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Summary record of the 2573rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1999, **vol. I**

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

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

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

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

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

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

It was so decided.

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

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

The meeting rose at 12.45 p.m.

2573rd MEETING

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

Chairman: Mr. Zdzislaw GALICKI

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

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

[Agenda item 3]

* Resumed from the 2571st meeting.

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

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

[3] Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

* Resumed from the 2571st meeting.

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

[5] See 2571st meeting, footnote 6.

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

[7] See 2567th meeting, footnote 11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cooperation with other bodies

[Agenda item 11]

Statement by the Observer for the Inter-American Juridical Committee

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[17] See footnote 15 above.

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 1.10 p.m.