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Summary record of the 2577th meeting

Topic:
State responsibility

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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.

form of language gave the erroneous impression that the aiding or assisting State itself participated in the commission of the wrongful act as co-author. Insertion of the phrase "by the latter", present in the existing article, would solve that problem. The Commission should also make it clear that the aiding or assisting State itself committed an independent internationally wrongful act and not rely merely on the words "is internationally responsible", which again worked for the second but not for the first case.

4. Article 27 adopted on first reading said that the aid or assistance was wrongful "even if, taken alone, it would not constitute the breach of an international obligation". That very useful clarification did not appear in the proposed new article 27. Furthermore, new article 27, subparagraph (*a*), or more specifically the words "of the circumstances", went too far. The element of intent was essential in the first case (the aiding or assisting State) but not relevant to the second case (the subordinate State). How was it possible to speak in the first case, before the commission of the wrongful act, of the "circumstances of the internationally wrongful act" as if that act had already been committed? The Commission should be less demanding and replace the words "of the circumstances" by something more general or simply delete them.

5. The second condition, namely new article 27, subparagraph (*b*), gave rise to more problems: the act would be internationally unlawful if committed "by that State", i.e. by the aiding or assisting State. That provision considerably reduced, without good reason, the scope of application of article 27. It did not exclude bilateral obligations alone. It also excluded multilateral obligations by which the aiding or assisting State was not bound. The condition was not necessary, since it was most unlikely that a State would knowingly and deliberately help another State to breach its bilateral or multilateral treaty obligations. Neither the commentary to the draft articles adopted on first reading[4] nor the second report of the Special Rapporteur contained any examples drawn from international practice.

6. Accordingly, since the issue was almost devoid of practical interest and since the Commission's solution would not trouble anyone, it would be wiser to opt for a broad rule offering as many guarantees as possible rather than for a narrow rule leaving many lacunae. From the legal standpoint, it would be difficult to defend the notion that a State could with impunity help another State to breach its international obligations, even very minor ones, when it was perfectly aware that the act in question was wrongful.

7. The Commission should consider whether incitement as such should also be treated on an equal footing with aid and assistance for the most serious international crimes, i.e. the ones covered by article 19 (International crimes and international delicts). In the last sentence of paragraph (13) of its commentary to article 27, the Commission offered a timid glimpse of such a possibility, which should be further explored.

8. Article 28, paragraph 1, adopted on first reading did not give rise to any particular problems: the international responsibility of a subordinate State whose international capacity was non-existent or limited should also be non-existent or limited, and the responsibility should rest primarily with the dominant State, regardless of whether it was aware of the commission of the wrongful act by the subordinate State. On a drafting point, he preferred "power of direction or control" to "power of direction and control", although he recognized that "control" was the stronger term.

9. The proposed new article 28 (Responsibility of a State for coercion of another State) did not give rise to any particular problems either. He could accept the existing version, namely article 28, paragraph 2, or indeed the new formulation, except for the phrase "but for the coercion", which was superfluous and confused the issue. He understood the logic of the Special Rapporteur's approach to new article 28 bis (Effect of this chapter), subparagraph (*a*), but it was somewhat difficult to deal on an equal footing with the case of the aided or assisted State and the case of the subordinate State or State acting under coercion. Article 28 bis, subparagraph (*b*), was difficult to grasp and it should be clarified.

10. Mr. CRAWFORD (Special Rapporteur) said that he was grateful for Mr. Economides' drafting suggestions, but there was an issue of principle concerning article 27. He had no difficulty with the idea of treating article 27, as adopted on first reading, separately from article 28, paragraph 1, but it was not right to assimilate coercion to direction. The starting point of the Commission's approach was that it was dealing only with the responsibility of States in the international sense and not with the responsibility of subordinated entities, which were not States, whatever they might be called. The relations within a formal dependency situation gave rise to wholly new problems, which could largely be dealt with under chapter II (The "act of the State" under international law). One State might give directions to another State, but if the latter State would be acting contrary to its international obligations by complying it should not comply and was not excused if it did comply. In the case of coercion, however, it was excused; hence the need for "but for the coercion".

11. Opinions might differ as to whether a State should be held responsible for knowingly assisting another State to breach an international obligation by which the first State was not bound. Perhaps, in fact, the Commission wished to go beyond the rules of privity or *pacta tertiis nec nocent nec prosunt*. If so, it would be creating new primary rules. Article 27 in its broad form, as adopted on first reading, should not be in the draft articles since it was plainly a primary rule.

12. However, a State should not be able, by inducing or assisting another State, to achieve a result which it could not achieve itself. That point fell properly within the framework of the draft articles. It was the reason for the limitation and for the saving clause, because there might well be other primary rules—in the Convention on the Prevention and Punishment of the Crime of Genocide for example—having a broader scope. Accordingly, the point of his proposal was that a State was entitled to help

[4] See 2576th meeting, footnote 6.

another State to do something which it would be lawful for that State to do itself. The position of the latter State was a completely different question. For instance, if two States agreed between themselves not to export supercomputers to a third State, when they were not acting under multilateral sanctions and the third State was not a legitimate target of collective countermeasures, the third State, in the Economides view, would be committing an internationally wrongful act by importing supercomputers from one of those States if it knew of the bilateral agreement. That was an intolerable situation and could not possibly be right. It made the purpose of bilateral action inimical to a third State binding on that third State. As he had said, if it took that route, the Commission would be enacting new primary rules.

13. Mr. DUGARD, responding to the comments made by Mr. Economides on the proposed new article 27, subparagraph (*a*), said that the State must indeed have knowledge not merely of the circumstances of the act but also of its wrongfulness. The Commission's difficulty was that it was dealing in article 27 with both criminal and delictual responsibility without having decided whether to retain article 19. In the case of criminal responsibility there must be full knowledge of the wrongfulness of the act.

14. Mr. CRAWFORD (Special Rapporteur) said the requirement that the assisting State should be bound by the norm coped with the problem of multilateral obligations, including with respect to crimes. In the event of crimes, all States were bound by the rules relating to crimes, by *jus cogens*. But why should a State be required to have knowledge of wrongfulness when it was acting as an accessory but not be so required when acting by itself? That was why he had included "of the circumstances". If a State had to be bound by the primary obligation in question, all that was needed was the same conditions as when it was acting by itself, namely, that it knew what it was doing. Since ignorance of the law was not an excuse when a State acted by itself, why should it be an excuse in the case of assistance to another State? If the Commission included the proposed limitation, which seemed right in principle and for which he would fight, on the ground that if the article was excluded then the chapter had to be deleted, the draft would remain within the framework of the secondary rules, without prejudice to the existence of broader primary rules, and would cope with the vast problem of criminal intent. His proposal dealt with the problems of bilateral and multilateral treaties and obligations *erga omnes*.

15. It was true that some legal systems adopted a broader view of the law on inducing bilaterally unlawful acts, but most such systems also included substantive defences, the defence of justification, for example, thus transparently shifting the matter to the sphere of the primary norms. The Commission could not do that. The whole point was to keep chapter IV within the framework of a set of secondary rules. He therefore disagreed entirely with Mr. Dugard, whose comment had quite unnecessarily introduced the spectre of the intention of States with respect to the acts in question.

16. Mr. ECONOMIDES said that, according to new article 27, subparagraph (*a*), intent was an essential condition for the application of State responsibility, i.e. an aiding or assisting State must be fully aware of the wrongfulness of the act. In the example of the supercomputer, the establishment of the responsibility of the assisting State required the conclusion that it had been fully aware of the act's wrongfulness and had accepted it. That situation was virtually impossible in practice as far as bilateral obligations were concerned. The Commission was thus giving enormous importance to a question which was not worth examining.

17. Mr. CRAWFORD (Special Rapporteur) said that he would give a specific example of what he meant. On the assumption that an agreement among the States members of OPEC was a legally binding treaty prohibiting them from exporting oil below a certain minimum price—and all the States in the world were perfectly aware of that agreement—then in the Economides view it was an unlawful act for a non-member of OPEC to buy oil below that price; OPEC thus became a worldwide-ratified cartel under chapter IV. That was an intolerable situation.

18. Mr. Sreenivasa RAO said that he was grateful for the Special Rapporteur's clarification, but did not think that the OPEC example was entirely apposite. He also wondered whether it was really possible to apply the concept of intent, generally ascribed to individuals in national law, to States in the framework of international law. Again, perhaps the concept of knowledge of the circumstances was being taken too far. The best course might be to follow the approach used in the existing article and leave a given case open to interpretation as to what exactly was involved.

19. Mr. LUKASHUK said that he fully supported the basic points made by Mr. Economides. Article 27 deserved special attention because internationally wrongful acts were increasingly being committed by States acting together. In that light, the proposed new article 27 was less successful than the version adopted on first reading, especially as it combined in a single article two quite different cases. Was it really possible to treat together the case of assistance to a State and the case of the exercise of direction or control by a State? The latter case was an example of coercion rather than of assistance. Consequently, he could not understand why the exercise of direction or control should be subject to the requirements of subparagraphs (*a*) and (*b*).

20. A State was responsible only if it exercised real and not merely nominal direction or control. If it really exercised such direction or control it could not fail to be aware of the circumstances. Thus, the new article 27, subparagraph (*a*), was illogical. Furthermore, the State exercising direction or control would be an accomplice in the wrongful act even if its influence was not itself wrongful. Therefore the responsibility of the directing or controlling State should be addressed in a separate article. Providing assistance and exercising direction or control were quite different matters. Article 28 as adopted on first reading should be retained.

21. Article 27 had another substantive shortcoming. It dealt with assistance by one State to another, but experience showed that States often committed a wrongful act jointly, with each bearing equal responsibility. In such cases the requirements of article 27 on awareness were

irrelevant. Of course, the question of joint conduct had not escaped the Special Rapporteur's attention. He attributed accessory responsibility to such conduct in paragraph 159, subparagraph (*a*), of his second report. In paragraph 211 he also touched on the problem of conspiracy, but concluded that the notion was not needed in chapter IV. He nevertheless acknowledged in the same paragraph that issues might arise "in terms of reparation for conduct caused jointly by two or more States".

22. In an attempt to justify his position, the Special Rapporteur stated that joint conduct of States usually took place within the framework of an international organization and that the issue should be resolved in the articles on the responsibility of such organizations. That was true, and questions of the responsibility of members of an organization for its wrongful acts would also be resolved there, as would questions of the responsibility of an organization for the acts of its members. However, the draft articles should address as a separate issue the responsibility of States for the joint commission of wrongful acts. It was not of particular significance to the Commission whether such acts were committed under the auspices of an organization. The situation was such a topical one that the Commission could not defer a decision until it had dealt with the articles on the responsibility of international organizations. There should be a separate article on the joint conduct of States.

23. Mr. ADDO said Mr. Economides had stated that intention was a condition sine qua non: in other words, that there must be knowledge on the part of the State in order for responsibility for an internationally wrongful act to be established. The problem was how, and by whom, that intention or knowledge was to be established. Would it be established by an independent adjudicatory or investigatory body, or would it be a presumption rebuttable by the affected State? Intention seemed to him to be a notion that properly belonged to criminal law and municipal systems. He would welcome some clarification of that issue by Mr. Economides or by the Special Rapporteur.

24. Mr. ECONOMIDES said that article 27 did indeed contain the condition that there must be intention, or more accurately knowledge, on the part of the State. However, the question of how, and by whom, the existence of that condition was to be established belonged to the realm of practice. It would be resolved by the organs—perhaps States in their negotiations or, failing that, the judge or arbitrator—competent in a given case.

25. Mr. SIMMA, referring to the OPEC example cited by the Special Rapporteur, said his own reading of new article 27 was that subparagraph (*b*) excluded from its scope strictly bilateral treaty obligations in which State C was not bound by any rule contained in a treaty concluded between States A and B. On the other hand, as it currently stood, article 27 covered not only the case of obligations *erga omnes* but also rules of general international law to which both States were subject, such as rules on diplomatic relations, whether conventional or customary. The wording suggested by the Special Rapporteur thus took care of that problem.

26. The other problem, the subjective element of intention, was incorporated into what was clearly a secondary rule—in a departure from the Commission's usual practice that he heartily welcomed. The concomitant neglect of the objective element of the materiality or essentiality of the aid or assistance was an issue to which he intended to revert later in the debate.

27. Mr. BROWNLIE said he supported the general purpose of new article 27, but felt that subparagraph (*a*) was pleonastic, as the elements of knowledge were already built into the conditions of aiding, assisting, directing and controlling. It was also likely to cause misunderstanding, as it might actually set conditions of liability, and set them at rather a high level. In his view, the article would be much improved by deleting subparagraph (*a*), with subparagraph (*b*) retained as the sole condition.

28. Mr. KABATSI said his understanding of new article 27 as proposed by the Special Rapporteur was that treaty arrangements among a set of States limited to the interests of those States did not bind States not parties to the treaty in question. Those arrangements might be of little interest to the aiding or assisting State, and might even run counter to its interests. When a State gave aid or assistance to another State resulting in the commission of a wrongful act, that wrongful act must be held wrongful in respect of the aiding or assisting State if its responsibility was to be triggered.

29. Mr. CRAWFORD (Special Rapporteur) said he conceded that there were three situations: aid and assistance, direction and control, and coercion, and that the conditions for each needed to be considered separately. He agreed with the views expressed by Mr. Brownlie and Mr. Simma, to the extent that the level at which one set aid and assistance depended on whether subparagraph (*a*) was retained. If subparagraph (*a*) were deleted, aid and assistance would have to be further particularized along the lines hinted at by Mr. Simma. The reason why he had proposed that the wording should merely be "aids or assists" was that the requirements contained in subparagraph (*a*) alleviated any difficulties regarding the threshold.

30. On the point raised by Mr. Lukashuk, he agreed that there might be a need for an article making it clear in chapter II that where more than one State engaged in the conduct, it was attributable to each of them. Chapter IV was not concerned with joint conduct in the proper sense of the word—which would include a situation in which two States acted through a joint organ (other than an international organization). Where a joint organ acted on behalf of several States—for example, in launching a satellite—that constituted conduct of each of those States, attributable to them under chapter II. Chapter IV was concerned with a different situation in which a State did not itself carry out the conduct but assisted, directed or coerced the conduct, which nevertheless remained the conduct of another State. There was absolutely no intention to exclude the case of joint action. The fact that any joint action might in some sense be coordinated by an international organization did not mean that the State was not itself carrying out the conduct. If it was the State's agent that engaged in the act, the State was responsible for the acts of its agent or organ, even though there was some umbrella coordinating role of an international organization. That situation was not excluded by the proposed subparagraph (*a*). The problems of joint conduct should thus

be seen within the framework of chapter II. The Drafting Committee should consider whether some clarification of that point was required in chapter II itself, or whether it could be adequately dealt with in a commentary forming part of the *chapeau* to chapter II.

31. Mr. ROSENSTOCK said that the contributions by previous speakers had raised the fundamental question whether articles 27 and 28 were really needed in an edifice constructed on secondary rules and designed to serve as secondary rules. Undeniably, the Special Rapporteur's proposals for new articles 27, 28, 28 bis and the title of chapter IV were a vast improvement on the text adopted on first reading, with its overbroad scope and its heedless and shameless crossing of the line between primary and secondary rules. The restriction of article 27 to obligations binding upon the assisting State was particularly helpful in ensuring that the Commission did not stray too far and too boldly into the forest of primary rules. However, he still inclined to the view that few if any situations were remotely likely to occur where those articles, as corrected by the Special Rapporteur, would be necessary to establish the result the Special Rapporteur produced. He would be pleased to hear the Special Rapporteur furnish examples of what the Commission had achieved by including that material.

32. A possible exception was a hypothetical situation in which there was a strong case for some coercion having taken place but the coerced State was not legally able to absolve itself by claiming force majeure: where, in short, the coerced State could have resisted, albeit at some considerable cost. One was too close to "incitement" for so loose a rule. If the phrase "but for" was intended to limit the article to circumstances covered by chapter V (Circumstances precluding wrongfulness), that fact had not been made sufficiently clear to him. Perhaps it could be stressed in the commentary.

33. The issue was not whether coercion was legal or otherwise, but whether the Commission was dealing with secondary rules or venting its outrage at coercion—a matter for primary rules. The best way to conceive of the rules contained in the chapter was by way of a process of subtle or indirect attribution. To underscore that point, it might be worth adding the words "acting alone" at the end of proposed new article 27, subparagraph (*b*). Perhaps that was merely a question of drafting.

34. It followed that he was in complete agreement with Mr. Yamada (2576th meeting) and the Special Rapporteur concerning interference with contractual rights, for the reasons given by the latter.

35. Mr. Sreenivasa RAO sought clarification from Mr. Rosenstock concerning a hypothetical situation in which a State might have resisted coercion.

36. Mr. ROSENSTOCK said he had had in mind a situation in which a State was under perhaps considerable pressure to do something, but not to the point at which it could claim force majeure. In such a situation, he was not sure the Commission would remain in the realm of secondary rules if it tried to pin responsibility on the coercing State—unless it wished to adopt a primary rule condemning coercion, a course of action which would not be within its mandate. His conclusion could be built on the words "but for", if stated sufficiently clearly on the record and in the commentary.

37. Mr. SIMMA asked whether the Special Rapporteur could confirm that, in the example cited by Mr. Yamada (ibid.) of a treaty providing for the delivery of a commodity, the threshold he had established for coercion to be operative would not be reached.

38. Mr. CRAWFORD (Special Rapporteur) confirmed that Mr. Simma was correct in his assumption. The Commission must understand that it would get into deep waters if it followed the path proposed by Mr. Economides. It would then become embroiled in the question of what constituted unlawful coercion, whereupon the draft articles would become completely unmanageable. He entirely accepted the point made by Mr. Economides and Mr. Yamada (ibid.): the Commission might want to consider direction and control separately from assistance. But the virtue of adopting the approach he was proposing was that, by so doing, the Commission could maintain a general notion of coercion that did not require it to make extremely controversial judgements about the nature and legality of coercion. To tackle those issues would spell the end of any hopes of concluding consideration of the topic during the current quinquennium. The Commission was not seeking to enact the whole of the law, but merely secondary rules, and it was concerned only with coercion that overrode the will of the acting State. In his view, the Commission was in effect dealing only with situations of force majeure. The situation with regard to direction was quite different: there, the State gave direction and it was obeyed, but the acting State might be perfectly happy to have received the direction and to cooperate therewith, and was therefore not coerced.

39. Mr. YAMADA, clarifying his statement (ibid.), said he had been asking, not whether a certain type of coercion was lawful or unlawful, but whether, if the coercing State was not under an obligation into which the coerced State had entered with other States, it should be held responsible for the breach of the obligation. He had cited the very revealing example of an Asian country with natural gas deposits which were developed and exploited by a European company. The product passed through Japan, however, as the liquefaction and transport of the natural gas were done by a Japanese company. Japan thus had the means to coerce, or influence, the other Asian country to break the export contract. If that country did so, would Japan be held responsible under the proposed new article 28?

40. Mr. DUGARD requested clarification from Mr. Rosenstock on what he himself found a radical but very attractive proposal. Was he suggesting that the Commission should dispense with chapter IV altogether and leave matters to attribution and wrongfulness? Much of the debate so far had centred on primary and secondary rules, but in taking on coercion, the Commission was entering dangerous waters. It was moving towards a definition of coercion which would be very similar to the General Assembly's Definition of Aggression.[5] The proposal by Mr. Rosenstock would allow the "purity" of the draft articles as an exercise in secondary rules to be retained.

[5] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

41. Mr. ROSENSTOCK said that Mr. Dugard had correctly understood his proposal.

42. Mr. Sreenivasa RAO said the point that needed to be stressed after hearing the Special Rapporteur explain certain nuances about handling the issue of coercion in chapter IV was that doing away with coercion altogether would mean doing away with the responsibility of the coercing State, and only the responsibility of the State which had breached the obligation would come into play. There were limits within which that could be done, and the Special Rapporteur was right to point them out.

43. Mr. LUKASHUK said that the Special Rapporteur's response to the problem of coercion was quite correct. It was not for the Commission to give a definition of coercion. A precedent already existed in the 1969 Vienna Convention, which mentioned coercion without elaborating on the concept. The Commission should go along with the position advocated by the Special Rapporteur.

44. Mr. PAMBOU-TCHIVOUNDA said he was grateful to the Special Rapporteur for fighting, not to jettison chapter IV, but to clarify its contents. The current discussion, particularly the statements by Mr. Lukashuk and Mr. Economides, had revealed a concern to avoid contributing to confusion. The only reproach that could be levelled at the Special Rapporteur at the present stage was that new article 27 covered two situations of very differing scope: aid/assistance and direction/control. Those two situations should be clarified, perhaps by reverting to a treatment similar to that used on first reading. What was meant by aid or assistance, precisely? New article 27, subparagraph (*a*), involved a problem, namely "knowledge of the circumstances". Did the phrase "if it is established", in article 27, as adopted on first reading, mean the same thing? If the Commission was in agreement, the work could usefully be done by the Drafting Committee. New article 28 raised similar problems, but even more acutely. What exactly was involved when a State, again "with knowledge of the circumstances", coerced another State? On that problem, however, he thought the Drafting Committee could be of lesser assistance without some guidance from the Special Rapporteur.

45. Mr. SIMMA, referring to Mr. Rosenstock's comments, said there were two choices before the Commission. The first was not to refer in the draft articles to the role or implication of third States in the commission of internationally wrongful acts. If cases arose in which a third State was actually involved, the role of that State would have to be viewed through the overall prism of State responsibility. That approach would be fine with him. Another choice, which Mr. Rosenstock appeared to favour, was to subsume the cases under discussion within attribution. He could go along with that approach as well.

46. The cases in point could be placed on a sliding scale, from aid/assistance to direction/control to coercion. A former Special Rapporteur, Mr. Roberto Ago, had decided to have aid/assistance on the one hand and direction/control and coercion on the other. He himself preferred the previous direction/control solution, because aid/assistance involved an actual wrongdoer who, though assisted, performed the act with full intent. In fact, as the Special Rapporteur had pointed out, direction could be entirely welcome to such a wrongdoer. But that brought up the issue of control, and there was only a difference of degree between control and coercion. Accordingly, the last word had not yet been said about where the various cases were to be placed in the scale.

47. Mr. KUSUMA-ATMADJA said that great care must be exercised when introducing concepts that were valid and useful in internal law into the context of international law, where they could sometimes be dangerous. Intent was one such concept. If wrongful acts were linked to crime, a thicket of problems would rise up involving a distinction between crime and delict. The Commission must not head in that direction.

48. As to Mr. Yamada's remarks, it was true that a joint authority had been set up by one country and its closest neighbour to explore and exploit oil and natural gas. All decisions on those activities were subject to the approval of an executive board consisting of the ministers of the two countries concerned. OPEC was generally considered to be a cartel, in that its members were obliged to abide by certain production limits. To go beyond the production limits was wrong in the eyes of OPEC. But did the obligation extend to prices as well? And at what point were exports affected?

49. The CHAIRMAN extended a warm welcome to the new member of the Commission, Mr. Gaja.

50. Mr. GAJA expressed his thanks to the Chairman and said he would first like to make a general remark. While he recognized the need to revise part one of the draft in the light of developments in practice, of the comments by Governments and further consideration of the subject, several provisions adopted on first reading had been found by ICJ to correspond to rules of general international law. The most recent instance was the advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. The Court was now discussing continuing and composite wrongful acts with reference to the Commission's work in the 1970s under the Special Rapporteur, Mr. Ago, so it was disconcerting to see that the Commission was at the same time engaged in redrafting the relevant articles. Those remarks should be taken, not as criticism, but as a note of caution about altering some provisions that had become an authoritative restatement of the law.

51. He shared some of the Special Rapporteur's misgivings about article 22 (Exhaustion of local remedies). As adopted on first reading, the article represented an attempt to combine two approaches. According to the first approach, the use of local remedies provided the wrongdoing State with the opportunity to remedy what appeared to be a breach of an international obligation. According to the second, shared by the majority of members of the Commission, exhaustion of local remedies was required in all cases and was a burden imposed on the private party before a claim could be preferred on its behalf. If the exhaustion of local remedies was viewed as affecting the admissibility of a claim, the requirement would naturally be viewed as procedural. However, before remedies were

exhausted, the legal consequences that attached to wrongful acts did not necessarily ensue. A State might use its good offices with a view to ensuring that a natural or legal person enjoyed certain treatment even before remedies were exhausted. In the case of a claim arising from the breach of an obligation, however, the exhaustion requirement would have to be complied with. Moreover, the fact that the requirement could be waived was not necessarily decisive. A waiver might follow from an agreement between the States concerned or constitute a unilateral act, altering the circumstances of a case but leaving general international law unaffected.

52. While sympathizing with the view that exhaustion of local remedies affected the admissibility of a claim, he felt that further thought should be given to the issue of whether admissibility of claims had a place in part one.

53. The possibility of a State adopting equivalent conduct—Ago's idea—depended entirely on the content of the primary rule. The details to be inferred from such rules should perhaps be addressed in the commentary rather than in the article itself.

54. As to new article 27, the wording proposed by the Special Rapporteur rightly assumed that the aiding or assisting State should also be under an obligation not to commit the internationally wrongful act. This does not necessarily occur in the case of breach of a multilateral treaty. For example, a State party to a multilateral treaty on extradition was under an obligation to extradite an offender when requested to do so by another State party. Another State party would not be in breach of the treaty unless also requested to extradite. If the offender was expelled by the requested State to another State party to the same treaty, there was arguably no obligation for the latter State to return the offender. In the case of a human rights treaty, however, all States parties were under an obligation to prevent a violation of human rights in any specific circumstances covered by the treaty. There was an *erga omnes* obligation. Aiding or assisting would thus be relevant in the second case but not in the first. Article 27 could perhaps be worded in such a way as to clarify the matter.

55. The existence of an obligation not to assist or aid a wrongdoing State appeared to depend on a wide interpretation of primary rules, as illustrated by the hypothetical case cited in paragraph 181 of the Special Rapporteur's second report of a party to a nuclear non-proliferation treaty assisting another party in acquiring weapons from a third State in breach of the treaty. While he had nothing against the ostensible focus on primary rules in part one, he wondered whether it was wise to state a principle of such wide scope as that contained in article 27, which seemed to add a rule prohibiting aid or assistance to all primary rules.

56. According to note 2 to the proposed new article 27, the assisted State should actually have committed the wrongful act in order for responsibility to ensue. The primary rule would arguably prove a more effective deterrent if it prohibited the rendering of aid or assistance, irrespective of the consequences.

57. Mr. CRAWFORD (Special Rapporteur) said that Mr. Gaja had established a case for the retention of article 22, proposed as new article 26 bis, in chapter III (Breach of an international obligation). Other members felt strongly that it belonged elsewhere and the question was still open. His own position was that it was wrong to treat the issue of local remedies as though it involved a choice between two irreconcilable views—one "substantivist" and the other "proceduralist".

58. With regard to new article 27, subparagraph (*b*), it had been asked whether the aiding or assisting State would be committing a wrongful act in extending the aid or assistance or whether it would have committed a wrongful act if it had committed the same act as the assisted State. The case of an extradition treaty was not perhaps a good example, for if State A instead of performing its obligation under the treaty deported the accused to State B, State B was not assisted in the unlawful act. It merely complied with an obligation to readmit a national. But if State B, knowing that the accused was being sought by State C, successfully urged State A to return him instead of complying with the extradition treaty, State B, if bound by the extradition obligation, was guilty of an unlawful act. A separate extradition request to State B would not be required under the circumstances.

59. Mr. Simma had mentioned three options: deletion, extended attribution and full-scale implication. A fourth option was a code of primary rules. His present wording of the proposed article implied extended attribution in the sense that the assisting or directing State was required to assume responsibility for the conduct that it had knowingly assisted or directed.

60. Mr. HE said that, although there was a case for deleting chapter IV, he supported its retention. The new title "Responsibility of a State for the acts of another State" reflected the content of the chapter more accurately.

61. With regard to new article 27, a number of factors had to be taken into account in determining whether aid or assistance was rendered for the commission of a wrongful act. Interference with contractual rights had been cited to illustrate that the inclusion of article 27 was justified where one State was implicated in the commission of a wrongful act by another. Two conditions were mentioned in the article: that the State rendering the aid or assistance must do so with knowledge of the circumstances of the internationally wrongful act and that the act must be internationally wrongful for both the assisting and the assisted State. Only the second condition was new. The first had been contained in the article adopted on first reading.

62. He doubted whether proposed new article 27 covered the situation previously dealt with under article 28, paragraph 1, as adopted on first reading, i.e. where one State directed and controlled another to breach its international obligations. He would prefer to retain article 28, paragraph 1, with a clarification in the commentary. The terms "direction and control" were more closely related to "coercion". One possible approach would be to draft three separate articles, the first dealing with aid and assistance, the second with direction and control, and the third with

coercion. An alternative approach would be to revert to the article as adopted on first reading: aid and assistance would be covered by article 27, with the addition of the two provisos, direction and control by article 28, paragraph 1, with clarifications in the commentary, and coercion by article 28, paragraph 2. He was in favour of retaining a separate article 28 bis dealing with the effects of chapter IV as a whole.

63. Some important concepts and possibilities should also be envisaged in chapter IV, as enumerated in paragraphs 159, 161 and 211 of the second report. For example, in the case of incitement, a State would be implicated in the act concerned if it materially assisted a State in committing a wrongful act or directed or coerced it to do so. In the case of conspiracy, where a conspiring State aided or assisted another, the planning might itself constitute such assistance. The concept of joint or collective action or conduct raised questions about the extent to which States were responsible for the acts of the organization concerned or of individual member States, and about reparations for damages caused by the conduct of an individual State or two or more States. Responsibility for such acts should not be overlooked in the draft articles.

64. Mr. CRAWFORD (Special Rapporteur) said he agreed entirely that direction and control were more closely related to coercion than to aid and assistance. He had placed them in article 27 because they would be subject to the same regime as aid and assistance. He had no objection to the idea of three separate articles. There was an important distinction between a case in which a State acted voluntarily, even under direction and control, and a case in which it was actually coerced. The assumption was that nobody should be allowed knowingly to coerce another State, to commit a wrongful act, even if the coercion, considered alone, would not be unlawful.

65. He had an open mind on the question of whether the condition applicable in article 27 should also apply to coercion. If, for example, State A took lawful and proportionate countermeasures against State B, the aim of which was to procure cessation of a wrongful act, it in fact engaged in coercive action. If State A also knew that, in doing so, it was inevitable that State B would as a consequence of the countermeasures breach a bilateral obligation to State C, was State A responsible to State C for that situation? Obviously, if State A was bound by the same rule, it would incur responsibility. If not, the situation was unclear. Mr. Yamada argued that it would be difficult to sustain the breadth of article 28 with respect to coercion. One possible solution was to treat the act of coercion as unlawful and another to apply the terms of new article 27, subparagraph (*b*), to coercion: although the coercion as such need not be unlawful, the conduct would be unlawful if committed by the coercing State.

The meeting rose at 1 p.m.

2578th MEETING

Friday, 28 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. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, 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 (*concluded*)

1. Mr. HAFNER said that the Special Rapporteur had been correct to take account of the relativity of international law in drafting new articles 27 (Assistance or direction to another State to commit an internationally wrongful act) and 28 (Responsibility of a State for coercion of another State), proposed in his second report on State responsibility (A/CN.4/498 and Add.1-4). State responsibility was rightfully dealt with from a private law rather than a criminal law point of view. The public law aspects of international law covered only very exceptional situations, whereas the Commission was dealing with the normal application of international law in daily relations.

2. With regard to article 27, he fully subscribed to the two conditions required in order to entail a State's responsibility. To some extent, the condition established in proposed new article 27, subparagraph (*a*), included knowledge of the wrongfulness of the act, but such knowledge must be separated from the intention itself. Emphasizing the need for knowledge of wrongfulness did not mean that the notion of intention was automatically being reintroduced. He also shared the Special Rapporteur's opinion that incitement to commit a wrongful act should be excluded. Mr. Rosenstock had pointed out that all those problems could be dealt with through the question of attributability. It would be interesting, in that connection, to compare article 27 with article 8 (Attribution to the State of the conduct of persons acting in fact on

[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.