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Summary record of the 2589th meeting

Topic:
State responsibility

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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.

wrongfulness. He did not, however, propose to reopen the discussion on that point.

2. As Mr. Gaja had suggested, a reference to obligations under Article 103 of the Charter of the United Nations should be included in proposed new article 29 bis. But that Article 103 did not apply to customary law, and the question whether obligations under the Charter also prevailed over obligations resulting from customary law or general principles of law remained open. While recognizing that the issue could not be dealt with in the present context, he nevertheless wished to signal his doubts in that respect. Another issue that might arise from the inclusion of a reference to Article 103 was whether other treaties which declared their precedence over other commitments ought not to be mentioned as well. That, however, would undoubtedly be going too far.

3. Reverting to the issue of *jus cogens*, and referring to the example involving the right of transit or passage contained in note 1 on proposed article 29 bis, in the conclusions as to chapter V (Circumstances precluding wrongfulness) of the draft, contained in chapter I, section C, of his second report, he asked whether a neutral State which prohibited an aggressor State, but not the victim State, from making use of the 24-hour rule in one of its ports would be exonerated from its obligation under the law of the sea. The issue was, perhaps, already addressed by the article on aid or assistance and could be settled in accordance with that article, thus rendering article 29 bis superfluous. If maintained, the proposed provision was likely to give rise to problems of a new nature and could be said to impart a new shade of colour to *jus cogens*. He was inclined to agree with Mr. Pellet's remarks calling for a redefinition of *jus cogens*.

4. Noting that paragraph 312 of the second report failed to answer any of the questions it raised, he would reiterate that an answer would largely depend on the interpretation of the concept of obligation within the meaning of the draft. An exclusive interpretation would not be desirable so long as the article did not distort the concept as a whole. Since that was not the case, he saw no objection to referring it to the Drafting Committee for further study.

5. Mr. SIMMA said that the examples adduced by the Special Rapporteur in paragraph 306 of the second report brought out the practical relevance of proposed new article 29 bis. To take Mr. Hafner's image of "new colour" a step further, he would say that the possibility of conflict with *jus cogens* seemed to hover like a black cloud over international treaties which in themselves presented no problem with regard to State responsibility. The need to establish a circumstance precluding wrongfulness in order to exonerate States which lived up to their obligations arising from *jus cogens* was undeniable.

6. It had been argued that much of the ground covered by article 29 bis was already covered by article 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act). The difference was that, while article 27 envisaged the situation in terms of a State's collaboration with the perpetrator, article 29 bis made it clear that a State's failure to collaborate with the perpetrator of an act prohibited under *jus cogens* would not be considered wrongful.

7. As to Mr. Gaja's suggestion to include a reference to Article 103 of the Charter of the United Nations, he thought that the priority nature of Charter obligations should indeed be spelled out somewhere in the draft. Unlike Mr. Hafner, he believed that Article 103 did apply to customary law. Lastly, supporting the call for a redefinition of *jus cogens* made by Mr. Pellet (2588th meeting) and supported by Mr. Hafner, he explained that, in his view, the aim should be not to redefine *jus cogens* but to make the existing definition more complete.

8. Mr. HE said that article 29 bis was undeniably one of the strongest among the new candidates for inclusion in chapter V. Peremptory norms of general international law were defined by article 53 of the 1969 Vienna Convention and it was universally accepted that there could be no going back on that clear endorsement of the concept of *jus cogens*. Thus, theoretically as well as logically, there were solid grounds for including it in chapter V.

9. On the other hand, the strong doubts expressed by a number of Governments, in the comments and observations received from Governments (A/CN.4/492),[4] and referred to in paragraph 234 of the second report could not be overlooked. It was to be noted that the doubts related not so much to the substantive values embodied in *jus cogens* norms, such as those prohibiting genocide, slavery, war crimes, crimes against humanity and others, but rather to the uncertainty surrounding peremptory norms and to the risk of destabilizing treaty relations. It should also be noted that ICJ had up to now declined to use the term *jus cogens*, while endorsing the concept of intransgressible principles in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* [see page 257, paragraph 79]. For all those reasons, the Commission should exercise the utmost caution in deciding whether compliance with peremptory norms should be included in chapter V.

10. Mr. ROSENSTOCK said that he largely agreed with the comments made by Mr. Hafner and Mr. He. There was certainly no question of going back on the 1969 Vienna Convention, but neither should it be forgotten that the inclusion of *jus cogens* in the Convention had taken place in a very particular context and in the framework of a carefully constructed regime. In the case of article 29 (Consent), the Commission had decided, notwithstanding the doubts expressed by many members, to accept the provision because it was already in the draft articles and because there had been no overwhelming objection by Governments. Article 29 bis, on the other hand, was not in the text of the draft and there was no overwhelming demand on the part of Governments to include it. For the reasons given by Mr. Hafner, and in view of the risk of galloping instability, he wondered if the Commission would be wise to include article 29 bis in the draft.

11. Mr. LUKASHUK said that he had not expected article 29 bis to give rise to so much discussion. The article merely reproduced a universally recognized rule of international law enshrined in the 1969 Vienna Convention and reflected in the practice of ICJ. He entirely agreed with Mr. Simma's comments except on one point: in his view, to involve the Commission in the task of elaborating

[4] See 2567th meeting, footnote 5.

a new definition of *jus cogens* would be unrealistic and inappropriate. Referring to Mr. Rosenstock's remarks, he recalled that, in adopting a similar position at the United Nations Conference on the Law of Treaties, the United States delegation had not challenged the concept of *jus cogens* as such but had emphasized the need to define the procedure for determining what did and what did not constitute a peremptory norm.[5] In his opinion, article 29 bis was indispensable to the draft as a whole and had to be included.

12. Mr. DUGARD noted that, while the need for a reference to peremptory norms and *jus cogens* in the draft articles had been a recurrent theme in the debate, a number of members of the Commission had expressed concern about the particular provision under discussion. He wondered, therefore, whether the Special Rapporteur should not be invited to draft a more general provision on the subject of *jus cogens*, which might or might not reproduce the definition contained in article 53 of the 1969 Vienna Convention, for inclusion in chapter I (General principles). Such a provision establishing a general link between the doctrine of *jus cogens* and the subject of State responsibility could obviate the need for article 29 bis and other provisions dealing with peremptory norms.

13. Mr. CRAWFORD (Special Rapporteur) said that he would like to give that suggestion more thought. The proposed solution might indeed prove an elegant way of dealing with the issue raised by article 29 bis and by certain other draft articles. While reserving the possibility of adopting such a solution, the Commission should not, he thought, abandon the effort to arrive at a satisfactory formulation of article 29 bis.

14. Mr. KAMTO said that when the question of *jus cogens* had been debated in connection with the 1969 Vienna Convention, the main point at issue had not been the existence of peremptory norms of international law but their implementation. The difficulty with the example referred to in note 1 to the proposed text of article 29 bis was that it did not make clear who was to implement the peremptory norm. Any State could, with very serious consequences, arrogate to itself the right to act as an international policeman by invoking, say, human rights. If the principle set out in the draft article was maintained, the Commission must have the opportunity to discuss it again on the basis of the text that would eventually emerge from the Drafting Committee.

15. Mr. PELLET said that he did not share Mr. Kamto's view of the international order. In the case, for example, of a State selling arms to another State and discovering that the purchasing State intended to use those arms to commit genocide, the danger to the international order surely resided in the potential genocide rather than in the seller's decision to refuse to proceed with the sale.

16. Mr. KAMTO said that the example did not dispose of the difficulty. Who, in such a case, was to act as the guarantor of lawfulness? Was it individual States, was it the international community as represented by the United Nations or some other entity? How was international order to be preserved?

17. Mr. PAMBOU-TCHIVOUNDA said that he understood and shared Mr. Kamto's concerns and hoped that they would be duly taken into account by the Special Rapporteur, especially in connection with parts two and three of the draft articles.

18. Mr. CRAWFORD (Special Rapporteur) said that the debate on article 29 (2588th meeting) had not revealed any disagreement on the basic proposition that consent validly given could have the effect of precluding State responsibility. Rather, the point at issue had been whether that proposition should be dealt with in chapter V. Except for the suggestion made by Mr. Dugard, no equivalent conceptual concern had been expressed about the placing of article 29 bis. The doubts had been about the existence of any practical example, i.e. by reason of their operation, norms of *jus cogens* would have eliminated the obligation itself rather than simply its consequences. On balance, members appeared to think that there were situations in which that might not be so. Another difficulty that had been pointed out was the potentially destabilizing effect of *jus cogens* on a treaty in the event of inconsistency. The examples adduced had tended to relate to the use of force, which entailed the operation of Article 103 of the Charter of the United Nations. Yet situations were more likely to arise in consequence of other criminal activities, such as genocide, which all States were called upon to prevent. He saw no reason why, in the case of genocide, the obligation of prevention should not have the same status as the obligation not to commit genocide.

19. The debate had also been useful because it had revealed a strongly-held conviction that the law of State responsibility was affected by the notion of obligations to the international community at large, even if some members of the Commission had more difficulty than others in identifying those effects.

20. Bearing in mind the observations made by Mr. Dugard and Mr. Kamto, it seemed that article 29 bis could be referred to the Drafting Committee. It went without saying that the core issue of *jus cogens*, would come up again in connection with the resumption of the debate on article 19 (International crimes and international delicts) or some equivalent to it.

21. Mr. SIMMA, referring to the Special Rapporteur's assessment of Mr. Dugard's proposal for solving the problem that arose whenever the issue of *jus cogens* came up by simply including an article along the lines of "Without prejudice to any implications arising from obligations *erga omnes*, *jus cogens*, the international community, etc.", said that such a solution would be unacceptable. The progressive development and codification of State responsibility needed to address more fully the consequences of obligations owed to the international community as a whole.

22. The CHAIRMAN suggested referring article 29 bis to the Drafting Committee, pending consideration as to its

[5] See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968*, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), p. 295, 52nd meeting of the Committee of the Whole, paras. 15-17, and p. 330, 57th meeting of the Committee of the Whole, paras. 26-28; and ibid., *Second Session, Vienna, 9 April-22 May 1969*, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 102, 20th plenary meeting, paras. 20-23.

final place and content and taking into account the comments on article 29 itself.

23. Mr. PAMBOU-TCHIVOUNDA said he feared that such a course would be premature. It would be better to keep to article 29. He preferred postponing the discussion to give the members of the Commission time to consider article 29 bis more closely and express their opinions later in plenary. Such an important question, which posed substantive problems of principle, could not simply be left to the Drafting Committee.

24. Mr. LUKASHUK said that he shared Mr. Pambou-Tchivounda's concern, but saw no contradiction between the two proposals: the Commission could refer article 29 bis to the Drafting Committee and continue to reflect on it. He therefore endorsed Mr. Kamto's sensible suggestion to refer the article to the Drafting Committee while providing a later opportunity to discuss the outcome.

25. Mr. GOCO said that such a referral would place a heavy burden on the Drafting Committee, given the divergent views expressed in the Commission. He thought that article 29 bis could be referred to the Drafting Committee without prejudice to its being considered again in plenary.

26. Mr. PAMBOU-TCHIVOUNDA said that, in that case, the Commission should not be surprised if the Drafting Committee did not refer anything back to it at all because it had been unable to produce any formulation for article 29 bis.

27. The CHAIRMAN said it seemed clear that the discussion had not yet achieved satisfactory results and that article 29 bis called for further thought. As he saw it, discussion of the subject could usefully be suspended.

28. Mr. CRAWFORD (Special Rapporteur) said that, at the 2588th meeting, there had been enormous differences on another important issue, namely the proper place for consent, and yet members had been perfectly happy to refer article 29 to the Drafting Committee to see what it could produce. In the debate at the fiftieth session he had received a strong mandate from the Commission to reflect in the draft articles the notion of obligations to the international community as a whole. It had been one of the reasons for proposing article 29 bis. In the tradition of the Commission, the function of the Drafting Committee was to try to produce appropriate solutions to problems, including substantive problems. It was often easier to do that in an informal off-the-record discussion. He agreed entirely with Mr. Pambou-Tchivounda that, if the Drafting Committee could not produce a satisfactory formulation, then it should report back to the Commission and explain why. He also concurred with Mr. Kamto and Mr. Lukashuk that the question would have to be considered further. He wondered whether the Commission could not simply agree on the understandings reflected in the statements by Messrs Kamto, Lukashuk and Pambou-Tchivounda to refer article 29 bis to the Drafting Committee to see what it could do.

29. Mr. KATEKA said that the discussion raised the issue of the Commission's procedure. A debate had been held on article 29 bis and members had had an opportunity to express their views; some had spoken and some had not. Surely, the Commission did not have to force everyone to take the floor. It would be a different matter if the Commission had found that it was divided and wanted to take a vote. He saw no problem with referring the article to the Drafting Committee.

30. Mr. Sreenivasa RAO said that, in any case, the discussion would be unable to dispel the doubts or ambiguities associated with the issue, and he was therefore inclined to allow the Drafting Committee to consider the article, to see whether it was really necessary to have such a heavy *exceptio* and, if so, to take it into account in the final adoption. He did not think the substantive problems in article 29 bis could not be resolved.

31. Mr. BROWNLIE said that it was difficult for the Chairman to guess what everyone was thinking, but if all members had to give an opinion that they were in favour of referring article 29 bis to the Drafting Committee, then the question might as well be put to the vote, because not all members felt a need to speak in every debate. It seemed to him that the issues relating to *jus cogens* had been sufficiently discussed, and so he had remained silent. He endorsed the Special Rapporteur's remarks.

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

It was so agreed.

ARTICLE 29 ter

33. Mr. KATEKA said that article 29 ter (Self-defence) should be confined to the provisions of the Charter of the United Nations. Any broader application, as suggested by France, in the comments and observations received from Governments, would create more controversy on an already complex issue of international law. Only the inherent right of individual or collective self-defence set out in Article 51 of the Charter should be envisaged. He was not sure about the distinction the Special Rapporteur had introduced between the obligation of total restraint and one of presumably lesser restraint. The Special Rapporteur had cited humanitarian law, human rights and the non-first use of nuclear weapons. The latter example was merely a tactical issue which was used in disarmament but was generally of little practical consequence. In fact, the question should have been that of no use of nuclear weapons at all. He was not certain how that fitted into the scheme of things in the current context. Given the lack of clarity, he proposed removing the distinction.

34. Mr. CRAWFORD (Special Rapporteur), noting that Mr. Kateka's first point related to the comments made by France on the notion of self-defence outside the framework of the Charter of the United Nations, said that the wording of paragraph 1 of article 29 ter, which was identical to that proposed in article 34 (Self-defence) adopted on first reading, did in fact refer to the notion of self-defence in Article 51 of the Charter. However, the problem with article 29 ter as it stood was that it apparently gave a State an excuse for violating international humanitarian law if it was acting in self-defence, and that could not possibly be right. The Court had expressly recognized that point in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. It was a clear

example of where a distinction had to be drawn. Naturally it would be more desirable for States to agree never to use nuclear weapons than only to agree not to use them first. But, in the case of a unilateral undertaking by one State made to another State or States never to use nuclear weapons first, the undertaking was plainly intended to apply even to action in self-defence. The State making the undertaking was not saying that it would not use nuclear weapons first if it engaged in aggression; it was committing itself not to do so under any circumstances. That was what the Court considered to be an obligation of total restraint.

35. Mr. HAFNER, noting that the Commission was already engaged in the second reading of the text, that States had already used it in practice and that international courts had cited its provisions, said he was not sure how far the Commission should deviate from the existing version. In his view, it should do so only as far as was necessary. Certainly States would be surprised to examine something totally new, and putting them in such a position could endanger all of the work on the draft. Again, when the draft statute for an international criminal court[6] had been drawn up, consideration had been given to whether lawful measures under international law should act as a legitimate defence against individual responsibility. As it currently stood, the article did not give clear guidance on that matter, which merely showed how complex it was.

36. Where should the limit of the applicability of paragraph 2 be drawn? He fully recognized the need to restrict the notion of self-defence, and he suspected that "lawful" already covered the content of paragraph 2. Would it not suffice to explain in the commentary that the word "lawful" in paragraph 1 was to be understood in the way in which it was now reflected in paragraph 2?

37. The CHAIRMAN, speaking as a member of the Commission, said that he fully agreed with Mr. Hafner's suggestion. Paragraph 2 was already covered by paragraph 1. The addition of paragraph 2 might actually create more confusion. Moreover, the words "in particular" led one to wonder what other obligations might also be involved.

38. Mr. CRAWFORD (Special Rapporteur) said that Mr. Kateka objected to paragraph 2 in principle, and that was a question which had to be resolved, whereas Mr. Hafner and the Chairman, speaking as a member of the Commission, had argued that paragraph 2 was already implicit in the word "lawful" in paragraph 1, although the commentary to article 34 as adopted on first reading did not make that point clearly.[7] Moreover, there had been a recent decision by ICJ expressly directed to that issue in the framework of environmental obligations, not humanitarian law, and the formulation of paragraph 2 reflected the language employed by the Court, which had been asked to find that environmental obligations overrode self-defence. The Court had ruled that they did so only when they were expressed in such a way as to apply as obligations of total restraint in armed conflict. Hence, there was good authority for paragraph 2. He thought the matter should either be spelled out in the commentary or preferably in the article itself, because, as rightly noted by Mr. Simma, the Commission was trying to codify the law and not simply to point to it. To the extent that it was possible to express the content of the law with clarity, the Commission should do so. He agreed with the Chairman that the words following "in particular" might be out of place, but that was a separate question and one which could certainly be taken up in the commentary. In fact, the language there had been taken from article 60 of the 1969 Vienna Convention, where, again, States had felt that the question of humanitarian law was so important that it should be spelled out. Of course, it was a classic example of a restraint on States, even acting in self-defence.

39. The word "validly" in article 29 had been greatly criticized and many members had said that it was necessary to be more explicit. The fundamental question raised by Mr. Kateka was whether paragraph 2 was right. It was right; it had recently been affirmed to be right, it was classically right, it was not a case of progressive development, but of current law, and the only question was how to enunciate it.

40. Mr. SIMMA said that there were two tendencies in the Commission which he regarded as disturbing. One was to say that a concept could not be changed because it had been referred to by international courts and was therefore written in stone. To his mind, it was always necessary to consider the context in which a concept had been used by an international court. It might well be that, even if the Commission decided to add something to the concept or to change it, it would not contradict the rulings of international courts. That comment related to the remark by Mr. Hafner on the concept of self-defence, which, of course, was constantly used by States seeking to justify all sorts of actions.

41. The other tendency was to try to solve a problem by overworking certain words. To conceal behind the word "lawful" the problem that the Special Rapporteur sought to address in paragraph 2 was a good example. One perfectly commonsensical reading was that paragraph 1 dealt with the issue of *jus ad bellum*. The right existed to use military force in self-defence, and from that point of view, the word "lawful" in the phrase "if the act constitutes a lawful measure of self-defence" would describe the circumstances—the preconditions—for acting in self-defence, in the event of an armed attack for example.

42. It was by no means obvious that the word "lawful" would cover all limitations applicable once a State acted in self-defence, limitations which, in doctrinal terms, were subsumed under the heading of *jus in bello* and should be spelled out. They were what the Special Rapporteur had in mind in paragraph 2, which he was in favour of retaining because paragraph 1 could convey the false impression that everything was permissible in self-defence. However, the phrase "which are expressed or intended to be obligations", drawn from the language used in the advisory opinion concerning the *Legality of the Threat or Use of Nuclear Weapons* [see page 242, paragraph 30], was, in his view, superfluous. It was sufficient to say "international obligations of total restraint". The words "in particular", on the other hand, would only cause a problem if the preceding clause was unclear. They served the legitimate purpose of drawing attention to the

[6] *Yearbook...1994*, vol. II (Part Two), p. 26, para. 91.

[7] See 2587th meeting, footnote 12.

special case of humanitarian obligations. Moreover, the text was modelled on that of article 60, paragraph 5, of the 1969 Vienna Convention.

43. Mr. PAMBOU-TCHIVOUNDA said that the Special Rapporteur had proposed a new inflated version of article 34 as adopted on first reading that sought to establish the notion of an obligation of total restraint in the context of self-defence. He preferred article 34 for the reasons stated by Mr. Hafner. There might be some justification for addressing the issue of a breach of the obligation of total restraint in a separate article on State responsibility, but it was unwise to include a passing reference to such a complex subject in the context of armed conflicts, thereby detracting from its importance as a separate category of obligations. He suspected that the Sixth Committee of the General Assembly would be somewhat surprised to have to consider an entirely new draft article on self-defence.

44. Mr. PELLET said he saw no reason why States should be surprised to be presented with a new text. Many years had passed since the drafting of article 34 and it was perfectly conceivable that new issues had come to light and needed to be addressed.

45. He agreed with Mr. Hafner that the word "lawful" in paragraph 1 of article 29 ter covered the subject matter of paragraph 2, which merely served to illustrate the point. Self-defence was lawful in cases of armed aggression and paragraph 1 stipulated that specific measures could be taken in that context. He was in favour of deleting paragraph 2, but if it was retained the word "lawful" should be deleted from paragraph 1. In addition, the phrase "even for States engaged in armed conflict or acting in self-defence" in paragraph 2 should be deleted because the entire article was concerned with self-defence. Overall, however, the paragraph struck him as an unnecessary attempt to rewrite the whole body of international law on responsibility.

46. He concurred with the comment by the French Government under article 34, in the comments and observations received from Governments, that the reference to self-defence "in conformity with the Charter of the United Nations" was too narrow. Everyone knew, especially since the judgment of ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua* in 1986, that the natural right of self-defence was not a right founded on the Charter of the United Nations. The restrictive renvoi to the Charter could also cause problems where a State was not a member of the United Nations. He proposed replacing "a lawful measure of self-defence taken in conformity with the Charter" by "a lawful measure of self-defence within the meaning of the Charter".

47. Mr. ROSENSTOCK said he thought the term "lawful" was a reference to *jus in bello* and deleting it would have no effect whatsoever on the statement regarding *jus ad bellum*. It thus covered the subject matter of paragraph 2. The fact that an article was different from the version drafted 25 years previously should not be an obstacle to change, but the sensitivity of the subject might well give pause. As nobody had taken issue with article 34, with the exception of the point mentioned by Mr. Pellet, and as the word "lawful" served no purpose apart from addressing *jus in bello*, it was preferable to leave it unchanged. At all events, there was little difference of substance among the members of the Commission and all outstanding issues could be examined in the Drafting Committee.

48. Mr. SIMMA said he was convinced by Mr. Pellet's argument that the word "lawful" only made sense independently if it was intended to cover humanitarian, environmental and other limitations. Otherwise, it would be labouring the point to refer to measures of self-defence that were lawful and in conformity with the Charter of the United Nations. The issue of whether the humanitarian and other concerns should be spelled out in greater detail was what had prompted the Special Rapporteur to draft paragraph 2.

49. With regard to the French Government's comment on article 34, he agreed with Mr. Pellet that where a State could not invoke Article 51 of the Charter of the United Nations, it could still rely on customary law to justify action in self-defence. But France had raised an entirely different issue when it proposed that the broader limits laid down by international law should be referred to instead. He did not agree with the French Government on that score. In his view, there was a right of self-defence that had the contours and limitations of the right recognized in Article 51 of the Charter and no other broader right.

50. Mr. ELARABY said that the records of the Security Council and General Assembly were replete with claims and counterclaims regarding the lawfulness or otherwise of acts of self-defence. The reference in article 29 ter, paragraph 1, to "in conformity with the Charter of the United Nations" was therefore more important than the word "lawful". Although the Charter of the United Nations might not actually confer a right of self-defence, it set forth regulations and limitations relating to the role of the Council and the circumstances necessitating armed action. The word "lawful" raised a number of problems and should perhaps be deleted.

51. Mr. GOCO said he found paragraph 1 to be a sufficiently comprehensive comment on the subject of self-defence. The key word "lawful" covered the point that paragraph 2 was intended to make. With regard to the comment by the French Government, he proposed inserting a reference to "the inherent right of self-defence recognized in the Charter of the United Nations".

52. Mr. YAMADA said he had no objection in principle to paragraph 2 which, in his view, stated a primary rule of self-defence. It was obvious that a State which resorted to force in self-defence must observe all rules of warfare, including humanitarian law. However, he foresaw major drafting difficulties in spelling out the principle and would therefore prefer to delete the paragraph.

53. Mr. CRAWFORD (Special Rapporteur) said that one of the functions of a Special Rapporteur on second reading was to take account of developments that had occurred since the first reading. In the case in point, an important judgment by ICJ had been of direct relevance. The commentary to article 34 had failed to interpret the word "lawful" in the sense that had emerged during the

present discussion, relating it exclusively to the requirements of proportionality, necessity or armed attack.

54. Self-defence in the context of chapter V was not taken as a circumstance precluding wrongfulness in relation to the use of force. The primary rule was perfectly clear: force could not be used in international relations except in self-defence. The position was that self-defence was a justification or an excuse, as ICJ had ruled in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in relation to breaches of other obligations, e.g. the obligation not to cause substantial harm to the environment. In response to the argument that such obligations prevented the use of nuclear weapons, the Court had stated that, where a State was acting in self-defence, they did not. But there was another category of obligations that had to be complied with even in self-defence. If the Commission wished to take the position that the word "lawful" covered not only *jus ad bellum* but also *jus in bello* and authorized him to produce a commentary in which the point was made crystal clear, he would be happy to do so.

55. He accepted Mr. Pellet's argument that alternative wording to "in conformity with the Charter of the United Nations" should be considered and would be content to have article 29 ter, paragraph 1, referred to the Drafting Committee. He agreed with the proposal to delete paragraph 2 on the understanding that the content would be fully reflected in the commentary.

56. Mr. KAMTO said that, in his view, the right of self-defence could be understood only in the context of the Charter of the United Nations. If there was a basis other than the Charter for such a right in international law, the question was whether, from the standpoint of international responsibility, the regime of self-defence should come under the Charter or remain outside it. He would have no hesitation in opting for the former alternative. To conceive of the use of self-defence outside the framework of the Charter would lay it open to a serious risk of slippage due to the lack of a treaty regime to control it and of guarantees of control by the Security Council under the Charter.

57. Mr. Sreenivasa RAO said the Special Rapporteur had made the point in article 29 ter, paragraph 2, that, when a person or a State acted lawfully in self-defence, it was still bound by principles such as those contained in humanitarian and human rights law. But although the applicability of humanitarian law to both parties to a conflict was a basic principle, there was no real agreement on such issues as proportionality, military necessity, legitimate targets, and the development of weapons for deterrence or strategic purposes. Civilian sites were commonly targeted in armed conflicts and environmental issues were overlooked. He was in favour of a wider public debate on the subject and the promotion of restraint through dissemination. The commentary should make the point that considerable ambiguity still existed in respect of the notion of total restraint and was exploited in practice.

58. Mr. BROWNLIE said he supported the Special Rapporteur's procedural proposal, and also wished to make two general points. The debate, particularly on article 29 ter, had revealed certain systemic problems relating to chapter V. The first was that, according to a purist and slightly esoteric view, chapter V consisted of a series of formulations of conditions for the legality of State conduct that could be represented—albeit in a rather academic way—as primary rules. In that case, chapter V would fall. It was his understanding that the members of the Commission were now estopped from taking that very unhelpful academic view of chapter V.

59. The second systemic problem was that the content of the articles in chapter V inevitably gave rise to problems with regard to their relationship to other parts of international law. The Commission could not reasonably expect the Special Rapporteur to produce, as it were, in passing—either in a second "without prejudice" paragraph or in the commentary—an economical codification of the whole of *jus cogens*, simply because it was in some way relevant. Thus, in the context of article 29 ter it would certainly be helpful if some of the relational points were made in the commentary. But if the Commission insisted that the Special Rapporteur—or the Drafting Committee, for that matter—should deal with those relational points in the actual text of the articles, it would be difficult to achieve that aim efficiently, and to avoid mistaken inferences being drawn subsequently from what was stated and what was not stated. He therefore hoped that the Commission would not devote too much time to relational problems and that it would instead concentrate on the important task of propounding the principles of excuse or justification.

60. Mr. HE said he endorsed the view that article 29 ter should apply to measures of self-defence taken in conformity with the provisions of the Charter of the United Nations. Paragraph 2 would raise some highly debatable issues, and he accordingly thought it should be deleted. The commentary should, however, comprehensively reflect the various views expressed on the issues raised by paragraph 2.

61. Mr. HAFNER said it was his understanding that only paragraph 1 of article 29 ter was to be submitted to the Drafting Committee and that the commentary should elaborate on the contents of paragraph 2. However, there was a difference between "lawful measures of self-defence" and "lawful self-defence" and, in his opinion, the former expression addressed the issues raised in paragraph 2. He therefore proposed that the Commission should decide that, unless paragraph 1 was amended, the substance of paragraph 2 was to be considered by the Drafting Committee for possible inclusion in the text of article 29 ter.

62. Mr. SIMMA said that, as the Special Rapporteur had pointed out, when the draft articles had been adopted on first reading, the then Commission had understood the word "lawful" to refer to concepts such as proportionality, rather than to *jus in bello* limitations.

63. Mr. PAMBOU-TCHIVOUNDA asked whether a decision to refer article 29 ter, paragraph 1, to the Drafting Committee would imply that the question of the placement of the provisions of that article had been settled.

64. Mr. CRAWFORD (Special Rapporteur) said that the Drafting Committee would have to consider, in the context of chapter V as a whole, the order in which individual

articles would appear within the chapter. It would be premature to take a decision as to their numbering at the present juncture.

65. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer article 29 ter, paragraph 1, to the Drafting Committee, and to consign the contents of its paragraph 2 to the commentary.

It was so agreed.

ARTICLE 30

66. Mr. CRAWFORD (Special Rapporteur) said that Mr. Rosenstock had already expressed concern at his proposal to postpone discussion of article 30 (Countermeasures in respect of an internationally wrongful act) until the following session, instead proposing that article 30 should be taken up at the current session, once the Commission had completed its consideration of the other articles of chapter V. At that time the Commission could also discuss the related issue of whether the detailed treatment of countermeasures in part two should be retained.

67. His own position was that the Commission could not discuss the exact formulation of article 30 until it had decided whether to retain the treatment of countermeasures in part two. If it was decided to retain that treatment, article 30 could simply take the form of a renvoi to part two. Thus, the only question the Commission needed to discuss at the current juncture was whether countermeasures could ever constitute circumstances precluding wrongfulness. If time permitted once the Commission had completed its consideration of chapter V, he would then welcome a discussion of the issue of principle in relation to the treatment of countermeasures, which would serve to provide him with guidance in preparing his next report. Following that discussion, he would be happy to consider the implications for article 30, and even to propose a text for that article if the Commission had taken a clear position on the general issue. In his opinion, however, it would not be fruitful to enter into a detailed discussion of the content of article 30 at the current time.

68. Mr. ROSENSTOCK said he did not insist on an immediate discussion of article 30 and would be happy for the Commission to discuss it once the other draft articles in chapter V had been considered. In his opinion, however, it would not be prudent to delay discussion of article 30 until the Commission came to consider part two. To do so might make it more difficult to reach agreement on either of those matters. Many of the articles were in some sense dependent on other articles: hence the somewhat provisional nature of many of the decisions taken with respect to them. He was thus reluctant to accept the view that the Commission should not attempt to deal with article 30 in the context of chapter V. Article 30 should be discussed either there and then, or else at the end of the discussion of chapter V.

69. Mr. SIMMA said he supported Mr. Rosenstock's view. Article 30 should be discussed as it currently stood, and at the current juncture rather than at the end of the debate on chapter V.

70. Mr. GOCO said that the Commission should tackle article 30 there and then, as the place of countermeasures in a scheme of circumstances precluding wrongfulness needed to be discussed, without prejudice to the question of the place of countermeasures in part two.

71. Mr. CRAWFORD (Special Rapporteur) reiterated his position, which was that if, after the current debate, the Commission decided that article 30 belonged in chapter V in some form—as he himself believed—then progress would have been made. The current debate could afford an opportunity to draw attention to problems of drafting, and to consider whether article 30 had a place in chapter V. If, subsequently, the Commission decided to delete the chapter dealing with countermeasures from part two, he would then propose a new version of article 30. A full-scale discussion of article 30 at the current meeting would not obviate the need for a later discussion of that article if the Commission decided to delete the treatment of countermeasures in part two. Consequently, he did not think it fruitful to discuss the content of article 30 in detail at the current juncture.

72. Mr. TOMKA said that his views on article 30 were, first, that countermeasures should be listed among circumstances precluding wrongfulness. In cases such as the *Air Services Agreement of 27 March 1946*, *Military and Paramilitary Activities in and against Nicaragua*, and, more recently, the *Gabčíkovo-Nagymaros Project*, countermeasures had been found to be an institution of international law precluding wrongfulness. It would thus be a retrograde step to delete article 30 from chapter V.

73. Secondly, he fully supported the need to define the conditions for resort to countermeasures in detail in part two. The detailed treatment by ICJ of that issue in the *Gabčíkovo-Nagymaros Project* case would doubtless be of value to the Special Rapporteur in his work. Lastly, when the Commission had adopted the draft articles on countermeasures, it had had in mind individual countermeasures, as opposed to "sanctions" as defined in paragraph (21) of the commentary to article 30.[8] He would be interested to hear from the Special Rapporteur whether the articles on circumstances precluding wrongfulness would also cover the situation of compliance with binding decisions of the Security Council imposing sanctions, a situation in which a State might be prevented from complying with other international obligations. One answer might be that, under Article 103 of the Charter of the United Nations, obligations arising from the Charter would prevail.

74. Mr. GOCO asked whether he was right in understanding that, if the Commission decided to retain article 30 as a circumstance precluding wrongfulness, the Special Rapporteur would then produce a new version of article 30.

75. Mr. CRAWFORD (Special Rapporteur) said he emphatically agreed with Mr. Tomka that article 30 covered a circumstance precluding wrongfulness and should be retained in chapter V, without prejudice to the question of its formulation. He also agreed that the Commission's intention when adopting article 30 had been to deal only

[8] Ibid., footnote 8.

with countermeasures proper, and not with sanctions. He conceded that article 30 was not very clearly formulated in that regard, a matter the Drafting Committee would need to address. Sanctions imposed under the Charter of the United Nations were expressly saved by article 39 (Relationship to the Charter of the United Nations) in part two, which would in due course apply to the articles as a whole. Sanctions imposed lawfully under other specific treaties would be covered by the *lex specialis* principle, but in any event they were not countermeasures. It should be made clear in the text and commentary that article 30 was not concerned with sanctions.

76. As to Mr. Goco's point, he supported the retention of an article 30, but the formulation would depend on the extent to which countermeasures were dealt with in detail in part two. If the treatment of countermeasures was retained in part two, article 30 could be very brief. Once the Commission had concluded its consideration of the remaining articles in chapter V, he would be happy to formulate a brief paper addressing the arguments for and against retaining a treatment of countermeasures in part two. Thereafter the Commission could return to article 30.

77. Mr. ROSENSTOCK said that chapter V would be woefully insufficient if it did not include an article 30. He personally found article 30 substantially acceptable as currently worded. That wording might or might not have to be radically recast in the light of the fate of chapter III (Countermeasures) of part two.

78. The CHAIRMAN said that a majority of members appeared to favour discussing the desirability of retaining article 30, but not its substance.

79. Mr. SIMMA said he fully agreed with the Special Rapporteur and Mr. Rosenstock with regard to the procedure to be adopted, the need to retain article 30, and the need to regulate countermeasures in part two. As to the drafting, he had two concrete proposals to make. First, it seemed not to be entirely clear to some States that article 30 excluded organized sanctions. That point should be clarified, since sanctions decreed by the Security Council to counter a threat to the peace might be directed against a State whose threat to the peace did not necessarily involve a breach of international law. Secondly, he strongly advocated replacing the word "legitimate", which carried a heavy ideological charge, by a word such as "legal" or "justified", as many activities that were "legitimate" were not entirely legal.

80. Mr. PAMBOU-TCHIVOUNDA asked whether it might be useful for the Commission to work on the basis of the redrafting of article 30 that the Special Rapporteur had just offered to prepare, rather than considering a text that had apparently now been superseded.

81. Mr. CRAWFORD (Special Rapporteur) said that, like the hapless Coleridge in Byron's *Don Juan*, he felt called upon to "explain his explanation". If he were to propose a new article 30 at the current juncture, he would have to propose two different texts, one based on the assumption that the treatment of countermeasures would be retained in part two, the other based on the opposite hypothesis.

82. Mr. ROSENSTOCK asked whether it could be placed on record that the Commission now accepted in principle that countermeasures had a place in chapter V; that the provision relating to countermeasures would broadly resemble article 30 as adopted on first reading; and that that provision might nonetheless require further consideration, depending on the ultimate fate of chapter III of part two.

The meeting rose at 1.05 p.m.

2590th MEETING

Friday, 18 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 30 (*concluded*)

1. Mr. KATEKA drew attention to the linkage between article 30 (Countermeasures in respect of an internationally wrongful act) of part one and chapter III (Countermeasures) of part two of the draft.

2. Countermeasures had a place in the draft only subject to certain conditions, which were set out in chapter III of part two, concerning the obligation to negotiate, the principle of proportionality and the settlement of disputes, and were designed to prevent abuses. Yet paragraph (17) of the commentary to article 30[4] implied the possibility, by way of reprisals, of bombarding a town or a port of an

[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 2587th meeting, footnote 8.