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Summary record of the 2576th meeting

Topic:
<multiple topics>

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

which had originated in the Commission and which, it was hoped, would shortly enter into force.

35. As for publications issued under the responsibility of the Office of Legal Affairs, the *Yearbook of the International Law Commission, 1994*, vol. II (Part One) and the *Yearbook of the International Law Commission, 1996*, vol. II (Part Two) were being printed. The proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law, held in New York on 28 and 29 October 1997, had been published in June 1998.[15] An *Analytical Guide to the Work of the International Law Commission 1949-1997*[16] had been published in July 1998 to commemorate the fiftieth anniversary of the Commission and to complement *The Work of the International Law Commissio*n, currently in its fifth edition.[17] As for the *United Nations Juridical Yearbook*, the 1994 and 1995 editions were in the press and the Codification Division was finishing the 1996 edition. Work was also being completed on the 1989 edition, so that there would be no backlog as from the year 2000. The Codification Division had issued Volume XXI of the *United Nations Reports of International Arbitral Awards*[18] and was at present working on Volume XXII. It was finalizing the proceedings of the Seminar to commemorate the fiftieth anniversary of the Commission, held at Geneva on 21 and 22 April 1998, as well as a collection of essays by legal advisers of States, legal advisers of international organizations and practitioners in the field of international law, to be published at the close of the United Nations Decade of International Law. Referring again to General Assembly resolution 53/99, he said that the first part of the centennial celebrations for the First International Peace Conference had taken place at The Hague earlier that week, the second part being scheduled for June at St Petersburg.

36. In regard to the comment by Mr. Economides about the relationship between the Commission and ICJ, it was, of course, for the Commission to decide upon the form that relationship should take. It should be noted, however, that everything concerning ICJ could now be immediately accessed on the Internet.[19] In that connection, he drew attention to a most important advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, handed down by the Court only a few days earlier on the subject of the privileges and immunities of experts appointed by human rights bodies. Members would be interested to hear that the advisory opinion contained references to articles on that topic which had been elaborated by the Commission.

37. With reference to Mr. Lukashuk's comments, while it could not be denied that much remained to be done with regard to the observance of international law in the fields of international peace and security, human rights and humanitarian law, the situation in many other fields such as communications and public health could be described as excellent. The worldwide availability of information on the Internet, the ever-increasing importance of the activities of non-governmental organizations and the immense contribution being made by civil society in general should not be overlooked. What was needed was not more law but closer observance of the law and a higher quality of statesmanship at the political level.

38. In conclusion, he assured members that the Secretariat was doing its best to provide a level of services commensurate with the importance of the Commission's role.

The meeting rose at 11.30 a.m.

2576th MEETING

Tuesday, 25 May 1999, at 10.05 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Yamada.

Cooperation with other bodies (*continued*)*

[Agenda item 11]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN invited Mr. Tang Chengyuan, Secretary-General of the Asian-African Legal Consultative Committee (AALCC), to address the Commission on the Committee's activities.

2. Mr. TANG Chengyuan (Observer for the Asian-African Legal Consultative Committee) said that his organization attached great significance to its longstanding ties with the Commission and profoundly appreciated the latter's role in the progressive development and codification of international law. It was customary for the Commission to be represented at the annual sessions of AALCC and, in recent years, the Commission had also been repre-

[15] *Making Better International Law: The International Law Commission at 50* (United Nations publication, Sales No. E/F.98.V.5).

[16] United Nations publication, Sales No. E.98.V.10.

[17] Ibid., E.95.V.6.

[18] Ibid., E/F.95.V.2.

[19] www.icj.cij.org.

* Resumed from the 2573rd meeting.

sented at the meeting of the Legal Advisers of member States of the Committee held at the United Nations Headquarters in New York during the session of the General Assembly.

3. The thirty-eighth session of AALCC had been held at Accra, from 19 to 23 April 1999. At that session, the Commission had been represented by Mr. Yamada and by Mr. Addo, a national of the host country. Twelve substantive items, including the work of the Commission at its fiftieth session, had been on the session's agenda, but, for lack of time, only some of those items had been the subject of intensive debate.

4. On the topic of State responsibility, AALCC had considered that the draft articles on countermeasures dealt with the most difficult and controversial aspect of the whole regime. One delegate to the Committee had expressed the opinion that the principles of State responsibility should be based on consensus among States and that the draft articles should differentiate between legal injury and material damage.

5. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, AALCC had observed that the Commission had yet to decide on the best direction in which to further its work on the matter. Although the title of the topic was confusing, the substance was clear; moreover, the Commission's work on prevention of transboundary damage should also cover the issues of liability and compensation.

6. With regard to reservations to treaties, the formulation of guidelines seemed a practical way of filling any gaps in the Vienna regime. It had been suggested that the Commission should give due regard to preserving the delicate balance of the customary rules of international law relating to the integrity and universality of a treaty. One delegate to AALCC had expressed the view that the special meeting on reservations to treaties organized by the Committee as part of its thirty-seventh session had dealt exhaustively with the topic. It had been stated in that regard that articles 19 to 23 of the 1969 Vienna Convention were a flexible regime that had stood the test of time and that the final guidelines should reflect the views expressed by the Committee the previous year.

7. AALCC had also taken note of the fact that the work of the Commission on the two topics of diplomatic protection and unilateral acts of States was still in its preliminary stages. In that connection, he recalled that in 1996 the Committee had expressed the wish that the Commission should include the topic of diplomatic protection on its agenda, as it felt that consideration of that topic would complement the Commission's work on State responsibility. At the thirty-eighth session of AALCC, the topic of diplomatic protection had aroused some interest in that it focused on individual rights as opposed to the rights of the State of nationality.

8. With regard to unilateral acts of States, the view had been expressed that the topic was complex and that the Special Rapporteur should not rely on available State practice. While unilateral acts of States could impose international obligations, they could not be cited as sources of international law. Acts of States were regulated either by the law of treaties or by the law relating to State responsibility. One delegation had been of the view that, in the absence of a coherent doctrine encompassing all kinds of unilateral acts, the work of the Commission would lend clarity to aspects of State actions and contribute to ensuring stability in international relations. It had been observed that the Commission's objective should be to identify the constituent elements and effects of unilateral legal acts of States and formulate rules generally applicable to them.

9. With regard to the nationality of natural persons in relation to the succession of States, the Committee had welcomed the work of the Commission and the adoption of the 27 draft articles[1] prepared by the Special Rapporteur, Mr. Mikulka. The draft articles were fairly flexible and provided enough options to enable States to adopt the Commission's draft.

10. The other items considered in the course of the thirty-eighth session of AALCC were: the United Nations Decade of International Law;[2] status and treatment of refugees; deportation of Palestinians and other Israeli practices, including massive immigration and settlement of Jews in the occupied territories in violation of international law, particularly the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949; legal protection of migrant workers; the law of the sea; extraterritorial application of national legislation: sanctions imposed against third parties; report of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court; follow-up to the United Nations Conference on Environment and Development; legislative activities of United Nations agencies and other international organizations concerned with international trade law; and the report of the WTO Seminar relating to Certain Aspects of the Functioning of the WTO Dispute Settlement Mechanism and Allied Matters, held at New Delhi on 17 and 18 November 1998. A document containing an overview of the thirty-eighth session of AALCC had been filed with the secretariat of the Commission.

11. In reply to Mr. Yamada, who, in his statement to AALCC at its thirty-eighth session, had invited comments from member States of the Committee on the item on the Commission's long-term programme of work concerning environmental law, he said that, under the administrative arrangements for its thirty-eighth session, the Committee had organized a Special Meeting on Effective Means of Implementation, Enforcement and Dispute Settlement in International Environmental Law. The report of that Special Meeting had been circulated to the members of the Commission for information. The salient ideas that had emerged from the Special Meeting were: that international environmental law was based largely on treaties that adopted a sectoral approach, whereas an integrated and comprehensive approach was needed to address environmental issues; that, with increasing liberalization and the resultant expansion in world trade, the legal interface between trade and the environment needed to be studied; that States must build up their capacity for the effective implementation of the law and that capacity-building must be accompanied by the transfer of technology and

[1] See 2569th meeting, footnote 8.

[2] See 2575th meeting, footnote 4.

financial resources to the least developed and developing countries; that only States could enforce international obligations relating to the environment; and that alternative dispute resolution (ADR) could be an important means of settling environmental disputes. The Committee had expressed the wish that other meetings should be organized in collaboration with UNEP and other relevant international organizations, for an in-depth consideration of the issues addressed during the Special Meeting.

12. As to future cooperation between AALCC and the Commission, the secretariat of the Committee would continue to prepare notes and comments on the substantive items considered by the Commission so as to assist those representatives of the member States of the Committee who participated in the consideration by the Sixth Committee of the report of the Commission to the General Assembly on the work of its session. An item entitled "Report on the work of the International Law Commission at its fifty-first session" was on the agenda for the thirty-ninth session of AALCC, to be held in 2000. On behalf of the Committee, he invited the Chairman of the Commission to attend that session and expressed the hope that the trend towards closer cooperation between the two bodies would continue.

13. Mr. YAMADA said that he had followed with great interest the thirty-eighth session of AALCC, which had, as always, accorded close attention to the work of the Commission. He had himself presented an oral report on the activities of the Commission and on the relevant work of the Sixth Committee of the General Assembly. He had also informed the Committee of the Commission's future work programme. There had been fewer contributions from the States of Africa and Asia than from other States, particularly in Europe, and he had invited the Committee to participate more actively in the work of the Commission and had stressed the need for the Committee to play a catalytic role in promoting relations between the Commission and the member States of AALCC.

14. Mr. KATEKA said that he welcomed the information provided by the Observer for AALCC, but thought that the views expressed by the members of the Committee on the topics being considered by the Commission should have been described in greater detail. It was certainly useful for the Committee to gather information to assist those of its members who took part in the consideration by the Sixth Committee of the report of the Commission to the General Assembly on the work of its session, but it would be equally appropriate for the Committee to transmit to the Commission reasoned views for its consideration. The Committee's five-day annual session did not appear long enough to handle all the items on its agenda. If it had a shorter agenda, the Committee could concentrate on important items. The Committee's work was nevertheless extremely interesting.

15. The CHAIRMAN said he was convinced that the reports provided to the Commission on the Committee's thirty-eighth session and on the Special Meeting on Effective Means of Implementation, Enforcement and Dispute Settlement in International Environmental Law, which attested to the quality of the exchange of information by the Committee and the Commission, would be of great interest to the members of the Commission.

16. Mr. HE said that he welcomed the tradition by which the Observer for AALCC described the Committee's activities to the Commission each year and a member of the Commission outlined the Commission's work at the annual session of AALCC. He had been pleased to note that the topics considered by the Commission were also being studied by the Committee. The collaboration between the Commission and the Committee could nevertheless be further strengthened and improved, for example, if they were to transmit to each other all relevant documents, thereby facilitating exchanges of view of topics of common interest. The strengthening of cooperation on some of those topics that called for more in-depth study might also be considered.

17. Mr. ADDO said he also thought that, since its annual session was short, AALCC might choose one or two topics of common interest being considered by the Commission on which to hold an in-depth discussion. He wished to know whether the Committee intended to establish a web site and, if so, when, so that all necessary documents could be widely and rapidly disseminated. For example, if such a site had existed, the members of the Commission could have familiarized themselves in advance with the documents submitted by the Committee.

18. Mr. KUSUMA-ATMADJA thanked the Observer for AALCC for the very useful documents which he had submitted and which gave an outline of the Committee's work and of all the topics it was considering. The Committee should focus on a smaller number of topics. The Secretary-General of AALCC had done an excellent job in the area of cooperation with the Commission, which should be represented by more members at the Committee's meetings. Such cooperation was important in general, but even more important on specific topics such as environmental law, an area in which the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal was clearly better suited to the situation of continental States than to those of many Asian countries which were both continental and insular or insular only.

19. Mr. GOCO said that the activities of AALCC were extremely important, first, because of the number of African and Asian countries composing it and, secondly, because of the contribution made by those countries to the progressive development and codification of international law, as demonstrated, inter alia, by the contribution the Committee had made to the preparatory work for the establishment of an international criminal court at its Special Meeting on the Establishment of an International Criminal Court, held at Manila, from 5 to 6 March 1996. Without neglecting other subjects of pressing concern to the international community, the Committee should focus its activities on a selected number of topics of particular importance for the region, including the topics of migrant workers and the status and treatment of refugees.

20. Mr. Sreenivasa RAO pointed out that AALCC had done remarkable work for the region under all its Secretaries-General and particularly under the leadership of Mr. Tang Chengyuan, who had shown the full measure of his talents at the thirty-eighth session of AALCC. Since it now had a permanent headquarters in India, the Committee could devote itself entirely to expanding its coopera-

tion with other bodies, inter alia, in the context of specialized meetings. Two such meetings had been held during the past year, the first was the Seminar relating to Certain Aspects of the Functioning of the WTO Dispute Settlement Mechanism and Allied Matters and the second was the Meeting to Consider the Preliminary Reports on the Themes of the First International Peace Conference, held at New Delhi, on 11 and 12 February 1999. In addition, by setting priorities and working to ensure the best possible use of available funds, the Secretary-General had succeeded in stabilizing the Committee's financial situation. In respect of cooperation with the Commission, the Commission had always been represented at meetings of AALCC, either by its Chairman or by one of its members, but it would be useful for additional African and Asian members of the Commission to be able to represent it. The draft conventions and guidelines of the Commission on extradition, mutual legal assistance, the problems of refugees, the law of the sea and the law of treaties had always been very useful to the Committee, enabling it to make an important contribution to the overall work of codification in those areas. The same was now true of environmental law, on which the Committee had held a Special Meeting on Effective Means of Implementation, Enforcement and Dispute Settlement in International Environmental Law, in Accra, so that the member countries could say what their interests and aspirations were and take part in the codification of the topic.

21. Mr. TANG Chengyuan (Observer for the Asian-African Legal Consultative Committee) thanked members of the Commission for their comments and suggestions. With regard to the need to focus on a small number of topics, he pointed out that the Committee operated according to the principle of consensus and that the member States were not always prepared to withdraw topics they had proposed. The Committee tried to get round that difficulty through the system of special topics or meetings devoted to a specific subject. As to preparations for the General Assembly of the United Nations, the Committee distributed a summary of the work done on the items on the Sixth Committee's agenda to all representatives of its member States in New York. The Committee intended to carry out new studies on the topic of environmental law. It had also established a working group on migrant workers in the context of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. It was currently considering the question of creating a web site. In conclusion, he welcomed the desire for expanded cooperation between the two bodies expressed by the Chairman and all members of the Commission.

22. The CHAIRMAN said that, of all the regional bodies, AALCC was the one which had the largest number of eminent jurists and the one which spent the most time studying the Commission's work. The work done by the Committee should therefore be taken into account, for it was a mirror in which the Commission could see both its successes and its mistakes. The continuity of their interaction was extremely important for both parties and must be ensured even if financial difficulties sometimes prevented it from taking place in an official context. The Commission had recently established a web site and the experience had proved to be particularly positive, as it ensured that its documents were more widely distributed. The Committee should therefore not hesitate to do the same. The system of ordinary and special meetings adopted by the Committee was an interesting experiment in that it improved the capacity of legal bodies to react to the changing needs of societies and countries, something which the Commission should not overlook. In conclusion, he expressed the hope that the Secretary-General of the Committee would maintain contact with the Commission in the context of cooperation between the two bodies that he hoped would be long-lasting.

State responsibility[3] (*continued*)* (A/CN.4/492,[4] A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,[5] A/CN.4/L.574 and Corr.1 and 3)

[Agenda item 3]

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

ARTICLES 27 AND 28 (*continued*)*

23. Mr. SEPÚLVEDA said he welcomed the fact that the Commission had made remarkable progress on the consideration of the delicate topic of State responsibility, particularly thanks to the Special Rapporteur's legal knowledge and his ability to explain and elaborate on legal concepts with precision and clarity. The Commission's work could only benefit therefrom and should lead to the establishment of a better-organized legal system composed of rules that clearly delineated the rights and duties of States in the area of international responsibility.

24. With regard to chapter IV (Implication of a State in the internationally wrongful act of another State) of part one of the draft articles as adopted on first reading, the salient aspect of the second report of the Special Rapporteur on State responsibility (A/CN.4/498 and Add.1-4) was his recommendation that the key ideas on which the chapter was based should be preserved, subject to some alteration. It would be absurd if a State that was an accomplice in the commission by another State of a wrongful act or that coerced another State into committing a wrongful act were not held responsible. Articles 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act) and 28 (Responsibility of a State for an internationally wrongful act of another State) adopted on first reading had expressed confused concepts that needed to be reformulated. The text of new articles 27 (Assistance or direction to another State to commit an internationally wrongful act), 28 (Responsibility of a State for coercion of another State) and 28 bis (Effect of this chapter) proposed by the Special Rapporteur in paragraph 212 of his second report was an improvement: it was of a higher legal standard and it removed ambiguities. For example, the word "Implication" in the title of chapter IV did not take account of the degree of a State's participation under the various possibilities covered. He

* Resumed from the 2574th meeting.

[3] 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.

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

[5] Ibid.

assumed that the new proposed title, "Responsibility of a State for the acts of another State", referred to the responsibility of the first State (State A) as a result not of just any act, but of a wrongful act committed by the second State (State B). If so, that idea of wrongfulness should be incorporated in the title.

25. The appropriateness of doing so was underscored by the Special Rapporteur's statement, in the explanatory note following the proposed new title, that moreover, in the case where State B's conduct is coerced by State A, the wrongfulness of that conduct may be precluded so far as State B is concerned. The case could be one of a state of emergency or of force majeure, under which responsibility would be precluded. But the wrongful act committed by State B would nevertheless remain wrongful, even if the State did not necessarily incur responsibility.

26. Turning to article 27, he said that, in the text adopted on first reading, the words "Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act" were confusing. It would have to be determined where responsibility lay for establishing that the aid or assistance in question had been rendered to commit a wrongful act. And that would involve a subjective element. Should the task be entrusted to the victim of the wrongful act or to a judicial body or an arbitral tribunal? He was pleased to note that the proposed new text did not include criteria of that kind, which lent themselves to a variety of interpretations. Secondly, both the commentaries to the relevant articles adopted on first reading[6] and the notes accompanying the proposed new articles 27, 28 and 28 bis, contained a set of guidelines which formed the basis for the principles embodied in article 27 on the complicity of two States in the commission of a wrongful act. First, there was the cause-and-effect relationship between the aid provided and the commission of the wrongful act: the assistance rendered should have the effect of facilitating the commission of the act that breached international obligations. Then there was the principle of intention: a State that rendered assistance for the commission of a wrongful act, knowing full well that a wrongful act would be committed and that the act would be wrongful if it committed it itself, must do so with intent to become an accomplice. Lastly, there was the principle of dual responsibility: article 27 presupposed the commission of two acts that were in themselves internationally wrongful acts and hence implied the existence of two types of responsibility, namely, the responsibility of the State that rendered the assistance and the responsibility of the State that breached its obligations in committing a wrongful act.

27. New article 27, which was well drafted both in terms of form and of substance, thus stipulated that a State A which directed or controlled State B in breaching an international obligation incurred the same responsibility as a State that aided or assisted another State in committing a wrongful act. It nevertheless failed to cover all the ground. For reasons that he found unconvincing, the Special Rapporteur had recommended omitting the hypothesis of conspiracy as a component of international responsibility, in other words, conspiracy between two or more States to commit an internationally wrongful act. It could be argued that each of the States concerned was individually responsible. But, as under the internal legal order, the nature of the wrongful act and the penalties which were applicable differed in the case of organized crime, which entailed aggravated responsibility. For example, following the nationalization of the Suez Canal in 1956, the Governments of three States had formed a conspiracy, characterized as a breach of international law, to oppose the decision.[7] The Commission could thus provide for cases of collective or joint responsibility, without prejudice to the assignment of individual responsibility.

28. The exact meaning of "coercion" in the context of article 28 should be made clear. According to paragraph (29) of the commentary to article 28 adopted on first reading, cited in paragraph 203 of the report, "'coercion' is not necessarily limited to the threat of or use of armed force, and should cover any action seriously limiting the freedom of decision of the State which suffers it—any measures making it extremely difficult for that State to act differently from what is required by the coercing State"; in paragraph 204 of the report, the Special Rapporteur stated that coercion for that purpose was nothing less than conduct which forced the will of the coerced State, giving it no effective choice but to comply with the wishes of the coercing State. It was not enough that compliance with the obligation was made more difficult and onerous. Moreover, the coercing State must coerce the very act which was internationally wrongful. It was not enough that the consequences of the coerced act make it more difficult for the coerced State to comply with some other obligation. As those criteria were essential for determining the grounds for coercion and its consequences, it would be desirable to include in the draft articles a definition of the terms used, duly defining the nature and scope of coercion and making it clear that the term was not confined to the use of armed force, but also included economic pressure.

29. Reverting to the question of the exhaustion of local remedies in chapter III (Breach of an international obligation), he expressed the view that neither article 26 bis (Exhaustion of local remedies) proposed by the Special Rapporteur in his second report nor the Commission's discussion had really done justice to the matter. The commentary to the corresponding article 22 (Exhaustion of local remedies) adopted on first reading[8] ran to some 20 pages and dealt with the legal principles underlying the rule, State practice, judicial decisions and the writings of jurists. A number of conclusions had been drawn, in particular: the Commission considered that the principle establishing the requirement of the exhaustion of local remedies was well founded in general international law; the principle was based on the idea that there could be no breach, or at least no definitive breach, of an international obligation unless the individuals who complained had tried to obtain redress by any means available under the internal law of the State bound by the obligation; a State

[6] For the commentaries to articles 27 and 28 see *Yearbook ... 1978*, vol. II (Part Two), pp. 99 et seq. and *Yearbook ... 1979*, vol. II (Part Two), pp. 94 et seq., respectively.

[7] See M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office), vol. 12, 1971, pp. 320-321.

[8] See 2574th meeting, footnote 5.

incurred international responsibility where a denial of justice was established, that is to say, where local remedies had been exhausted and the State had not fulfilled its international obligations in a satisfactory manner. By limiting his comments to some five pages, however, the Special Rapporteur seemed to assign a minor role to the rule of the exhaustion of local remedies and had even cast doubts on its inclusion, or at least its place, in the draft articles. He strongly advocated the retention of the rule as an essential component of the law of international responsibility. It was not enough to argue that it might be incorporated in the law of diplomatic protection: nobody could really tell what a future instrument dealing with that subject might contain. It was clear, on the other hand, that the rule of the exhaustion of local remedies and its corollary, the denial of justice, were closely and irreversibly bound up with State responsibility. The position of the article dealing with the rule could be discussed once the validity of the principle had been established. It should normally appear in chapter V (Circumstances precluding wrongfulness) of part one, alongside the articles concerning circumstances precluding wrongfulness, but it could also be included in part two, as suggested by the Special Rapporteur.

30. In conclusion, he urged the Commission, whose task at present was to tidy up the draft articles, to refrain from undermining the result of many years' work by seeking to delete articles that were the product of mature reflection and analysis. The Commission's duty was to use that heritage to put in place a carefully planned legal order, with a system of rules defining the rights and duties of States in that area.

31. Mr. CRAWFORD (Special Rapporteur), referring to the part of Mr. Sepúlveda's statement relating to chapter III of the draft articles, said that the discussion of the matter was closed, the Commission having formally referred the corresponding draft articles to the Drafting Committee. However, to dispel any misunderstanding, he wished to reaffirm that he viewed the rule of the exhaustion of local remedies, which was normally included in treaties, as an established rule of general international law applicable both in cases of violations of human rights and in the field of diplomatic protection. There was no question of diminishing its importance. However, it had to be recognized that, contrary to the provision of article 22, an international obligation was not breached solely in cases where the individuals concerned had exhausted local remedies.

32. He summarized very briefly the conclusions of the discussion on that point for the benefit of members of the Commission who had been absent: it had been generally agreed that an article on the exhaustion of local remedies should be retained in the draft articles; it had been broadly agreed that the article should be formulated in broader terms along the lines proposed by Mr. Economides (2574th meeting); it had been generally agreed that the article should not prejudge the nature of the obligation of the exhaustion of local remedies, which could vary from one situation to another; and the Commission should be careful not to bypass the obligation of the exhaustion of local remedies, for example, having regard to the question of countermeasures and, to that end, should specify the consequences of the obligation, in particular the time when the rule applied in the case of an individual breach. Having said that, he found Mr. Sepúlveda's observations on chapter IV useful and had no comment to make on the substance.

33. Mr. Sreenivasa RAO said he was pleased that the Special Rapporteur had reaffirmed the importance of the rule of the exhaustion of local remedies in the draft articles on State responsibility, but it should be stressed that the rule was equally important in the case of investment contracts, which were becoming more and more common throughout the world and involved either States or States and individual investors. Such agreements generally stipulated that local remedies should be exhausted before the international complaints procedure could be set in motion. They could, however, also provide for arbitration.

34. The rule of the exhaustion of local remedies, which was well established not only in treaty law, but also in customary law, was a means of ensuring recognition of and respect for internal legislation and national systems. He noted with satisfaction that the Special Rapporteur had no intention of underplaying its importance.

35. Mr. PAMBOU-TCHIVOUNDA thanked Mr. Sepúlveda for drawing attention to the need to ensure consistency in chapter IV, especially since its title, "Implication of a State in the internationally wrongful act of another State", did not reflect its actual content. The new title proposed by the Special Rapporteur, "Responsibility of a State for the acts of another State", seemed more appropriate, although for the sake of clarity, it would be preferable to say "Responsibility of a State for the internationally wrongful act of another State". That was a matter for the Drafting Committee to decide.

36. He was broadly in favour of proposed new articles 27 and 28, subject to drafting amendments. He had some doubts, however, about new article 28 bis, particularly subparagraph (*b*): the possibility of invoking "any other ground" for establishing the indirect responsibility of a State implicated in the internationally wrongful act of another State seemed to introduce a heterogeneous element into an otherwise homogeneous whole.

37. Mr. DUGARD said that, if the Commission tried to define "coercion" in article 28, for example, by considering the question whether armed or economic coercion was involved, he feared it would be unable to avoid a debate on a definition of primary rules. In his view, it would be well advised to stick to the question of wrongfulness when considering the problem of coercion.

38. Mr. SEPÚLVEDA said his suggestion that the concept of coercion should be included in the definitions had in no way been meant to open a general debate on primary rules. He had simply wished to ensure that, where coercion was concerned, the conditions under which State responsibility arose were clearly delimited.

39. Mr. YAMADA commended the Special Rapporteur on his excellent analysis of "complicity" and "indirect responsibility" and supported his proposal that articles 27 and 28 should be retained with modifications.

40. In his view, articles 27 and 28 as adopted on first reading were much influenced by the concept of crime

dealt with in article 19 (International crimes and international delicts). He was therefore happy to note that the Special Rapporteur had raised the question whether there should be a general rule applicable equally to bilateral treaties and peremptory norms.

41. As the review of the comparative law experience, contained in the annex to the second report, showed, knowingly and intentionally inducing a breach of contract was considered to be a civil wrong in many legal systems. In the Japanese civil law regime, anyone who knowingly assisted another in breaching a contractual obligation by which that person was bound committed a tort. Such an individual was responsible not for the breach of contract, but for compensation for any damage suffered by the victim of the breach. That concept had, however, not been developed in the field of international law.

42. He therefore supported the Special Rapporteur's conclusion that article 27 should be limited to aid or assistance in the breach of obligations by which the assisting State was itself bound. He also agreed with the Special Rapporteur that the same proviso should be applied to article 28, paragraph 1. The directing or controlling State should be responsible only for acts which would have been wrongful if it had carried them out itself.

43. In the case of coercion, the Special Rapporteur contended that there was no reason why article 28, paragraph 2, should be limited to breaches of obligations by which the coercing State was also bound. Although the distinction made between coercion in article 28, paragraph 2, and aid and assistance in article 27 was relevant, he was not convinced by the Special Rapporteur's conclusion in paragraph 207 of the report. He cited the following example: State A became a party to a treaty binding several States not to sell a primary commodity below a certain fixed price. State B coerced State A into selling the product at a price below the floor set in the agreement, not through force, but through economic pressure. Such coercion was not unlawful under international law. He therefore had serious doubts as to whether State B could be held responsible for the breach.

44. The Special Rapporteur was proposing that articles 27 and 28, paragraph 1, as adopted on first reading should be combined in a single article in order to limit responsibility to cases of obligations opposable to the assisting and directing States. However, there was a conceptual difference between "complicity" in article 27 and "indirect responsibility" in article 28, which was made clear in paragraph (16) of the commentary to article 27, which read:

> The need to take into consideration such a form of "participation" by a State in the internationally wrongful act of another State is further attested by the fact that, as a general rule, aid or assistance in the commission of a wrongful act by another remains in international law, like "complicity" in internal law, an act separate from such commission, an act that is classified differently and that does not necessarily produce the same legal consequences. In other words, the wrongful act of participation by complicity is not necessarily an act of the same nature as the principal internationally wrongful act to which it pertains.

45. To draw an analogy with internal law, it might be said that the acts covered in article 27 were similar to acts committed by an accessory, which usually carried lesser charges than the principal offence. The acts in article 28 were entirely different. In article 28, the directing or controlling or coercing State was using another State as a means of violating obligations and, as such, was the principal perpetrator of the breach and not an accessory. The original grouping of article 27 and article 28 had made that difference very clear.

46. Article 27 raised another problem, how to determine the distribution of responsibility between the assisting State, and the assisted State. Paragraph (20) of the commentary to article 27 stated:

> These, however, are questions that relate not to the part of the draft dealing with the origin of international responsibility but rather to the second part, i.e. that which will deal with the content, forms and degrees of international responsibility.

However, he saw no reference to that question in the draft articles of part two adopted on first reading. The Commission should give some thought to that aspect when it considered part two.

47. Mr. CRAWFORD (Special Rapporteur) said he took it that Mr. Yamada's view was that article 28 should cover both direction and coercion, but that it should be limited to conduct which, if carried out by the directing or coercing State, would be wrongful.

48. Mr. YAMADA said that was exactly what he had had in mind.

49. Mr. PAMBOU-TCHIVOUNDA said that Mr. Yamada seemed to believe it would not be an easy matter to determine to what extent State A's coercing of State B into committing an internationally wrongful act was a decisive factor in the commission of that act. It might be wondered whether the coercion was the cause of the commission of the internationally wrongful act or whether the coercion was in itself the manifestation of an internationally wrongful act. In other words, was the coercing State responsible because it was bound by the obligation whose breach would be attributed to the State being coerced or was the coercing State responsible merely because it had coerced another State into committing the internationally wrongful act, thereby violating a general obligation.

50. Mr. ECONOMIDES said that Mr. Pambou-Tchivounda had raised the very pertinent question of dual responsibility. The question was whether responsibility arose for the coercing State both because it was using an unacceptable practice, coercion, giving rise to an independent responsibility, and because it had coerced another State into perpetrating an internationally wrongful act. The reply depended essentially on the primary rule involved and the Commission could not give it. The Commission should consider the responsibility involved in the commission by the coerced State of the internationally wrongful act, rather than a separate responsibility involving the use of coercion. The latter question should be resolved by the primary rules.

51. Mr. CRAWFORD (Special Rapporteur) said that national law analogies had been completely excluded from articles 27 and 28, especially where accessory responsibility was concerned. The basic assumption behind the draft articles was that each State was responsible for its own conduct, except in extreme circumstances which were dealt with in chapter V. Consequently,

the fact that State B had been directed to commit an internationally wrongful act by State A did not excuse State B from responsibility for the commission of that act. The only exception to that rule occurred when the independence of State B was overwhelmed by an act of coercion. He did not see why the term "coercion" should not be defined, if the Commission so wished. There was no point in the Commission formulating a primary rule and presenting it as a secondary rule just because it declined to define it. Article 28 provided for cases in which the independence of State B had been overwhelmed and the only State which could be held responsible for the commission of the internationally wrongful act was State A. He agreed that that distinction did not correspond to the distinction between accessory and principal in national legal systems. Once again, the basic assumption of the draft articles was that every State, while it remained a State, was responsible for its own action, except in the circumstances covered in chapter V. The reason for article 28 bis was to make it clear that other rules, especially primary rules, might impose broader forms of responsibility.

52. Mr. Sreenivasa RAO said that the Commission must not yield to the temptation to return to primary rules when dealing with secondary rules, as difficult as that might be. The Commission must be aware of the difficulties raised by the draft articles. For example, should economic coercion be understood as coercion within the meaning of Article 2, paragraph 4, of the Charter of the United Nations or as any other prohibited conduct? If a concept of differently injured States could be envisaged under the draft articles, why not a concept of differently injuring States? If the goal was to limit the conditions under which a State could avoid responsibility for the breach of an obligation, could other means not be envisaged to ensure that differently injuring States did not avoid responsibility in the name of lack of applicability or uniformity of standards of national law imported into the international realm? Those were important and complex questions which the Commission should consider most thoroughly and carefully.

The meeting rose at 1 p.m.

2577th MEETING

Wednesday, 26 May 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

State responsibility[1] (*continued*) (A/CN.4/492,[2] A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,[3] A/CN.4/L.574 and Corr.1 and 3)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 27 AND 28 (*continued*)

1. Mr. ECONOMIDES said that the draft articles in chapter IV (Implication of a State in the internationally wrongful act of another State) would rarely be applied in practice, but they did have a place in a text codifying the law of international responsibility. Article 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act) was the more important of the two articles adopted on first reading.

2. By addressing in his proposed new article 27 (Assistance or direction to another State to commit an internationally wrongful act), contained in his second report on State responsibility (A/CN.4/498 and Add.14), two distinct cases, covered by articles 27 and 28 (Responsibility of a State for an internationally wrongful act of another State), paragraph 1, the Special Rapporteur had complicated rather than simplified things. The two cases were very different. Article 27, as adopted on first reading, dealt with two separate internationally wrongful acts which were both punishable: the act of a State which by aid or assistance facilitated the commission of an internationally wrongful act by another State, and the unlawful act of that other State, which constituted the principal breach. In contrast, article 28, paragraph 1, dealt with a single internationally wrongful act which was attributable to a State exercising the power of direction or control of another State. The raison d'être of responsibility differed in the two cases. In the first case (art. 27) it was intentional participation in the commission of a wrongful act, i.e. complicity; in the second case (art. 28, para. 1) it was the incapacity of the subordinate State to act freely at the international level. The criterion was therefore absolute: a State exercising direction or control was automatically responsible even if it was unaware of the commission of the wrongful act by the subordinate State. Thus, the Special Rapporteur's first condition (proposed art. 27, subpara. (*a*)) was fine for article 27 adopted on first reading but not for article 28, paragraph 1. The two cases should be addressed differently in separate articles.

3. Turning to other questions prompted by the Special Rapporteur's proposals for article 27, he said that the new

[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.