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Summary record of the 2588th meeting

Topic:
State responsibility

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67. Mr. CRAWFORD (Special Rapporteur) said that cases of valid retrospective consent which did not merely constitute a waiver could indeed arise. In his view, however, such cases should properly be dealt with in part three of the draft, where he intended to propose an article on the question of waiver and the elimination of breach.

The meeting rose at 1 p.m.

2588th MEETING

Wednesday, 16 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka, 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*)

ARTICLE 29 (*concluded*)

1. Mr. KABATSI said that the question before the Commission was whether to retain article 29 (Consent) in chapter V (Circumstances precluding wrongfulness) of part one of the draft articles on State responsibility. In favour of its being retained was the fact that it had not given rise to formal opposition by the Governments which had formulated comments on chapter V, in the comments and observations received from Governments (A/CN.4/492).[4] As rightly pointed out by Mr. Gaja (2587th meeting), it was perhaps not appropriate on second reading to delete a provision which had not been challenged on first reading because that involved the risk of reopening the substantive debate.

2. However, if the article was retained and referred to the Drafting Committee, obviously the latter would have to devote considerable effort and time to it, given the variety of problems posed, for example, by the validity or limits of consent, the status of natural or juridical persons empowered to give consent or the value of consent vis-à-vis peremptory norms.

3. Another point which the Special Rapporteur had stressed was whether article 29 really belonged in chapter V. Unlike force majeure, distress or state of necessity, which could be invoked by a State committing a wrongful act to justify it, consent was by no means a "circumstance" and still less a "circumstance precluding wrongfulness" because, as rightfully noted by the Special Rapporteur, the fact that consent had been validly given implied that the conduct in question had been perfectly legal at the time of its occurrence.

4. In view of the problem of relevance to chapter V, together with all the related problems referred to earlier, the redrafting of article 29 would require the Drafting Committee to make an effort that was disproportionate to the importance of the article and he was therefore in favour of its deletion.

5. Mr. TOMKA noted that the Special Rapporteur was reviewing article 29 in the light of both comments and observations received from Governments and recent jurisprudence.

6. He was somewhat surprised by the proposal that the article should simply be deleted, whereas the comments of Governments had focused less on the content of the article than on its wording. Did that mean that there was no place in the draft articles on State responsibility for the principle, recognized in many legal systems, of *volenti non fit injuria*?

7. It seemed that, for the Special Rapporteur, to treat prior consent as a circumstance precluding wrongfulness was to confuse the content of the substantive obligation with the operation of the secondary rules of responsibility. He therefore wondered whether it might not be better to incorporate the element of consent in the primary rules. However, the examples which the Special Rapporteur gave in support of his line of reasoning did not seem very relevant. In his own view, commissions of inquiry working in the territory of another State or the exercise of jurisdiction over forces stationed abroad were, rather, cases of derogation from the rules of general international law according to which each State exercised exclusive jurisdiction over its own territory. The rules which were derogated from were not part of *jus cogens* and it was possible to derogate from them by mutual agreement. In paragraph (2) of its commentary to article 29 adopted on first reading,[5] the Commission had emphasized that it had not had in mind the case "of a treaty or agreement intended to suspend in general the rule establishing the obligation, and still less of a treaty or agreement intended to modify or abrogate the rule in question". The fact that there had been consent did not mean that the rule from which the obligation derived ceased to exist or even that it had been suspended. The Commission had stressed that the State

[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.

[4] See 2567th meeting, footnote 5.

[5] See 2587th meeting, footnote 8.

benefiting from the obligation consented not to the general suspension of the rule or its abrogation, but to the non-application of the obligation provided for by the rule in a specific instance. That was the whole point. It was essential to distinguish clearly between the case in which the consent given in a particular situation precluded wrongfulness, or accepted in advance a conduct which, without that consent, would have been contrary to the obligation and consequently wrongful, and cases of the suspension of a treaty under articles 57 and 65 of the 1969 Vienna Convention or derogation from a rule of general international law (customary law) by agreement.

8. The Special Rapporteur had referred on several occasions to the work of the Special Rapporteur on the law of treaties, Sir Gerald Fitzmaurice, and, in particular, to the limits of treaty obligations and circumstances justifying non-performance.[6] However, the law of treaties and the law of State responsibility were two very different things and, under the influence of the former Special Rapporteur on State responsibility, Mr. Roberto Ago, the Commission had decided not to use Fitzmaurice's work in its consideration of State responsibility. In his view, it was preferable for the Commission not to return to it or, if it did, to do so with the greatest caution. In particular, he had doubts about the practical value of distinguishing between "intrinsic" and "extrinsic" justifications or excuses.

9. On the other hand, just as article 62 of the 1969 Vienna Convention elaborated on the *rebus sic stantibus* principle, so the draft articles on State responsibility should elaborate on the principle of consent as a circumstance precluding wrongfulness. Previous speakers had stressed issues relating to the formulation of that principle, such as the definition of consent validly given or the status of persons authorized to give consent, but those issues might either be taken care of by the Drafting Committee or explained in the commentary. With regard to the issue of persons authorized to give consent, he did not see the relevance of the example given in paragraph 240 (*c*) of his second report on State responsibility (A/CN.4/498 and Add.1-4) on the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which had nothing to do with the subject matter of article 29. That Convention related to consent to arbitration to settle disputes arising between a State party and private corporations or persons of the other State party. At no time did such consent constitute a circumstance precluding wrongfulness within the meaning of article 29 or a waiver of a claim of responsibility.

10. The members of the Commission who had spoken against retaining article 29 (2587th meeting) had also expressed concern about its possible abuse. He was, however, not convinced that its deletion would provide States, and in particular smaller and weaker ones, with better protection. Deleting it would simply shift the problem by requiring States to consider whether consent was implied and to undertake a process of interpretation for want of clearly stated limits such as those in article 29, paragraph 2. In reality, that article made it possible to settle many problems and, for that reason, he fully endorsed its being retained.

[6] Ibid, para. 3.

11. Mr. SIMMA said that the report under consideration showed the progress made in thinking on the subject of State responsibility and demonstrated that *lex posterior* was always better than *lex prior*.

12. Concerning article 29, he said that his view was radically opposed to that of Mr. Tomka. To answer the question whether consent was really a circumstance precluding wrongfulness, it was necessary to refer to the premises of both the Special Rapporteur and his predecessors, which seemed to be the following: in cases of circumstances which precluded wrongfulness, the primary obligation remained in force, but the Commission was in the presence of certain cases which had the effect of precluding wrongfulness as long as the circumstances existed. That premise had never been contested by Governments or academic observers and, as the Special Rapporteur had pointed out in his second report, it had been corroborated by jurisprudence. According to that premise, the Special Rapporteur's conclusion that consent had no place in circumstances precluding wrongfulness was unassailable. Consent given in advance removed or suspended the operation of the primary obligation. Whether or not the *volenti non fit injuria* principle belonged in the draft articles on State responsibility was not the issue. The fact of the matter was that it was not a circumstance precluding wrongfulness as defined by Mr. Ago.

13. If, despite those considerations, the Commission decided to retain consent as a circumstance precluding wrongfulness, paragraph 240 of his second report gave it a foretaste of the difficulties which it would face. Even the question whether consent had been validly given gave rise to a whole set of problems, as did the competence of persons authorized to give such consent. With regard to the relationship between consent and peremptory norms, the Special Rapporteur rightly argued that some peremptory norms contained an intrinsic consent element. A comparison of paragraph 2 of article 29 as adopted on first reading with Article 2, paragraph 4, of the Charter of the United Nations showed that that problem had never even been touched on. Paragraph 2 said that paragraph 1 (the fact that consent could be a circumstance precluding wrongfulness) did not apply if the obligation arose out of a peremptory norm of general international law. Article 2, paragraph 4, of the Charter was certainly a peremptory norm. And yet everyone recognized that, if a State consented to the military forces of another State marching into its territory, such "authorization" would constitute a derogation from the provisions of paragraph 4.

14. If the Commission decided to retain article 29, then paragraph 2 of the version adopted on first reading was obviously very insufficient. Nor did the arguments put forward in the second report militate in favour of retaining it. The issues which the Commission would have to face if it decided to retain it would be too numerous and difficult to be referred to a Drafting Committee.

15. The only valid argument in favour of retaining article 29 was that it had not been challenged by Governments, but was that valid and sufficient? The arguments in favour of its deletion were more convincing, the first being that consent was not a circumstance precluding wrongfulness because it did not fit the Commission's definition of such circumstances. As pointed out by

Mr. Kateka (2587th meeting), article 29 also ran the risk of abuse, which was yet another reason to abandon it. Consequently, he was in favour of its deletion.

16. Mr. ELARABY said that the Special Rapporteur's analysis of the problems raised by article 29 had been very persuasive, but he did not think that the problems were such as to warrant deleting the article. The various points mentioned in paragraph 240 of the second report clearly called for in-depth reflection and careful drafting, but the question of consent could not, in his view, be omitted from the draft articles because a number of issues raised by Governments had to be settled.

17. For example, it was clear from paragraph (20) of the commentary to article 29 adopted on first reading that consent given by a State was only one element of an agreement between two parties: the subject having the obligation and the subject having the corresponding subjective right, who waived it. Such an agreement produced an effect only between the parties concerned and the obligation continued to exist with respect to all other parties. That point needed to be emphasized. Notwithstanding the drafting difficulties, it was also important to state in the draft articles that consent had to be validly given; in particular, it should have been explicitly expressed and not obtained through coercion. As Mr. Kateka had said (ibid.), States could coerce other parties into giving their consent and it should be mentioned somewhere that such conduct was not authorized.

18. Moreover, paragraph (17) of the commentary to article 29 adopted on first reading stressed the limited scope and duration of consent. Those limitations should also be spelled out in the draft articles. The Commission must offer guidance to States.

19. If only for those practical reasons, he thought that article 29 should be retained, although he agreed with Mr. Hafner that the title should be amended to read "Prior consent".

20. Mr. ECONOMIDES said that he would comment on both article 29 and article 29 bis (Compliance with a peremptory norm (*jus cogens*)) proposed by the Special Rapporteur in his second report because, in his view, they were closely linked.

21. With regard to article 29, he broadly shared the Special Rapporteur's conclusions because he had always felt that the article, or rather paragraph 1 thereof, was unorthodox: the idea that a State could consent to the perpetration of wrongful acts at its expense was somewhat troubling. Such a provision had no place in the draft articles on State responsibility. In the case of minor limitations on sovereignty, it was superfluous, while, in the case of major limitations, it raised problems and was quite simply undesirable. He had therefore no objection to the deletion of paragraph 1.

22. Paragraph 2, on the other hand, if skilfully reworded, could add a useful new element to article 29 bis proposed by the Special Rapporteur. One could say, for example, at the end of article 29 bis, that a State "cannot, by its consent, render lawful with respect to itself an act by another State that is not in conformity with an international obligation deriving from a peremptory norm of international law". That would have the dual advantage of stressing the legal authority of a peremptory norm and, *a contrario*, laying down the limits of consent.

23. Article 29 bis was absolutely essential because chapter V would be incomplete without it. If there was a conflict between a peremptory international obligation and an ordinary international obligation when it came to determining whether an act by a State was lawful or wrongful, the peremptory norm must clearly take precedence in all cases. However, the wording of article 29 bis called for two comments: the word "required" seemed inappropriate and the phrase "in the circumstances" made for obscurity rather than clarity. He suggested the following wording: "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the same act is in conformity with a peremptory norm of general international law."

24. Alternatively, laying more emphasis on the conflict of obligations, it might be said that "The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the obligation conflicts with a peremptory norm of general international law". That wording was based on article 53 of the 1969 Vienna Convention.

25. Mr. CRAWFORD (Special Rapporteur) said that article 29 bis was not being discussed for the time being. Article 29 should be considered fully on its merits before Mr. Economides' proposal concerning article 29, paragraph 2, was considered.

26. Mr. SIMMA said that the concept of consent was implicit in article 29 bis and raised the same problem of logic as had been mentioned by some members. To say in article 29 bis, in a new paragraph 2, that consent did not preclude wrongfulness in respect of *jus cogens* could imply, *a contrario*, that consent was valid as a matter of course in other circumstances. If the condition of consent was not explicitly expressed, it could not be subjected to restrictions ("validly given", "freely expressed") in a new paragraph 2 of article 29 bis because it would be nonsensical to say that consent, even where validly given, was null and void if the act breached *jus cogens* norms.

27. Mr. ECONOMIDES said that he had opposed the inclusion of article 29, paragraph 1, in the draft articles, but was in favour of including paragraph 2 after the provision of article 29 bis. It was true that consent could not render lawful an act by a State that was in breach of a *jus cogens* obligation and it could be assumed, *a contrario*, that in all other cases consent could render such an act lawful. In practice, all other cases would depend on the interpretation of the primary rule.

28. Mr. KAMTO said he was inclined to support the deletion of article 29. Two situations could arise out of the giving of consent prior to the occurrence of an act. Either such consent was not contrary to a peremptory norm or an objective *erga omnes* obligation, in which case there was no difficulty because the act formed part of the normal relations between two States. Or else the consent was contrary to *jus cogens*, in which case a situation would arise in which two States were shirking multilateral obligations. If the article was not deleted, it should at least be reworded. He did not think that Mr. Economides' pro-

posal resolved the problem fully, however, because his wording simply purported to make explicit article 53 of the 1969 Vienna Convention and not really to create a system of exoneration from wrongfulness. To say that wrongfulness would be precluded by the fact that the wrongful act was in conformity with a *jus cogens* obligation was nothing new. If the act was not wrongful because it was in conformity with a *jus cogens* obligation, the obligation should never have existed because it was in any case a breach of *jus cogens*. So it was not just practical arguments (confusion between the law of treaties and the law of responsibility), but legal arguments too that could be cited in support of the deletion of the article.

29. Mr. HE said it was clear from the second report that, in many cases, the consent given by a State before the occurrence of an act amounted to a legalization of the act in international law, while consent given after the commission of the act was tantamount to a waiver of responsibility, but would not prevent responsibility from arising when the act occurred. Thus, neither case constituted a circumstance precluding wrongfulness. However, one could still raise a third possibility that there might be cases where consent might be validly given in advance, but where it was not part of the definition of the obligation. In such a case, consent in article 29 as adopted on first reading could still be applied. He asked whether such a possibility could be excluded. The example cited in the first footnote to paragraph 238 of his second report, approximating Fitzmaurice's idea of "acceptance of non-performance", could come within the scope of former article 29 inasmuch as it could relieve State A of responsibility. In that regard, article 29 could still be useful after being reworded to reflect the views expressed during the discussion.

30. Mr. LUKASHUK said that the discussion of article 29 was purely theoretical. It was not a matter of the progressive development of the law, but of the codification of existing provisions in the light of the 1969 Vienna Convention. Consent represented an agreement in the context of which other parts of the agreement could be terminated. Whether article 29 was retained or not, the situation would remain unchanged because the article was a concrete expression of a general provision applicable to the articles on responsibility. A number of questions had been raised, particularly about the relationship with peremptory *jus cogens* norms, for example, on coercion, but such issues had been settled by the Convention and each individual article could not be linked to those general provisions. If the article was deleted, the situation would not change, but the intrinsic logic of the draft articles would be adversely affected. It was therefore in order to preserve the systemic character and overall logic of the draft articles that article 29 should, in his view, be retained.

31. Mr. BROWNLIE said he thought that it would be disastrous to delete article 29. To begin with, its deletion would fly in the face of experience. Secondly, it would be completely ineffectual because consent would continue to be a justification in international law and the Commission's assertion to the contrary would change nothing. Thirdly, it would be viewed as eccentric and tarnish the Commission's reputation. And, fourthly, it would be illogical: consent could create a situation in which the primary rule ceased to be binding and the question of consent as a justification would lose all consistency. That analysis did not apply, however, in the context of legal discussions before an international court of arbitration. In that kind of setting, the argument that consent encroached on primary obligations was possible, but it could conversely be argued, where such was not the case, that the circumstances had generated consent entailing a specific risk of damage even if the primary obligation remained in force. There were thus two situations which might be closely interconnected, as was the case with many factual situations, but which were nevertheless dissimilar. It was therefore illogical to talk about the validity or non-validity of a primary obligation. He was furthermore unconvinced by the argument that the Commission was faced with difficult drafting problems and that a reference to *jus cogens* was necessary. The Commission ran up against drafting difficulties pertaining to *jus cogens* in most of its work.

32. Mr. ADDO said that, in international law, many of the violations of the rights of a State could be legitimated by its consent, but that consent had to be given before or at the same time as the violation. Retrospective assent would constitute a waiver of the right to claim reparations, but would not repair the breach of international law that had taken place. Consent would be vitiated, of course, by error, coercion or fraud, by analogy with the rules applying to treaties. Whether or not consent had been freely given in advance was a crucial question of fact that was fraught with difficulties, for it had often been invoked by States to attempt to justify what were blatant acts of intervention. The entry of foreign troops into the territory of a State, which was normally unlawful, usually became lawful if it took place with the consent of that State. The Security Council and the General Assembly had considered many cases of that kind. The basic principle of consent as a legitimating factor had not been challenged in those forums. Differences of opinion always arose, however, on whether consent had been validly given, whether the rights of other States had been violated and whether peremptory norms had been infringed. According to paragraph (11) of the commentary to article 29 adopted on first reading, consent, to be valid, must be "really expressed", but the expression could be in the form of conduct as well as of words. Was there consent if there were elements of coercion? Would implicit threats of invasion or threats of economic retaliation invalidate consent? Did consent, to be valid, require the support of the people in a State? Was domestic law of relevance and was it decisive or were standards of international law relevant for determining the "will" of the State? Those questions arose in several cases involving military intervention. Consent precluded the wrongfulness of an act only in relation to the State that gave its consent, but an act consented to by one State could constitute a breach for another. For example, injury to nationals of a consenting State in violation of an international convention could also constitute a breach in respect of other parties to the convention. It had to be noted that the Commission's draft considered that even consent freely given would not absolve a State from responsibility where the obligation was one of *jus cogens*. Did that mean that the principle of *jus cogens* was being extended beyond what was laid down in articles 53 and 64 of the 1969 Vienna Convention? Mr. Ago, and the

Commission had based their views on "logical principles" rather than on practice. Would a Government then be free to consent to give up sovereignty and become a protectorate or province of another State? Could self-determination be asserted as a principle of *jus cogens* and a referendum demanded as a condition of a State's consent to give up sovereign rights in favour of another? Those were large questions on which members of the Commission should exercise their minds before committing themselves to retaining article 29. He personally was in favour of the deletion of the article because it would create more problems than it would solve. Experience was preferable to logic.

33. Mr. PELLET warned the Commission about the danger of rashly challenging provisions that had been adopted on first reading and had been generally well received. Certainly, nothing prevented the Commission from going back to an article or even deleting it or adding others, especially since some provisions had been under consideration for 20 or 30 years. He did not blame the Special Rapporteur for wishing to delete a particular provision if he believed there were pressing reasons to do so, but that was not the current case. Like Mr. Brownlie, he thought that the Commission would look ridiculous if it deleted article 29. Mr. Addo had said that experience should prevail over logic. The relevant experience and practice, however, were precisely that consent validly given constituted a circumstance precluding wrongfulness. He had great difficulty in understanding the tortuous reasoning of certain members of the Commission who seemed to have doubts about what appeared to be obvious and in conformity with consistent practice that had been firmly established. When a State gave its consent to an act, it was valid, even if a contrary rule had existed at the outset. It was also very difficult to understand the assertion that, when consent operated as a circumstance precluding wrongfulness, it was included in the primary rule. That did not reflect the real situation in law. There were, on the one hand, primary rules which either excluded or did not exclude the possibility of giving consent and, on the other hand, a general rule that, when a State expressed its consent not to apply a rule of positive law, its responsibility did not come into play because the wrongfulness itself was expunged. The rule provided for in article 29, paragraph 1, adopted on first reading, to some extent played the role of the *rebus sic stantibus* principle in the law of treaties. Some authors did, of course, claim that the principle was a clause implicitly included in treaties, but that was an artificial analysis, for it was in fact a general rule of international law. The idea that it was possible to give consent to the infringement of what was essentially a general rule also seemed to be a rule of international law. Primary rules had nothing to do with the matter. They could include or exclude the possibility of consent, but that was an entirely different issue. It would be unfortunate if the Commission suggested the deletion of a provision that seemed to be patently obvious.

34. He agreed with the members of the Commission who had said that consent constituted a circumstance precluding wrongfulness only if it had been given in advance. Consent given ex post facto came under the determination of responsibility and, thus, of part two of the draft articles. If consent was retained among the circumstances precluding wrongfulness, as he hoped it would be, the words "validly given" did not give rise to any particular problems, since it was quite true that not all consent was valid and the examples referred to by Mr. Addo were relevant and convincing. He did not think that now was the right time to raise the question when consent was given validly or not. If some members of the Commission thought that the validity of consent was a crucial issue, it should be included in the agenda, but he did not think that all of international law could be rewritten in connection with each provision of a draft.

35. Those observations made him very sceptical about whether article 29, paragraph 2, as adopted on first reading, was well founded. While he was fully aware that *jus cogens* was an essential safeguard for the expression of consent and that consent that was contrary to *jus cogens* could not produce effects, he believed that that was just one more example of "consent validly given" and just one of the very explicit and detailed warnings that the Special Rapporteur should sound to explain the words "validly given". That was why he believed that article 29, paragraph 1, should be retained, paragraph 2 should be deleted and further explanations should be given in the commentary.

36. Mr. Sreenivasa RAO said he fully endorsed the views expressed by Mr. Pellet and, like him, felt that, since the draft articles were being considered on second reading and some of their provisions had already been applied, it would be better to avoid deleting an article when it was under consideration unless there were fundamental reasons for doing so.

37. He agreed with the concerns expressed by Mr. Kamto and Mr. Kateka (2587th meeting) and by Mr. Addo, but he also thought that the cases referred to could be seen only as examples of consent validly given for a specific purpose and should not be extended to serve as a basis for the breach of other rules. He was therefore in favour of retaining article 29 with all the examples and explanations that might be necessary, especially as its deletion would in no way help to solve the problems involved.

38. Mr. MELESCANU said that he would like the Special Rapporteur to give an example of the application of the rule embodied in article 29, paragraph 1, or the possibility of such application. Since, in his opinion, the law was based primarily on experience, it was necessary to see whether experience did indeed provide the basis for retaining article 29, paragraph 1. The examples given by other members were not convincing, particularly the example of the right of overflight. While overflight of the territory of a country without prior authorization was prohibited under international law, once agreement had been given in advance, the rule applied and a wrongful act could no longer be involved.

39. Mr. CRAWFORD (Special Rapporteur) said that the current discussion went to the very heart of the issue of circumstances precluding wrongfulness and that the members of the Commission who did not believe in the distinction between primary rules and secondary rules sometimes became a bit impatient with those who did. His concern had been to situate the idea of consent within the framework of that distinction, which had been made in

chapter V. That approach did not give rise to problems with regard to many of the other circumstances covered by the chapter. If the problems raised by the idea of consent could be solved by the Drafting Committee, that was what should be done.

40. Mr. Brownlie and Mr. Gaja, together with Mr. Sreenivasa Rao, did not include the idea of consent in the context of consent given in advance in a treaty, which they saw not as a circumstance precluding wrongfulness within the meaning of chapter V, but as part of *lex specialis*. In their view, there could be some cases which came within the framework of a system accepted by all, but to which there were major exceptions, even if a great deal of room was made for consent within that system. The principle of *volenti non fit injuria* might well be a general principle as far as the rights of a consenting State were concerned. That was an important point which should clearly flow from the rule and be explained in the commentary. There could, however, be some situations in which the only excuse or justification for a conduct had been consent that had remained in force at the time of the act. That was especially true in the case of the use of force. If a State consented in advance to the use of force in its territory and then withdrew its consent, recourse to force became wrongful, even if the State had withdrawn its consent ill-advisedly. He did not think, however, that a State was entitled to waive its right to withdraw its consent to the use of force in its territory by another State. That was an intermediate case that he had not foreseen in his report. In reply to Mr. Melescanu, he said that, to his knowledge, article 29, paragraph 1, had not been expressly invoked in case law, but that everyone accepted the principle of effective consent as an important operational element. Account might nevertheless be taken of intermediate cases where consent had not been withdrawn after, but before the act.

41. Mr. GOCO drew Mr. Melescanu's attention to the case of *Savarkar*, an Indian revolutionary who had escaped during a call in a French port from the ship on which the British Government had been transporting him for repatriation to and trial in India. He had ultimately been arrested on French territory with the consent of a French policeman. The question had been whether there had been consent in that case, since the French Government had subsequently disavowed the policeman and that raised the issue of how to determine which authority was entitled to give consent.

42. Mr. Addo's question touched on very delicate issues, since it had to be determined whether consent had in fact been given and then whether it was limited by other factors. In his opinion, too much time should not be spent on those aspects and there was a certain logic in the conclusions that the Special Rapporteur had drawn. Consent validly given in advance entailed lawfulness, but to seek to determine whether such consent had been given in valid circumstances would be to start down a road full of traps. Whether the law was a matter of logic or of experience, it was the reflection of the times and should evolve accordingly.

43. Mr. TOMKA said he did not think that it was essential to determine whether article 29 had been expressly invoked or not. Referring to Mr. Melescanu's question, he said that a person considered to be dangerous might be arrested by the forces of a State in the territory of another State, the latter State having given its consent in advance to that arrest. By giving its consent, that State accepted the suspension of the other State's obligation, but wrongfulness was excluded only in that particular case and there was no general suspension of the rule establishing the obligation.

44. Mr. PELLET pointed out that, in the *Savarkar* case, it could be argued that the consent had not been given in a lawful manner and had thus not been validly expressed, but that, if it had been, the rule established in article 29 would have applied, a consideration that also militated in favour of retaining article 29, paragraph 1.

45. Mr. ROSENSTOCK said he was in favour of the deletion of article 29, but there appeared to be no majority in favour of retention or deletion. The Drafting Committee might therefore be asked to make minor amendments to the text that would be acceptable to the advocates of deletion. The Special Rapporteur himself seemed to be backtracking and further time should not be spent on the discussion.

46. Mr. CRAWFORD (Special Rapporteur) said that he endorsed Mr. Rosentock's proposal. Summing up the debate, he said it was true that Governments had not criticized the inclusion of article 29 as such, but had expressed concerns about its wording, even if that wording appeared to raise issues that went far beyond what some of the comments suggested. Intermediate cases could be imagined, as indicated in the footnote at the end of paragraph 238 of the second report. He was receptive to the argument that deletion of the article could give the impression that there were far greater implications than the concerns raised by distinctions, which were, in many respects, very much open to manipulation. The question was where exactly the boundary between primary rules and secondary rules lay. If it was ultimately decided, as seemed likely, that the idea of consent should be maintained in the draft articles, satisfactory wording must be found to meet the concerns expressed by several members of the Commission.

47. Mr. DUGARD said that the second report of the Special Rapporteur was distinguished by its clarity at the level of jurisprudence and its insistence on the distinction between primary and secondary rules. Leaving aside the question whether law was essentially a matter of experience or of logic, the only possible justification for maintaining article 29 seemed to him to be that the principle it set forth formed part of experience, in terms both of domestic law and of the draft articles on State responsibility.

48. Very little mention had been made in the current debate of the analogy with domestic law, although the principle *volenti non fit injuria* came from that source. The principle was a general one found in many legal systems and was, in particular, widely accepted in criminal law. The Commission was not obliged, of course, to be guided too rigidly by the precepts of domestic law, which were not founded upon a clear-cut distinction between primary and secondary rules, if only because domestic law systems considerably predated that distinction. For

example, the rule against assault was often defined in domestic law as violation of the bodily integrity of a person without that person's consent; there, the idea of consent formed part of the primary rule. On the other hand, it was accepted in most domestic law systems that consent precluded wrongfulness. Such lack of clarity in the thinking on those matters could be explained by the way in which domestic law had evolved. The Commission would have to decide whether it wished to preserve the muddiness of domestic waters or preferred the logic advocated by the Special Rapporteur in his second report.

49. Another reason in support of the deletion of article 29 was the difficulty of deciding by what authority consent could be given. In the case of domestic law, that was an easy matter, but, in international law, it was often a most difficult exercise; Ago, in his time, had been well aware of the problem by stipulating that consent had to be "validly given". A recent case, the arrest of Mr. Öcalan in Kenya, provided a good illustration of the difficulty, since it was not yet clearly established whether consent to his arrest in Kenyan territory had been given by a person empowered to do so. If the answer was in the negative, the arrest would have been unlawful.

50. He therefore thought it preferable to opt for the clarity of jurisprudence and to consider that absence of consent was an intrinsic condition of wrongfulness and the giving of consent did not preclude wrongfulness. His decision to oppose the retention of article 29 was confirmed by the impossibility of producing a good example of a case where consent would have precluded wrongfulness. Mr. Tomka had mentioned the hypothesis of kidnapping, but the primary rule in that case was and remained that there should be no intrusion in the territory of the State by an agent of another State. In the case of Eichmann,[7] for example, the abduction had been carried out by Israeli agents in Argentine territory without the previous consent of the Argentine Government; thus, the act had been wrongful even if the Argentine State had subsequently waived its right to demand reparation from the Israeli State. Likewise, in the case of overflight of a territory, a State which gave its consent after the event waived the right to demand reparation.

51. All those considerations led him to oppose the retention of article 29 and to wonder why some members wanted to keep it. It had been argued that logic required the maintenance of article 29, but, in his own view, it was, in fact, experience—long years of acceptance of article 29—that was inducing the members in question to want to keep it. That, however, raised the question of the object of the present debate. Was it simply to endorse previously approved articles or was it to submit them to careful scrutiny? Of course, it would be difficult to modify provisions already endorsed by, for example, ICJ, such as article 33 (State of necessity), but, where there had been no such confirmation by jurisprudence, as was the case with article 29, and where State practice in the area concerned was negligible, a fresh look at the question seemed to be called for. In the case in point, logic required the deletion of article 29.

[7] See Security Council resolution 138 (1960) of 23 June 1960.

52. Mr. PAMBOU-TCHIVOUNDA said that he was in favour of retaining article 29. The greatest circumspection should be exercised in considering the deletion of a provision from what was already a long-standing draft. Some of the draft provisions had already received what amounted to legal confirmation; that was, for instance, the case with article 33. The Commission could not be sure that a situation would not arise in future where a judge might endorse a principle set forth in an article that had been deleted. It would be wrong to prejudge the future fate of the draft articles, some parts of which, adopted on first reading, could already be regarded as forming part of the law.

53. However, article 29 called for three comments. First, its wording was a little awkward because, as it stood, it gave the impression that the responsibility relationship between the State committing the wrongful act and the injured State had to be seen as part of an exclusively treaty-based system of obligations, without, incidentally, making it clear whether bilateral or multilateral treaties were meant. Thus, the concept of "consent" and that of "peremptory norms of international law" harked back to the 1969 Vienna Convention, which was entirely devoted to the primary rules of the law of treaties. That gave a distorted picture of the topic.

54. Secondly, obligations whose violation constituted an internationally wrongful act could be obligations in customary international law, general international law, imperative law, objective law, etc., all of which had to be borne in mind when analysing article 29.

55. Thirdly, the great shortcoming of article 29 was that it singled out the role of the injured State's conduct in the occurrence of the wrongful act by reducing it to the consent which that State was supposed to give under certain conditions, which, incidentally, were both too specific and not specific enough. If the Commission was to be rigorous in relation to the importance of the conduct of the injured State in the occurrence of the wrongful act as a circumstance precluding wrongfulness, it had to adopt the same approach and be just as demanding in the case of all other circumstances precluding wrongfulness (distress, force majeure, etc.).

56. An answer also had to be found to the question of the form (written, declarative or other) that consent could take. Article 29 was silent on that point. Furthermore, all States could find themselves in the situation dealt with by the provision and it could be asked whether they should provide for such an eventuality in their constitution or some other code. He would not mention silence, that paradoxical form which could reflect implicit consent; after a certain time, the absence of reaction on the part of the injured State could be taken as consent. For political reasons, States did not necessarily care to publicize their intentions when organizing their legal relationships. Only in the presence of a dispute did the question arise as to what precisely had been agreed between them. Realism dictated recognition of the fact that there were forms of tacit consent to a wrongful act and that such tacit consent was a circumstance precluding wrongfulness.

57. His position in favour of maintaining article 29 was thus subject to two conditions. In paragraph 1, any terms

that could prove confusing and were only of theoretical importance, such as the word "validly", should be deleted. Since it was hard to see what purpose it served to reproduce article 53 of the 1969 Vienna Convention word for word in paragraph 2—in a reference that was full of possibilities for misunderstanding—only the first sentence should be retained, with the addition of a reference to obligations of an objective nature (obligations *erga omnes*). Jurisprudence existed in that regard and that type of obligation could not be ignored. Thus, if article 29 referred to "a rule of *just cogens* or a rule *erga omnes*", article 29 bis could be deleted.

58. Mr. CRAWFORD (Special Rapporteur) noted that the problem arising in connection with article 29 was partly the result of the fact that the situation it referred to was the least likely of all circumstances that could preclude the wrongfulness of an international act. Furthermore, as had just been recalled, the article implied a complete displacement of the obligation. Fitzmaurice's analysis, although 40 years old, remained entirely accurate in that regard.

59. Two other things were also clear. First, while no Government which had submitted comments on the article had expressly accepted it, none had proposed that it should be deleted. Secondly, the majority of members of the Commission seemed to be in favour of maintaining it.

60. It should, however, be pointed out that the situation dealt with in the article was not one in which wrongfulness had been ruled out in advance by prior agreement between two States in the form of a treaty or some other analogous instrument, but a situation where consent was given at the very moment of the occurrence of the wrongful act. Such a middle case did exist and, for that reason, the general principle according to which a State was free to dispose of its own rights had to be expressly stated in chapter V. Article 29 was precisely a reflection of such a middle case.

61. He had no objection to article 29 being referred to the Drafting Committee, on the assumption that the Drafting Committee would produce a modified version of the article.

62. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer article 29 to the Drafting Committee.

It was so agreed.

ARTICLE 29 bis

63. Mr. GAJA recalled that articles 53 and 64 of the 1969 Vienna Convention provided that any treaty which conflicted with a peremptory norm of general international law was void. Article 65 of the Convention described the procedure to be followed with regard to the invalidity or termination of a treaty conflicting with *jus cogens*. That implied that a treaty remained in force, so far as the obligation in question was concerned, for as long as that procedure had not been carried out. It was therefore possible to imagine a case where an obligation provided for by the treaty remained and coexisted with another obligation imposed by a peremptory norm. Yet the very term "peremptory norm" meant that an act incompatible with such a norm was considered unlawful. That was the case, for example, with the use of force in the territory of another State, which remained wrongful even if there was a treaty providing for it. As Mr. Economides had pointed out, the obligation under the peremptory rule prevailed over that imposed by the treaty rule. It was equally obvious that the treaty obligation was one which the State parties were free not to respect. That followed, however, not from treaty law, but from the law of State responsibility.

64. Article 29 bis was perhaps not absolutely necessary, but it could do no harm. However, a problem arose as to which provisions of the Charter of the United Nations took precedence over obligations established by treaty between Member States. Did all Charter provisions do so or only those which corresponded to a peremptory norm of international law?

65. Mr. PELLET said that the explanation provided in article 29 bis not only did no harm, but was very useful. As the Special Rapporteur pointed out, it was best not to water it down too much by explaining that conduct contrary to a norm of *jus cogens* was not lawful. That was a rule of general international law which was not specific to the law of State responsibility. It would be best to leave article 29 bis as it stood.

66. The Special Rapporteur also stated that it was not necessary to repeat the definition of a "peremptory norm". Yet that had already been done in article 29, paragraph 2, adopted on first reading. Contrary to what the Special Rapporteur said, perhaps a little categorically, that definition, which continued to be disputed, had to appear somewhere in the draft, but not necessarily in the place where it was located at the current time. It also did not necessarily have to reproduce the definition given in article 53 of the 1969 Vienna Convention, whose scope was exclusively functional, since it was suited to the purposes of treaty law. By moving outside that context, there could be a broader definition.

67. Mr. TOMKA said that it was difficult to imagine a situation in which the rule provided for in article 29 bis would be applicable. In customary international law, it would mean that there was a customary rule which required a certain conduct on the part of a State, while, at the same time, there was a peremptory rule prohibiting that conduct. Article 29 bis would thus serve a practical purpose only if a conflict existed between obligations of general international law.

68. In the law of treaties, if a treaty was not in conformity with a norm of a peremptory nature, it was invalidated *ab initio* and no obligation stemmed from it. In the event of the supervening emergence of a new peremptory norm which the treaty in force contravened and if a State invoked that conflict in order to denounce the treaty, the treaty was void as soon as the State invoked that conflict. As soon as it did so, the State had no obligation to perform the treaty and he failed to see what conflict could arise in such a case.

69. Therefore, while not opposing the principle embodied in article 29 bis, he did not see how a State could be required by a peremptory norm to adopt a certain conduct while at the same time being prohibited from doing so by another.

70. Mr. CRAWFORD (Special Rapporteur) said he agreed with Mr. Pellet that the concept of *jus cogens* was too influenced by the conditions in which the first formal definition had been provided in the context of the law of treaties. The idea of reconsidering the definition from the point of view of State responsibility was attractive, provided that it was not done solely in the context of article 29 bis; the term *jus cogens* was also used elsewhere in the draft. The Commission had not yet decided that the draft should contain a definitions clause, but, if it chose to include one, it would have to consider where in the text it should appear.

71. As Mr. Gaja had said, at the general level, where there was a conflict between the requirements of a peremptory norm and those of a non-peremptory one, the former requirements prevailed. That rule, however, existed outside the field of the law of responsibility, which merely reflected its consequences. That being said, the Commission was called upon to consider conflicts of substance rather than conflicts *litteris verbis* which related to the actual language of treaties. It had to envisage, first, conflicts with rules which were not treaty rules and, secondly, conflicts which did not arise from the treaty as such, but from particular circumstances.

72. By not adopting a slightly more relaxed attitude on the subject of what constituted circumstances precluding the wrongfulness of an act of a State, the Commission would be endorsing a far too narrow concept of *jus cogens*, especially in view of the position it had already taken in connection with consent, which had effect only in terms of express obligations and their invalidation after a rather anomalous procedure, whereas the real effect of *jus cogens* was much more fundamental.

73. From a more pragmatic point of view, it should be borne in mind that, according to the 1969 Vienna Convention, a conflict between a treaty and *jus cogens* invalidated the treaty *in toto*, including provisions that might be beneficial. It was not in the interest of international law to invalidate a treaty on the grounds that it was incidentally in conflict with certain peremptory norms. Clearly, if a treaty provided, say, for the enslavement of the population of a State by another State, that treaty was null and void, but that was a purely academic hypothesis. In most real situations, a conflict between the treaty and *jus cogens* would arise in an incidental manner. There was therefore some advantage in broadening the application of the concept of *jus cogens*.

The meeting rose at 1.05 p.m.

2589th MEETING

Thursday, 17 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka, 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*)

ARTICLE 29 bis (*concluded*)

1. Mr. HAFNER said that the question raised by the proposed new article 29 bis (Compliance with a peremptory norm (*jus cogens*)) was rooted in a certain concept of the meaning of obligation and breach of obligation. As indicated previously, he was in favour of viewing the obligation separately from the rule because the eventual scope of the obligation depended on several different rules, including secondary rules. Such an approach would make it possible to answer the question asked by the Special Rapporteur in paragraph 312 of the second report on State responsibility (A/CN.4/498 and Add.1-4) without the risk of dissolving part one of the draft articles altogether. Any case of an incidental breach of *jus cogens* through the implementation of a treaty obligation would be precluded because the scope of the obligation would already be limited by existing *jus cogens*. Reading article 31 of the 1969 Vienna Convention in the same way would produce the same result insofar as the interpretation of a treaty, which necessarily preceded its application, had to take account of the legal context, in other words, of other applicable rules of international law. The same would apply to rules of customary law, so that in the final analysis the new provision would not be needed. It could, of course, be argued that the same would apply to the question of consent, but the absence of a definition of the effects of consent in other rules would seem to justify the inclusion of consent, if not of *jus cogens*, among circumstances precluding

[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.