the determinative function of international law, from the standpoint both of the act and of its author, had been amply demonstrated in the cases cited in paragraph (6) of the commentary to article 4 adopted on first reading.[10] It was the text of article 5 itself which was somewhat unfortunate in that it unintentionally gave the impression that if the internal law of a State did not provide explicitly that its constituent entities were organs of the State, their acts were not attributable to the State. The solution was not then to rely on article 7 for a correct interpretation of article 5. The importance of clarity on that point had been highlighted by the arguments presented in the arbitration between Texaco Overseas Petroleum Company and California Asiatic Oil Company and the Government of the Libyan Arab Republic[11] and in the anonymous example given by the Special Rapporteur (2553rd meeting).

64. The Special Rapporteur's proposal to regroup articles 5 and 6 and paragraph 1 of article 7 was both clear and economical. The Drafting Committee would be hard put to improve on it, but it would be difficult to incorporate the question of "internal law" in the proposed new article 5 without resorting again to the earlier ambiguous language or without mentioning considerations which would be better placed in the commentary. Territorial governmental entities should not be mentioned in article 10. They could be mentioned in article 5 without too much risk, provided that their inclusion did not further complicate that article to the point of blurring its clarity and laying it open to mistaken interpretations.

65. Mr. LUKASHUK drew attention to the positive aspects of the draft articles: on the one hand, they gave concrete expression to the principle of State responsibility and, on the other hand, they embodied the principle of the difference between the State and its component units. Since those two important principles were the cornerstone of the text, the Special Rapporteur should reconsider a

[10] See 2553rd meeting, footnote 9.

[11] Ibid., footnote 11.

passage of the commentary which did not seem to do them justice. In paragraph 154 (*a*) he stated that a State was only responsible if the conduct in question was attributable to it and involved a breach of an international obligation owed by the State to persons or entities injured thereby. But responsibility in international law concerned the relations between States; the subjects of international law were States and not physical or moral persons. The violation of the rights of physical persons by an organ of the State, for example, the rights guaranteed by the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights came within the jurisdiction of that State and not an inter-State jurisdiction.

66. With regard to article 5, he was glad that the Special Rapporteur had used, in paragraph 157, the phrase "may exercise international functions". There were of course cases in which political parties or religious organizations were not organs of the State but still exercised functions of authority, sometimes very important ones. It was therefore impossible to endorse the arguments of those speakers who had asserted that only internal law could determine an organ's status. Such arguments were contradicted by the 1969 Vienna Convention, as Mr. Simma had just explained.

67. The last phrase of article 5, which states "provided that organ was acting in that capacity in the case in question", could be deleted because it addressed a rare case, the situation created was perfectly clear, and the text would thus be shorter.

68. Turning to article 7, he said that he had doubts about the responsibility of the component units of a federal State. To disregard the specific elements of a federation would be an unjustifiable error and would cause great complications, as the Special Rapporteur indicated in his comments. The solution might be to insert in article 7 itself a clause incorporating the substance of paragraph 188 of the first report, to read: "exceptional cases where component units in a federal State exercise some limited international competencies, for example, for the purposes of concluding treaties on local issues". That provision might be further expanded to cover regions and not just federal States. Regions had a transboundary dimension, and it would be necessary sooner or later to address their situation.

69. Article 8, subparagraph (*b*), seemed too vague, as the Special Rapporteur himself acknowledged. It should be drafted in more specific terms in order to provide a better definition of the cases which it covered.

70. He too thought that draft articles 5 to 8 and 10 should be sent to the Drafting Committee.

The meeting rose at 1 p.m.

2555th MEETING

Tuesday, 4 August 1998, at 12.10 p.m.

Chairman: Mr. João BAENA SOARES

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

State responsibility[1] (*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*)

ARTICLES 5 TO 8 AND 10 (*concluded*)

1. Mr. ECONOMIDES said that he was generally in agreement with the new wording of article 5 (Attribution to the State of the conduct of its organs) proposed in paragraph 284 of the first report of the Special Rapporteur on State responsibility (A/CN.4/490 and Add.1-7) and welcomed in particular the deletion of the provision "having that status under the internal law of that State", for two reasons. The first was that in most cases, the words mostly were redundant, for "organ of the State" meant all the organs of the State which had that status under internal law. Secondly, in a few exceptional cases the provision could be too restrictive. It was possible, for example, that some organs of the State might not have that official status under internal law. Furthermore, Mr. Dugard had cited the different example of the puppet states which had existed in South Africa under the apartheid regime and the puppet state which Turkey had created in northern Cyprus after having invaded and occupied that country in violation of international law. In the *Loizidou* v. *Turkey* case the European Court of Human Rights had found that it was Turkey, and not its puppet state, which had been responsible for the violations of Mrs. Loizidou's rights under the European Convention on Human Rights.

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[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.