

Document:-
A/CN.4/SR.2556

Summary record of the 2556th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1998, vol. I

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reconciliation. Article 15 could not apply in that case, because it would be unwise and unrealistic to attribute to the State the conduct of the insurrectional movement prior to the agreement. The Drafting Committee would have to endeavour to accommodate that point, for otherwise existing Governments which had been neither overthrown nor replaced and had shown a spirit of conciliation by incorporating elements of insurrectional movements in the Government would be too heavily penalized: they would in fact pay for their policy of reconciliation by being required to shoulder the full responsibility for the acts committed by the insurrectional movements during the insurrection.

56. The last question concerned the attribution to a State of acts which were not connected with the conduct of an organ, or the conduct of an entity referred to in article 7, paragraph 2, or the conduct referred to in article 8, or the conduct in the special cases cited in article 9 or article 15: the acts of private persons. The problem with article 11 (Conduct of persons not acting on behalf of the State) in its current wording was that it seemed to say that the conduct of private persons was not attributable to the State without really saying that. It often happened that the responsibility of States was triggered. If a way was found to take account of the very extensive commentary to article 11 in the draft articles and make the limits of attribution to the State clear, article 11 would no longer be necessary.

57. There was a second problem which did not appear in the draft articles, for reasons which had originally been rather vague but which had currently become clearer as a result of the case concerning *United States Diplomatic and Consular Staff in Tehran*, in which it had been established by the courts which heard the case at the time that the Government of the Islamic Republic of Iran had endorsed the conduct of the private parties concerned. And that was not the only example. There was also the *Lighthouses* case,¹¹ which had established that the Greek Government had endorsed the conduct of the independent Government of Crete before the annexation of Crete by Greece. The Government had been deemed responsible *ab initio* for that conduct despite the widely held view that a new State did not usually succeed to the State responsibility of the predecessor State.

58. The cases in which a State endorsed conduct which was not attributable to it included the case of civil conflicts in which an administration or territory could escape the control of the State but in which, under the peace agreement, the Government ratified the acts which had occurred in the territory and accepted responsibility for them. There were thus many situations in which the State endorsed conduct which was not its own. For the purposes of article 15, a distinction must be drawn between conduct which was merely approved by the State and conduct which was truly endorsed (as in the case concerning *United States Diplomatic and Consular Staff in Tehran* and the *Lighthouses* case). It was for that purpose that he had proposed new article 15 *bis* (Conduct of persons not acting on behalf of the State which is subsequently adopted or acknowledged by that State), the text of which was reproduced at the end of paragraph 284 of the first

report. The point might seem elementary, but it was necessary, for the purposes of attribution, for the State to accept that the conduct in question should be treated as its own conduct. Article 15 *bis* was therefore an essential addition to chapter II for the regulation of the situations which he had just described, and it had the added benefit of preserving the essence of article 11 in a clearly more workable article. The very long commentary to article 11 should be reproduced in the commentary to article 15 *bis* to explain and clarify the exceptions to the rule of attribution.

59. By preserving article 9 on the organs of the State, by combining articles 14 and 15 into a single article (which had the added benefit of not giving more space to insurrectional movements than they warranted), by adopting article 15 *bis*, which contained a provision previously appearing in article 11, and by adopting a saving clause on international organizations, the Commission would not only preserve the substance of the draft articles but substantially improve them as well.

The meeting rose at 1.10 p.m.

2556th MEETING

Wednesday, 5 August 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, 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. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, 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*)

ARTICLES 9 AND 11 TO 15 *BIS* (*continued*)

1. Mr. HAFNER said that the set of draft articles under consideration raised very complicated problems, espe-

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.*

¹¹ Decision of 24/27 July 1956 (France v. Greece) (UNRIIAA, vol. XII (Sales No. 63.V.3), pp. 161 et seq.).

cially as international relations had evolved since the articles had been drafted. New modalities of cooperation had appeared between States, between States and international organizations, and between international organizations. One example was the Memorandum of Understanding on the administration of Mostar between the European Union and Bosnia and Herzegovina on the administration of the town of Mostar during the transitional period.⁴ Article 1 of the Memorandum provided that the administration of Mostar should be entrusted to the European Union, although it did not have the status of international organization. It might be wondered therefore who was responsible for the acts of the town's administrative authorities.

2. Article 9 (Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization) addressed two specific cases, the first of which concerned an organ of a State sent to another State in order to assist it. The Special Rapporteur gave several examples of that situation, and there was nothing to be added. The situation was more complicated in the second case, when an organ exercised functions on behalf of another State but within the limits of its own competence. The term "placed at the disposal of" must be carefully defined in that connection, it being understood that the context was exclusively the status of relations between States. It might also happen that a State was obliged under international law to comply with orders given to it by an international organization or even by another State. For example, consideration would have to be given to the case in which a State exercised consular functions in the interest or on behalf of another State. Such a case had occurred when Austria had concluded a bilateral treaty with Switzerland for the reciprocal exercise of consular functions. There was also the famous article 8, subparagraph (c), of the Maastricht Treaty, pursuant to which every State member of the European Union undertook to provide consular and diplomatic protection for the nationals of the other member States. Another example was provided by the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency drafted under the auspices of IAEA: that text envisaged the possibility of offering assistance to another State in the event of an accident and contained detailed regulations on claims for reimbursement and compensation, according to which the State requesting assistance was answerable in actions brought by third States against the provider of the assistance, which the requesting State must release from all responsibility.

3. The Commission should therefore consider that type of situation in connection with article 9 and the possibility of also applying the *lex specialis* clause to that part of the draft articles. Similar cases had occurred in which a State had acted on the orders of an international organization because it had no other choice. Was the responsibility of that State engaged in such a case? The problem arose most frequently in the area of human rights, when the organization giving the orders was not subject to the same obligations as the State which carried them out. There were many examples in which legal bodies had given orders to States, posing the problem of responsibility, and

such cases might occur frequently in the future in connection with the International Tribunal for the Former Yugoslavia and the International Criminal Court.

4. At first sight it appeared wise to delete article 13 (Conduct of organs of an international organization) as the Special Rapporteur proposed. On second thought, however, it would be remembered that States sometimes tried to impose on the host State responsibility for the acts of an international organization. Another problem arose in that connection, the problem of the links between an international organization and States which were not members of the organization. If the question of responsibility was treated separately, the result would be that non-member States would be compelled to recognize the legal personality of the international organization. But article 13 was intended precisely to cover all the cases in which non-member States must recognize the responsibility or non-responsibility of the host State, which also implied recognition of the legal status of the international organization. That was a fundamental international problem which could not easily be solved, and if the draft articles passed over it in silence, it would be essential to insert a saving clause on international organizations.

5. He was in favour of combining articles 14 (Conduct of organs of an insurrectional movement) and 15 (Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State) into a new article 15 (Conduct of organs of an insurrectional movement), as proposed by the Special Rapporteur in paragraph 284 of his first report on State responsibility (A/CN.4/490 and Add.1-7). But account must also be taken of the fact that an insurrectional movement did not necessarily lead to the formation of a new Government. It could happen that the insurrectional movement became only a part of the Government. The Special Rapporteur's language ("which succeeds in becoming the new Government of that State") did not cover the case in which the insurrectional movement was represented in the existing Government. There was a further case—when the Government respected to some extent the aspirations of the insurrectional movement by according it a degree of independence in a territory forming part of the structure of the State. That scenario might not be covered by article 15.

6. To sum up, he accepted the principle of including an article 15 *bis* (Conduct of persons not acting on behalf of the State which is subsequently adopted or acknowledged by that State) proposed in paragraph 284 of the first report, for the draft articles would be incomplete without it, and he approved of most of the deletions proposed by the Special Rapporteur, provided that the problem of international organizations was mentioned in a saving clause.

7. Mr. CRAWFORD (Special Rapporteur) said that he wished to clarify two points raised by Mr. Hafner. First, the difficulty of article 13 did not lie in the proposition which it contained but rather in a much more important problem which it touched upon—that of the responsibility of States for the acts of international organizations, which was only partially a problem of attribution. The issue was such a broad one that the wisest option was to insert a saving clause and then to delete article 13, because it was

⁴ See *Bulletin of the European Union*, No. 6-1994, p. 84, point 1.3.6.

impossible both to refer to a problem and also to state that it would not be dealt with. As Mr. Hafner had said, it was such a difficult question that it had to be given special treatment.

8. Secondly, the text of article 13 did not cover cases in which an insurrectional movement became part of a reconstituted Government. It was only when an insurrectional movement succeeded in replacing the existing Government that the rule applied. It was a rule of exception which he had wished to expand. Moreover, a Government which had not been defeated by an insurrectional movement would hardly take the trouble to initiate a process of reconciliation by welcoming members of the movement into the Government if, by so doing, it had to assume responsibility for the acts committed earlier by the insurrectional movement, which were very often illegal, even anti-constitutional, under internal law. It was thus better to keep to the current wording, so as to avoid discouraging reconciliation, which was in itself highly desirable.

9. Mr. DUGARD said that the question of insurrectional movements must be discussed in the commentary to articles 14 and 15. The text by the former Special Rapporteur, Mr. Ago,⁵ was somewhat outdated on that point: it did not take account of decolonization since 1960 and although making a few brief references to national liberation movements it generally addressed only the initial stages of the practice of States in the matter.

10. The first question was whether the term “insurrectional movement” was still relevant. Many liberation movements would be unhappy to be treated as mere insurrectional movements. But was it really possible to distinguish national liberation movements recognized by the competent regional organizations and by the United Nations from those which did not enjoy such recognition? The issue went far beyond the Commission’s mandate, but it should still consider using some other formula.

11. In paragraph 272 of his first report, the Special Rapporteur proposed deleting paragraph 3 of article 14 of the draft articles adopted on first reading on the ground that it deals with the international responsibility of liberation movements which are, *ex hypothesi*, not States. His intention was therefore to draw a distinction between the responsibility of States and the status of State. The Commission had carefully avoided the question of the recognition of States. But could it continue to avoid it in the case of insurrectional movements which had received some recognition? One example was provided by the Palestine Liberation Organization (PLO) before the Declaration of Principles on Interim Self-Government Arrangements, signed by the Government of the State of Israel and the Palestine Liberation Organization, the representative of the Palestinian People (Oslo Accords),⁶ for it had been recognized as representing the State of Palestine by about 50 States. In those circumstances, could an unlawful act have been attributed to the PLO on the ground that it was no longer simply an insurrectional

movement? The debate on that issue was still continuing, even within the framework of the Oslo Accords: could Israel in fact be held responsible for the acts of the Palestinian Authority in the areas placed under its control?

12. The case of Namibia raised another problem in that connection, the problem of the identity of its Government after the withdrawal of the mandate: was the Government the United Nations Council for Namibia or the de facto Government of the South African regime? As to whether the Commission should take situations of that type into account, it was considerations of the same kind which had led to the drafting of paragraph 4 of article 1 of Protocol I to the Geneva Conventions of 12 August 1949, which was designed to ensure that liberation movements enjoyed the benefits of international humanitarian law while imposing on them a number of responsibilities and obligations. Perhaps the Commission should take a similar approach and try to regulate the responsibility of such movements for the unlawful acts which they had committed.

13. Lastly, there was the question of the responsibility incurred by a State for acts committed by an insurrectional movement in its territory. In paragraph 263 of his first report, the Special Rapporteur said that the State was not responsible unless in very special circumstances where the State should have acted to prevent the harm. That formula was a little too categorical, for a State was not freed from its responsibility if it failed to put an end to the activities of an insurrectional movement operating in its territory against another State. That issue would require more detailed examination.

14. Mr. BROWNLIE said that he was glad that the Special Rapporteur had made some cuts in the text, because the formulations by the former Special Rapporteur, Mr. Ago, were often too convoluted and difficult to apply. That was true in particular of the negative-attribution principles. The Ago text said nothing about the question of the attribution of the conduct of a non-State entity. In the meantime several cases, such as the case concerning *United States Diplomatic and Consular Staff in Tehran*, had provided striking illustrations of the problem.

15. He was not sure that the responsibility of a State should not be entailed in respect of the acts of insurrectional movements. Whatever the principle adopted, and whatever exceptions might be provided to a negative principle, there must be no doubt about the continuity of the primary rules. It must be made perfectly clear in the commentary to paragraph 3 that the provisions for general attribution applied without prejudice to specific primary rules, especially when such rules contained obligations of result. In other words, a State could systematically rely on the pretext of civil disturbances to escape from an obligation. Of course, the draft articles embodied the principle of *lex specialis*, as well as containing a saving clause on international organizations, but a saving clause must also be included with respect to the content of specific primary rules in the provision on insurrectional movements.

16. Mr. SIMMA, replying to Mr. Dugard on the meaning of “insurrectional movement” and on the case of national liberation movements, said that “insurrectional movement” was already an old term but that “national liberation movement” was scarcely less old. If current events

⁵ See 2554th meeting, footnote 5.

⁶ A/48/486-S/26560, annex; see *Official Records of the Security Council, Forty-eighth Year, Supplement for October, November and December 1993*, document S/26560.

in Kosovo and the Congo were considered in the light of the case addressed in article 15, it would not be immediately apparent that the activities in question were activities of national liberation movements. It would be wrong to discard the existing terminology too quickly.

17. Mr. HAFNER said that he agreed with Mr. Simma on the traditional term "insurrectional movement".

18. With regard to one of the questions raised by the Special Rapporteur concerning the phrase "succeeds in becoming the new Government", the case in which there had been civil disturbances in a State followed by elections in which 80 per cent of the electorate had voted for the party representing the insurrectional movement prompted the question whether the newly elected Government was responsible for the earlier acts of that movement. It was very difficult to determine the dividing line.

19. Mr. BENNOUNA said that the Commission should not involve itself in the problem of the status of liberation movements, insurrectional movements or any other movements, for that was not its mandate. As ICJ had said in its advisory opinion in the *Namibia* case, international responsibility depended on the effectiveness of the authority exercised and not on its legitimacy. What had to be determined, therefore, was whether a State exercised real authority in a territory; if it did, it was responsible for what happened there. If the exercise of effective authority was interrupted, for example if the central authorities lost control of an area, and if the insurrectional movement exercised de facto authority and thus assumed governmental functions, it would also assume international responsibility on behalf of the State. The problem was one of the succession of responsibility.

20. In more general terms, the Commission should not reopen every issue on second reading. It must simply return to the difficult points and consider the proposed changes to draft articles which did indeed reflect current positive international law.

21. Mr. KABATSI said that he agreed with Mr. Bennouna that the Commission would be heading for serious difficulties if it tackled the problem of the status of insurrectional movements.

22. He could support the idea of merging articles 14 and 15 into a single article, provided that the simple situation addressed in those articles still did not allow any variation. As Mr. Hafner had said, there were many different scenarios: an insurrectional movement might become a member of the former Government; it might also be authorized by the Government to govern a part of the territory; parts of a Government might support insurrectional groups, and so on. To admit all those possibilities on the ground of not discouraging reconciliation seemed a little too simplistic. Complicated situations arose every day in the world, and a State often participated in some way or another in the acts of insurrectional movements. The State should therefore bear a part of the responsibility, especially when harm was caused to third countries. The issue was too important to be disregarded. The best thing would be to address explicitly the variations of the situation covered in articles 14 and 15, in a separate article, if necessary.

23. Mr. MELESCANU said that he endorsed Mr. Bennouna's position. In order to regulate the case of insurrectional movements the Commission must set two limits to responsibility. The upper limit was the situation in which the insurrectional movement became the new Government of the State. That possibility was duly addressed in article 15, paragraph 1. The lower limit was the general responsibility of the State for everything which happened in its territory. It was easy to conceive of many different intermediate situations, each with its own specific features.

24. The Commission would be wrong to start a debate, probably a fruitless one, on the status of insurrectional movements. It was not from that angle that it should try to clarify the situation. It might be possible for the commentary, which should be further expanded, to give explanations about the various forms and various goals of insurrectional movements. In any event, the analysis would have to be based on the principle of effectiveness rather than on the principle of legitimacy. It would have to bear in mind the ambiguous example of the PLO, which exercised certain State functions while Israel exercised others.

25. Mr. MIKULKA said that Mr. Dugard had convinced him that further thought should be given to the term "insurrectional movement". The draft articles were 20 years old, and their terminology was a little dated. The new situations which had emerged in the meantime justified new approaches to the legal concept of insurrectional movement and the adaptation of the draft articles, to bring them up to date, as it were.

26. He agreed in principle with Mr. Brownlie. If the insurrectional movement itself took responsibility for the acts occurring in the territory of a State, that did not necessarily mean that the State was excused from its international responsibilities. Article 15, paragraph 1, proposed in paragraph 284 of the first report, did not lead to that conclusion. It said in fact that the conduct of an organ of an insurrectional movement "shall not be considered an act of that State", which did not mean that the State itself was responsible for the failure to carry out its international obligations. The commentary to the article was perfectly relevant, but it must not contradict what was said in article 1 (Responsibility of a State for its internationally wrongful acts).

27. Mr. Hafner was right to draw attention to the case of an insurrectional movement which became the new Government of a State. But in what concrete situation could it truly be said that an insurrectional movement became a new Government? It was inconceivable that more than a part of the movement would come to power. That aspect of the question warranted further consideration. Moreover, there was perhaps no point in mentioning that case in article 15 since article 15 *bis* addressed it.

28. He was not sure about the reference to articles 5, 7, 8, 9 or 15 *bis* in article 15, paragraph 1 (*b*), proposed in paragraph 284 of the first report, for they did not seem relevant. For example, could it truly be said that the conduct of an organ of an insurrectional movement was the conduct of an entity "empowered by the law of that State to exercise elements of the governmental authority", in the

terms of proposed new article 7 (Attribution to the State of the conduct of separate entities empowered to exercise elements of the governmental authority). Could it be said that an insurrectional organ was acting “on the instructions of, or under the direction and control, of that State”, in the terms of subparagraph (a) of proposed new article 8 (Attribution to the State of conduct in fact carried out on its instructions or under its direction and control)? With regard to the latter provision, the insurrectional movement might conceivably be acting at the instigation of a second State. The reference was therefore all the more unfortunate.

29. Mr. ECONOMIDES said that article 15 adequately regulated the case of an insurrectional movement which became a new Government. However, it did not mention the legal situation during the insurrection itself. It was not clear whether the responsibility for unlawful acts should be attributed to the State or the insurrectional movement before the movement took power, if it ever did so. As Mr. Bennouna had explained, the answer to that question must be based on the principle of effectiveness, that is to say, on an assessment of the reality of the transfer of power from the organs of the State to the organs of the insurrectional movement. The qualifier “established” in the first sentence of paragraph 1 of the article was also certainly referring to the concept of effectiveness.

30. The Commission might adopt an interpretative provision removing the international responsibility of insurrectional movements from the scope of the draft articles. But it would still have to deal fully with the question of the responsibility of the State, which was in fact its task. In the transitional situation which he had just described, the State still remained responsible for its inaction and its failure to fulfil its international responsibilities. Traditional law held that the State was always internationally responsible for what happened in its territory. Thus, even if the responsibility for the events was attributed to an insurrectional movement, the State would be no less responsible, during the struggle itself, for its own failings.

31. Mr. ADDO said that the Commission could not leave the legal concept of insurrectional movement out of the draft articles. Strictly speaking, article 15, paragraph 1, stated the obvious: it had to be either the insurrectional movement or the State which was responsible for what happened in the territory. But, as several speakers had already pointed out, the real legal problem was caused by an insurrectional movement which became the new Government of the State. History offered the example of Namibia in its relations with South Africa: could it be asserted that the new Namibian State should take responsibility for the acts of South Africa? Article 15 did not offer an answer to that question.

32. Mr. GALICKI said that he agreed that the draft articles should contain a provision such as article 15 to regulate the case of insurrectional movements. Of course, the appropriateness of the qualifier “insurrectional” was debatable, but for the moment it was the only term which the Commission had found. Article 15 stated that, in general terms, the conduct of an insurrectional movement was not regarded as an act of the State but added that it could be so regarded in certain circumstances. It was established and had already been stated that an insurrec-

tional movement could in fact be responsible for what happened in the territory of a State. The problem therefore came down to drawing the boundary between the two areas of responsibility.

33. More specifically, it was necessary to know the extent to which the conduct of an insurrectional movement could be imputed retroactively to the State created by the acts of that movement. The State was of course responsible for what happened in its territory, but should it be responsible for everything? And what of the responsibility of an insurrectional movement which, as such, acceded to power? Even more specifically, must the part of the insurrectional movement which came to power assume responsibility for the acts of the other part?

34. Mr. Mikulka was right to refer to the problem of the reference in paragraph 1 (b) to articles 5, 7, 8, 9 and 15 *bis*, in paragraph 284 of the first report. He had indeed explained the reasons why. The solution might perhaps be to make the reference more explicit, especially with respect to articles 7, 8 and 9.

35. In any event, the problem of the responsibility of insurrectional movements must be settled by reference to the practice of States. That practice offered very different situations, a multiplicity of cases, and many examples of ambiguous situations. He therefore recommended that article 15 should be drafted in as general terms as possible, as it already was in fact. Addition of more detail would lead to prolixity and the adoption of what might be termed a casuistic approach.

36. Mr. CRAWFORD (Special Rapporteur) said that he was very close to Mr. Bennouna and Mr. Melescanu with regard to the general design of article 15. The first thing to bear in mind was that the article was concerned with the general problem of the attribution of responsibility and not with the question of the primary rules which the State or the insurrectional movement might have broken. As had been pointed out, that consideration did not emerge very clearly from the wording of the article as adopted on first reading.

37. Mr. Mikulka has noted that, by definition, an insurrectional movement could not be regarded as an organ of the State—a point which went without saying. But there remained the case, referred to in article 8, subparagraph (b), of a group of persons which was in fact exercising elements of the governmental authority in the absence of the official authorities; it would no doubt be necessary to return to that provision. In general terms, the intention of article 15 was to bring within the scope of the draft articles everything which might be attributable to the State under international law. The question of whether the State honoured its international obligations was quite another matter.

38. As Mr. Bennouna had recommended, the Commission should avoid dwelling on the legal status of “insurrectional movements”. Some such movements, national liberation movements for example, could have greater obligations under international law, under the Protocols additional to the Geneva Conventions of 12 August 1949 for instance. Yet again, however, the Commission had to regulate only the question of the attribution of State responsibility. The question of the responsibility of insur-

rectional movements was not under consideration. However, some members had doubts about the division of international responsibility during the insurrectional action. It was of course possible to take the position that the leaders of insurrectional movements had some responsibility, under humanitarian or human rights law for example. There was also the trend in the Inter-American Commission on Human Rights to emphasize the *erga omnes* character of the prescriptions of those two areas of law. But the Commission was only concerned with the responsibility of States and not with that of insurrectional movements. In the case in question it was impossible to say that the State was responsible for acts committed during the insurrection, unless there were other reasons for imputing them to the State. The situation seemed perfectly clear.

39. There was a fundamental problem of approach which highlighted the somewhat unusual nature of article 15. The article provided in fact that acts which were not attributable to the State at the time when they were committed might be attributable to it a posteriori as a result of a subsequent event, for example the success of an insurrectional movement. Similarly, article 15 *bis* provided that the State "acknowledged" the conduct of an entity which was not its own entity. That was in fact a case of succession, with the special feature that it was a de facto succession and not a legal succession. Furthermore, however unusual it might appear, the situation had been generally confirmed by the case law, and the Commission was merely codifying the practice. The article as adopted on first reading also seemed to have been well received by States.

40. Article 15 *bis* offered a way out of the unusual situation: the new Government was not required to accept responsibility for the acts of the insurrectional movement which had brought it to power; it simply had the option of doing so. According to article 15, it had an obligation to do so. The case of Namibia was relevant in that respect, for on acceding to independence Namibia had acknowledged not only the conduct of the South West Africa People's Organization (SWAPO) but also the acts of South Africa, whose de facto regime imposed on Namibia had been illegal under international law. Namibia had not been obliged to do so, and article 15 *bis* would not have imposed such an obligation on it.

41. A more specific but equally pertinent question was emerging: what happened if the insurrectional movement ended with elections and the establishment of a Government which included representatives of the movement? When power was taken by force of arms it could be assumed that there would be at least continuity of the persons involved, but elections created a new situation with an interruption of the causal link with the earlier situation. Although that was a very interesting point of doctrine, he recommended not going any further than the existing text proposed for article 15, which was based on the current practice and on many precedents. The language could of course be improved, but it would be impossible for it to cover all possible cases. Article 15 *bis* was there to deal with borderline cases.

42. Mr. HE said that he did not think that the term "insurrectional" had become devalued. However, the Commission should not try to study the political aspects

of insurrectional movements. Some speakers had rightly pointed out that the attribution of responsibility to such movements was a problem which the draft articles could not disregard, if only because a line had to be drawn between the responsibility of insurrectional movements and State responsibility. The provision under consideration should therefore be formulated in very broad terms. So broad in fact that it might be necessary to have two articles, and thus cover all the situations.

43. Mr. ADDO said that the group of articles under consideration dealt essentially with the circumstances in which unlawful conduct could not be attributed to a State (arts. 11-14). Strictly speaking, there would be no need to consider under the topic any conduct which was not attributable to a State.

44. Article 9 dealt with the attribution to a State of the conduct of organs placed at its disposal by another State or by an international organization. The Special Rapporteur had been right to retain the article but to delete the reference to international organizations, which warranted detailed separate treatment.

45. Article 11 (Conduct of persons not acting on behalf of the State) provided that the conduct of persons or groups of persons not acting on behalf of a State should not be considered as an act of that State under international law. That was stating the obvious and, as the Government of the United States of America had stated in its comments under article 8, in the comments and observations received from Governments on State responsibility (A/CN.4/488 and Add.1-3), the provision added nothing to the draft articles. It should therefore be deleted, as the Special Rapporteur was proposing.

46. Article 12 (Conduct of organs of another State) did not add anything either, since it merely reaffirmed the rule of attribution, and should also disappear. The Special Rapporteur gave convincing reasons for deleting article 13 as well. The essential principles asserted in paragraph 1 of article 14 and paragraphs 1 and 2 of article 15 should indeed be brought together in a single article.

47. Articles 9 and 11 to 15 *bis* as proposed by the Special Rapporteur should be referred to the Drafting Committee.

48. Mr. PELLET said that he approved of many of the simplifications and deletions proposed by the Special Rapporteur but wondered whether he was not going too far in some cases.

49. He endorsed the deletion of the reference to international organizations in articles 9 and 13, but a specific provision should be added to the effect that the draft articles did not address either the responsibility of international organizations or the responsibility of States resulting from their relations with such organizations. Such a provision might be inserted in article 1, which the Drafting Committee should consider in conjunction with articles 9 and 13.

50. Article 9 provided suitable treatment for the very specific problem which it addressed, that is to say, the conduct of an organ placed at the disposal of a State by another State. It was a pity that it did not address the much more common case of the representation of a State by another State: for example, Switzerland took care of a number of official matters for Liechtenstein, Italy for San

Marino, and France for Monaco. It might not be sufficient to say in such cases that a State was placing certain organs at the disposal of another State. The problem which came up in practice was the problem of the partial representation of a State. Article 9 should therefore be expanded, either by amending its wording to show that that situation was indeed covered, or by adding a second paragraph, or indeed by drafting a separate article. It would also be desirable to make it clear in the commentary whether, in such cases, the responsibility rested with the representing or the represented State and what the consequences were for their relations with each other, that is to say, whether one could take legal action against the other.

51. He approved of the deletion of the reference to territorial governmental entities in article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity) proposed by the Special Rapporteur in paragraph 284 of his first report, provided that it was reintroduced in article 1. On the other hand, he was not convinced by the replacement of *compétence* by *pouvoir*. *Compétence* was in fact the most suitable term in French, for it was usually defined as authority circumscribed by the law, whereas *pouvoir* was a simple fact.

52. The Special Rapporteur's reason for deleting articles 11 and 12—that they were negative-attribution provisions—was not sufficient in view of the usefulness of the clarification which the articles provided. While the deletion of article 11 was indeed justified, for it contained merely a negative confirmation of the provisions of articles 5 (Attribution to the State of the conduct of its organs), 7 and 8, that was not true of article 12. The Special Rapporteur's comments (paras. 246-252) showed that the place where the unlawful act occurred had an effect on the determination of the responsibility. But the Special Rapporteur did not draw any consequences from that consideration. Perhaps he ought to compose a draft article to regulate the problem. Article 15, as proposed in paragraph 284 of the first report, was also drafted in negative form, although it could have read: "State responsibility is entailed when the insurrectional movement triumphs", which would have been more consistent. However, as a whole the new article was more satisfactory than articles 14 and 15 as adopted on first reading, although it did give rise to some problems. The Special Rapporteur had himself stated (para. 271) that it was difficult to assimilate national liberation movements to insurrectional movements. He had nevertheless retained only the term "insurrectional movement", on the ground that the same regime applied to both kinds of movement. That was true, but "insurrectional movement" had a negative connotation, whereas "national liberation movement" had a rather positive one. He therefore proposed that the language of the new article 15 should be amended by inserting "of a national liberation movement or" before "an insurrectional movement".

53. There was no need to state that such movements were established in opposition to a State or to its Government, since that was obvious. But some thought should be given to the implications of recognition of a national liberation movement or an insurrectional movement for the application of State responsibility. That question might be considered in the context of part two of the draft articles. It was perhaps a question of the regime of the responsibil-

ity of insurrectional movements and not of the regime of State responsibility.

54. The draft articles should also address the question of the place where the acts occurred, rightly highlighted by Mr. Bennouna, who had cited the example of Namibia. The situation was one in which a State exercised effective authority in a territory and was therefore responsible in principle for what happened there, except in exceptional circumstances, and it was not clear that the draft articles addressed that fundamental principle.

55. There was also a problem connected with the deletion of the saving clauses in paragraph 2 of article 14 and the second sentence of paragraph 1 of article 15 as adopted on first reading. Draft article 15 *bis*, which he endorsed, did not replace those clauses. A second paragraph should therefore be added to article 15 *bis* (or included as article 15 *ter*) stating that any provision excusing a State from its international responsibility applied without prejudice to the responsibility of the State for acts connected with national liberation wars or insurrections if the conditions stated in articles 5 to 18 were met. That idea lay at the heart of the law of responsibility for the acts of insurrectional movements, for which there already existed a body of extremely detailed rules reflecting the concern to maximize the responsibility of the State. The main thing was to stipulate that, even in the case of a war or an insurrection, the State was no less responsible if it had not done everything that it could to prevent the harm in question. The deletion of the saving clauses would cause that idea to disappear. The Special Rapporteur seemed to have made a minor mistake when, in order to illustrate the exceptional nature of article 15, he said that the provision was the only one which established responsibility *ex post facto*. But articles 21 (Breach of an international obligation requiring the achievement of a specified result) and 22 (Exhaustion of local remedies), and in particular, article 26 (Moment and duration of the breach of an international obligation to prevent a given event), also did so.

56. The draft articles were basically ready to be sent to the Drafting Committee.

57. Mr. BENNOUNA said that he was not sure that article 15 *bis* established or addressed responsibility *ex post facto*. The provision, about which he had some reservations, should state that the subsequent recognition by the State of the conduct of an insurrectional movement constituted an element of proof and not an element of attribution. A State's responsibility was triggered not at the time when it recognized the acts but at the time when it committed them. In other words, the acts were attributed to the State at the time when they occurred, and their subsequent recognition by the State constituted proof of that attribution.

58. Mr. CRAWFORD (Special Rapporteur), replying to Mr. Pellet's comments on the question of the representation of States addressed in article 9, said that it was not only a problem of attribution. In fact, the question of representation raised a series of problems connected with joint action by States, which also came within the scope of chapter IV (Implication of a State in the internationally wrongful act of another State) of part one of the draft articles. The question should therefore be addressed in that context, for article 9 concerned only one very specific

aspect, that of attribution. The Commission might return to the question when it considered chapter IV.

59. He said that there would in fact be no difficulty in retaining “competence” in the French version of article 10.

60. With regard to the negative formulation of article 15, he had merely said that the Commission should avoid negative formulations in the articles concerning attribution, except when they constituted exceptions to a normal situation. Insurrectional movements within the meaning of article 15 were indeed an exception. However, the Drafting Committee would have to give detailed consideration to the various issues raised in the very interesting discussion of insurrectional movements.

61. One of the reasons why he preferred the negative formulation was that he had agreed to the introduction of the concept of territorial governmental entity in article 5 and that some insurrectional movements established in a territory sometimes constituted such entities. It would however be necessary to make an exception for insurrectional movements established in opposition to a State or to its Government. The concept of territorial governmental entity was not defined anywhere in the draft articles adopted on first reading, and the commentary did not offer a detailed analysis of such entities. The wording of article 5 would therefore have an effect on the wording of article 15. The other issues raised by Mr. Pellet could be dealt with by the Drafting Committee.

62. Turning to the point made by Mr. Bennouna, he said that article 15 *bis* could indeed cover a number of different situations: a State might acknowledge the conduct as its own but it might also decide of its own free will to endorse conduct which was not imputable to it. That happened, for example, when the State did not exist at the time of the acts or when it did not exercise territorial sovereignty in the area in which the acts occurred. However, it was not entirely pointless to have a general provision covering a number of situations and offering a degree of flexibility. Once a State had endorsed or espoused an act, the question of attribution no longer arose and it was not necessary to pose it. The analytical approach taken by Mr. Bennouna had not therefore altered his own opinion on the question.

63. Mr. BENNOUNA said that he was generally in agreement with the deletions proposed by the Special Rapporteur. He agreed that the question of the responsibility of an international organization, an organ of an international organization, or a State acting in the context of an international organization did not fall within the scope of the topic of State responsibility and required separate treatment. Moreover, it appeared that, as part of the Commission’s long-term programme of work, Mr. Brownlie intended to propose the topic of the responsibility of international organizations.

64. The attribution to a State of the conduct of organs placed at its disposal by another State was indeed a very rare case. The example given by the Special Rapporteur, in paragraph 220 of his first report, concerning appeals to the United Kingdom Privy Council, was specific to the law of the Commonwealth and was an academic hypothesis which had hardly any concrete applications. The case mentioned by Mr. Pellet was entirely different: it con-

cerned joint action by several States and the possibility of a challenge to one of them, which might if necessary take legal action against the others. The problem had risen in particular in the context of the launching of satellites. That situation did not seem to be covered by the draft articles, and the Special Rapporteur should consider introducing an additional provision to cover it.

65. He approved of the negative formulation of article 15, for the situation in question was taken to be an exception. However, the wording of the article might be improved to show clearly that a State was responsible if it did not take all necessary measures to maintain order during an insurrection. There were currently a number of situations in the world in which the State in question had not taken all the necessary measures and might, in some way, be accused of passive complicity, it being clearly understood that if the State lost effective control of the situation that exceptional fact would release it from its responsibility. Furthermore, as the Special Rapporteur and Mr. Pellet had said, even if the reference to international organizations was deleted, the saving clause concerning such organizations must be retained.

66. It would be useful for article 15 *bis* to address two situations: the one in which a State endorsed conduct which was not attributable to it, and the one in which the subsequent conduct of a State (by way of declarations or acts) provided proof that earlier conduct was attributable to it. That distinction should be brought out in the text more clearly. He was not sure whether the regime of responsibility was the same both in the case in which the conduct was not attributable to the State but the State nevertheless endorsed it and in the case in which the conduct was attributable in the first place.

67. Mr. ROSENSTOCK said that some members had strayed from the point in speaking of State responsibility for acts committed by an insurrectional movement. That was not the issue. But in some circumstances it might be held that a State was internationally responsible because it had not guaranteed security during an insurrection. The text should therefore say that a State was responsible not for the conduct of an insurrectional movement but for its own failure to prevent that conduct. It would be sufficient to mention the point in the commentary without raising it in the article itself.

Reservations to treaties (*continued*)* (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,⁷ A/CN.4/L.563 and Corr.1)

[Agenda item 4]

CONSIDERATION OF DRAFT GUIDELINES OF THE GUIDE TO PRACTICE PROPOSED BY THE DRAFTING COMMITTEE AT THE FIFTIETH SESSION

68. Mr. SIMMA (Chairman of the Drafting Committee), introducing the report of the Drafting Committee (A/CN.4/L.563 and Corr.1), said that the report dealt exclusively with the topic of reservations to treaties, to which

* Resumed from the 2552nd meeting.

⁷ See footnote 2 above.

the Drafting Committee had devoted five meetings from 27 to 31 July. It had examined guidelines 1.1 to 1.1.6, 1.1.8 and 1.4 proposed by the Special Rapporteur in his third report on reservations to treaties (A/CN.4/491 and Add.1-6). Since it had other matters to deal with, the Drafting Committee had decided to defer to the next session its consideration of guidelines 1.1.7 and 1.2 concerning interpretative declarations. Furthermore, as the draft text consisted of a set of guidelines, the Committee had decided to retain for the moment the form and structure proposed by the Special Rapporteur, the purpose of which was to establish a clear distinction, including a visual one, between guidelines and prescriptive articles. The Drafting Committee and the Commission would have an opportunity to review that mode of presentation on completion of the consideration of the guidelines on first reading.

69. However, the Drafting Committee had altered the order followed in the third report of the Special Rapporteur. The text currently began with a definition of reservations, then dealt with the various possible forms and combinations of reservations, and finally with practices which would not be regarded as constituting reservations. The text currently contained a saving clause. The Drafting Committee had found that arrangement more rational. In the report of the Drafting Committee the number of each guideline was followed, in square brackets, by the number of the original guideline in the third report of the Special Rapporteur.

70. In the first section of his Guide to the Practice the Special Rapporteur had proposed a definition of “reservation”. It was not a new definition but a composite version of the definitions already contained in the 1969 and 1986 Vienna Conventions. He had deliberately tried to draft a definition which would be sufficient in itself without departing from the definitions contained in those Conventions, his purpose being to avoid any confusion. The definition currently appeared in guideline 1.1, to which the Drafting Committee had not made, and could not make, any change.

71. Guideline 1.1.1 (Object of reservations), was numbered 1.1.4 in the third report of the Special Rapporteur. In order to avoid any mistaken interpretation of the term “object”, the commentary would state clearly that the guideline did not address the substance of the reservation itself but rather the text to which the reservation referred, that is to say, one or more provisions of a treaty or the treaty as a whole. The only changes made by the Drafting Committee to the Special Rapporteur’s text were, first, to replace “implement” by the term “apply” used in the 1969 and 1986 Vienna Conventions and, secondly, to add the phrase “or an international organization” (A/CN.4/L.563/Corr.1) in order to bring the text into line with the definition which preceded it. The commentary would state clearly that the use of “may” should not be interpreted as having an effect on the question of the permissibility of reservations, which would be considered at a later stage. One member had entered reservations about the usefulness of the guideline.

72. When introducing guideline 1.1.2 to the Commission the Special Rapporteur had explained (2542nd meeting) that it had a limited but important function, namely to eliminate the apparent differences between the definitions

of “reservation” in article 2, paragraph (1) (d), and article 11 of the 1969 and 1986 Vienna Conventions. The Committee had reworked the text in order to bring out its purpose more clearly. It had removed the emphasis on the “moment” at which a reservation was made, since that detail was not significant in the context of the guideline. The term “when” had disappeared in favour of “Instances in which” in order to introduce the idea of “how” or “the occasion on which” reservations were made. Furthermore, since the definitions of “reservation” in the 1969 and 1986 Vienna Conventions had been incorporated in guideline 1.1, it was useful to mention that guideline in guideline 1.1.2—hence the wording adopted by the Drafting Committee: “Instances in which a reservation may be formulated under guideline 1.1”. The guideline’s title (Instances in which reservations may be formulated) corresponded to its content.

73. In guideline 1.1.3 (Reservations having territorial scope), which was numbered 1.1.8 in the third report of the Special Rapporteur, the Drafting Committee had made only one change to the original text—the deletion of the phrase “regardless of the date on which it is made”. The question of the time when reservations could be made would be dealt with later in the chapter on the formulation of reservations. Guideline 1.1.3 had been the subject of a long discussion, which had focused more particularly on whether a unilateral statement by which a State purported to exclude the application of a treaty as a whole to a given territory constituted a reservation. Most of the members had concluded that, in the light of the practice of States, the general definition of reservations in guideline 1.1, which mentioned only “certain provisions of the treaty”, should not be interpreted too restrictively and that, accordingly, a unilateral statement excluding the application of the whole of the treaty to a given territory could be assimilated to a reservation since it also constituted a limitation on the application of the treaty. However, some members had not shared that opinion and had reserved their position.

74. Guideline 1.1.4 (Reservations formulated when notifying territorial application), was numbered 1.1.3 in the third report of the Special Rapporteur. According to his definition, the reservations in question were unilateral statements which met the following two conditions: first, they were made on the occasion of a notification of the territorial application of a treaty; secondly, they purported to exclude or modify the legal effect of certain provisions of the treaty in their application to the territory in question. The Drafting Committee had thought it better to reverse the order of those two conditions in order to show clearly from the outset that the guideline defined a certain type of reservation.

75. Guideline 1.1.5 (Statements purporting to limit the obligations of their author) incorporated the central idea of guideline 1.1.6 proposed by the Special Rapporteur. It had three elements: limitation of the obligations of the author of the statement; limitation of the rights which the treaty created for the other parties; and a time element. In the light of the debate in the Commission and after lengthy reflection, the Drafting Committee had decided to delete the time element, which seemed irrelevant in the context. The second element—limitation of the rights of other parties to the treaty as a result of the limitation of the

obligations of the State making the statement—had also been deleted, because the second limitation did not always entail the first. The Committee had concluded that the main point was that a unilateral statement by which a State or an international organization limited its obligations under a treaty effectively constituted a reservation. There was no need at the current stage to examine the effects of such a unilateral statement.

76. Guideline 1.1.5 proposed by the Special Rapporteur had therefore been reformulated as guideline 1.1.6 (Statements purporting to increase the obligations of their author) to express that approach clearly. “Designed” had been replaced by “purporting” in the English version of the title. Guideline 1.1.6 incorporated the central idea of the Special Rapporteur’s guideline 1.1.5. The Drafting Committee had rearranged the order to create a logical sequence. Guideline 1.1.5 had dealt with a particular form of practices which were not reservations. Some members had found the provision redundant, since the purpose of the Guide to Practice was to describe reservations and not to define what could not be regarded as a reservation. However, many members had preferred to retain the guideline, on the ground that the purpose of the Guide was to be useful to Governments and that it was sometimes better, for the purposes of clarity at least, to describe some practices which appeared to be reservations but were not.

77. The text adopted by the Drafting Committee covered two cases. The first was the case of a unilateral statement by which a State or an international organization purported to assume obligations going beyond those imposed by a treaty. The second was the case of a unilateral statement by which a State or an international organization purported to accord to itself a right not appearing in the treaty. Those two types of statement did not constitute reservations within the meaning of guideline 1.1.

78. The Drafting Committee had stressed in that connection that it might happen that a State or an international organization, by means of unilateral statement, substituted another obligation for its obligation under a treaty without the substitution constituting a reservation. However, the Drafting Committee had thought it wiser to deal with that case in the commentary rather than in the guideline itself. Situations of that kind were not common in practice and their complexity called for detailed drafting and explanations which would be out of place in the brief space of a guideline.

79. Guideline 1.1.7 (Reservations formulated jointly), corresponded to guideline 1.1.1 proposed by the Special Rapporteur. Although the language was different, the meaning remained unchanged: the guideline took account of the fact that it was sometimes more convenient for several States or international organizations to formulate a reservation jointly. It merely confirmed that such a joint formulation did not affect the unilateral character of the reservation. It had been pointed out in the Drafting Committee that it sometimes happened that such joint reservations were formulated in such a way as to produce a degree of interdependence between the States or international organizations concerned. However, that issue was without prejudice to the unilateral character of the reservation with respect to the other parties to the treaty addressed by the statement, but the point should be

explained in the commentary in order to avoid any ambiguity.

80. The last guideline adopted by the Drafting Committee, the numbering and title of which would be decided later, was based on guideline 1.4 proposed by the Special Rapporteur. This title (Scope of definitions) had not been thought sufficiently close to the content of the guideline, which could be assimilated to a saving clause. Unlike the Special Rapporteur’s proposal, the Drafting Committee’s text dealt only with reservations, for it had not yet considered the guidelines on interpretative declarations. Until it had done so, it would not be able to decide whether two separate saving clauses were needed, one in the section on reservations and the other in the section on interpretative declarations, or whether it could combine the two clauses, as the Special Rapporteur had done in guideline 1.4.

81. The Drafting Committee had decided to add “and its effects” after “permissibility” in order to meet the concerns stated in the Commission about the applicability of that saving clause to the legal regime of reservations. The end of the Special Rapporteur’s text had been deleted, on the ground that it was redundant to state that the definition of reservations determined the application of the rules governing reservations. Lastly, the Drafting Committee had made a drafting change, replacing “unilateral declaration” in the English text by “unilateral statement”, the term used in all the other guidelines on the definition of reservations.

82. Mr. LUKASHUK said that he endorsed the work done by the Drafting Committee but wondered whether the formulation of guideline 1.1.1 was not so broad as to lose sight of the limits established by the 1969 and 1986 Vienna Conventions. It should include a reference to the limits within which reservations could be formulated.

83. Mr. BENNOUNA said that he found the use of the term “more generally” rather awkward in such an important provision as guideline 1.1.1. Furthermore, the phrase “to the way in which a State, or an international organization, intends to apply the treaty as a whole” went beyond the scope of reservations *stricto sensu* and encroached on the topic of interpretative declarations.

84. Mr. GOCO said that the title of guideline 1.1.4 would be clearer if it referred to the territorial application “of a treaty”.

85. Mr. ELARABY said that guideline 1.1.5 addressed only the limitation of the obligations of the author of the reservation and omitted to mention the limitation of the rights of the other parties, although both those elements appeared in the Special Rapporteur’s text of guideline 1.1.6. That omission created difficulties with regard to interpretative declarations, and no decision should be taken on the whole text until the guidelines on such declarations had been considered.

86. Mr. MIKULKA said that he shared Mr. Bennouna’s doubts about the end of guideline 1.1.1, which turned a statement as to the manner in which a State intended to apply the treaty into a reservation.

87. Mr. KABATSI pointed out that guideline 1.1.6 contained two elements—obligations and rights—although its title mentioned only obligations.

88. Mr. Sreenivasa RAO said that he shared the doubts expressed about guideline 1.1.1. The way in which a State intended to apply a treaty was determined by a positive logic and could not be assimilated to the notion of reservation, which had a negative connotation. There was also a divergence between the title of guideline 1.1.2 (Instances in which reservations may be formulated) and its content, which addressed the means of expressing consent to be bound by a treaty.

89. Mr. PELLET (Special Rapporteur) said that the whole constituted by guidelines 1.1.5 and 1.1.6, which were poorly drafted in his view, had been adopted by the Drafting Committee by a very large majority but against his recommendation.

90. Mr. SIMMA (Chairman of the Drafting Committee) pointed out, with regard to the limits referred to by Mr. Lukashuk, that there was a saving clause on the permissibility and the effects of reservations. As to the comments on guideline 1.1.1, the adopted formula certainly rubbed shoulders occasionally with the concept of interpretative declaration, but most of the members of the Drafting Committee had thought that it should be retained in the definition of the object of reservations.

91. Mr. Goco's proposal on the title of guideline 1.1.4 was a good one. The comments of Mr. Kabatsi and the Special Rapporteur addressed a very complicated issue, in connection with which the Drafting Committee had decided, by a very large majority, to take up the question of substitution in the commentary and not in a guideline. However, the title of guideline 1.1.6 might usefully refer also to the rights of the author State. Mr. Sreenivasa Rao's comment on guideline 1.1.2 was pertinent, but the Committee had decided to retain the phrase "means of expressing consent" for lack of a better alternative.

The meeting rose at 1.15 p.m.

2557th MEETING

Thursday, 6 August 1998, at noon

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. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Reservations to treaties (*continued*) (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,¹ A/CN.4/L.563 and Corr.1)

[Agenda item 4]

CONSIDERATION OF DRAFT GUIDELINES OF THE GUIDE TO PRACTICE PROPOSED BY THE DRAFTING COMMITTEE AT THE FIFTIETH SESSION (*continued*)

1. Mr. BENNOUNA said that the wording of guideline 1.1.1 (Object of reservations) should be less problematic since, as the Special Rapporteur had pointed out, it dealt not with the definition of reservations but with their object. He still had doubts, however, about the concept of reservations having territorial scope (guideline 1.1.3), which did not seem to be entirely consistent with article 29 of the 1969 and 1986 Vienna Conventions. As far as guidelines 1.1.5 (Statements purporting to limit the obligations of their author) and 1.1.6 (Statements purporting to increase the obligations of their author) were concerned, considering the position taken by the Special Rapporteur, it might be advisable to ask the Drafting Committee to review them and to consider the possibility of combining them into a single guideline. At any rate, guideline 1.1.5 did not contribute anything to the draft, but worked against the principle of useful effect, and guideline 1.1.6 envisaged hypothetical situations that were highly unlikely to occur.

2. Mr. AL-BAHARNA said that he found guideline 1.1.1 to be rather superfluous, inasmuch as the object of reservations was implicit in the definition itself, in the expression "in their application to that State or to that international organization". Hence, at least, the phrase "the way in which a State, or an international organization, intends to apply" should be deleted from the guideline. Guideline 1.1.2 should be redrafted along the following lines: the expressions "instances in which" and "include all the means of expressing" should be deleted, and the word "mentioned" should be replaced by the words "in accordance with". Guideline 1.1.6, including its title, should be reworded to indicate clearly that it referred to the obligations and rights of the author of the reservation. Drafting changes should also be made in guidelines 1.1.3 (Reservations having territorial scope), 1.1.4 (Reservations formulated when notifying territorial application) and 1.1.5, as well as to the final guideline, which had not yet been numbered.

3. Mr. CRAWFORD said that the problem posed by guideline 1.1.6 lay in the fact that it did not make a clear distinction between cases in which a State made a unilateral statement undertaking obligations going beyond

¹ Reproduced in *Yearbook . . . 1998*, vol. II (Part One).