

Document:-  
**A/CN.4/SR.2606**

**Summary record of the 2606th meeting**

Topic:  
**<multiple topics>**

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

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coerced had no choice but to do what it was being coerced to do, by reason of the very strong meaning given to coercion. The defence of that State would be effected on a basis of force majeure, i.e. its defence would be covered by article 31. However, the coercing State would be responsible to the injured State in such a situation. That being so, the effect of article 28 was to transfer liability from the coerced State—which had no choice but to act in any other way—to the coercing State. The problem raised during drafting was that it could not be said, as it had been in the first version of article 28, that the act was an internationally wrongful act of the coerced State, because under article 31 it was not. That was the reason for the current wording of article 28.

97. There were two conditions for the “transferred” responsibility under article 28: first, if the coerced State acted voluntarily, rather than involuntarily, it would have committed a wrongful act. Secondly, the coercing State must be aware of that. If both those conditions applied, responsibility was transferred from the coerced State to the coercing State, irrespective of the character of the coercion. Furthermore, article 28 bis made it clear that that occurred without prejudice to any other basis for the responsibility of the coercing State. Other situations might arise, for instance, if the coercion was intrinsically unlawful, in which case article 28 bis would apply. Article 28 was intended to deal with a situation in which a State was coerced to commit a wrongful act, and the injured State would otherwise be left without redress.

98. It was not normally the case that a State which agreed to have forces placed on its territory was also accepting the risk that those forces would exercise coercion against it. The assumption was that the forces in question would act lawfully. The object of article 31, paragraph 2 (b), however, was designed to cover situations in which, for example, one State offered another State a guarantee against the occurrence of an event, such as flooding caused by climatic factors. In such a case, the existence of a guarantee against flooding meant that the guarantor State had accepted the risk of flooding caused by climatic conditions. It could not then claim that the floods had occurred because of exceptional monsoon rains, which were part of the natural order of things. On the other hand, if the floods were caused by the collapse of a dam, and not by the circumstances guaranteed, force majeure might apply.

99. Thus, paragraph 2 (b) of article 31 was a standard proviso of the kind found in force majeure provisions in legal systems worldwide. It was certainly not intended to deal with a situation in which, for instance, forces located on the territory of a State stepped outside their mandate and coerced the host State.

*The meeting rose at 1 p.m.*

## 2606th MEETING

*Monday, 19 July 1999, at 3 p.m.*

*Chairman:* Mr. Zdzislaw GALICKI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

**State responsibility<sup>1</sup> (concluded) (A/CN.4/492,<sup>2</sup> A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,<sup>3</sup> A/CN.4/L.574 and Corr.1 and 3)**

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE  
(concluded)

1. The CHAIRMAN invited the Commission to resume its consideration of the cluster of articles under chapter IV (Responsibility of a State in respect of the act of another State) of the draft articles (arts. 27, 27 bis, 28 and 28 bis) contained in the report of the Drafting Committee on the draft articles on State responsibility (A/CN.4/L.574 and Corr.1 and 3).
2. Mr. ECONOMIDES, referring to article 27 bis, said he agreed with other members that “directs or controls” would be preferable to “directs and controls”. He had made the same comment at an earlier plenary meeting.
3. He did not find the wording of article 28 at all satisfactory. Subparagraph (a) made a somewhat premature reference to force majeure, namely, chapter V (Circumstances precluding wrongfulness). However, article 28 was intended only to define a State’s responsibility in respect of the act of another State, not the wrongfulness of that act. Subparagraph (a) did not make that clear. Subparagraph (b) was obvious and could very well be deleted. Article 28 should perhaps be condensed into a simple sentence, such as, “A State which coerces another State to commit an internationally wrongful act is responsible for that act”.
4. Mr. LUKASHUK said that article 27 bis was somewhat naive in stipulating that a State which directed and

<sup>1</sup> 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.

<sup>2</sup> Reproduced in *Yearbook ... 1999*, vol. II (Part One).

<sup>3</sup> *Ibid.*

controlled another State must have done so with knowledge of the circumstances of the internationally wrongful act. Did that mean that the State had to be aware of all circumstances and all details of the act in question in order to be considered responsible? He did not think so. Moreover, “direction” and “control” were simply two kinds of coercion. He did not see why they should not be given exactly the same treatment as coercion in article 28. In fact, “direction and control” was a civil law concept which did not actually belong in public law.

5. He endorsed Mr. Economides’ comments on article 28, especially those on subparagraph (b).

6. Mr. TOMKA noted that article 27 bis set two conditions in order for the State which directed or controlled another State to be considered responsible for the other State’s act. That was one condition too many; the second was unnecessary. The act as such was wrongful, in other words not in conformity with international law. The act remained wrongful, whatever the direction or control exercised. If it was decided to keep the article as it stood, however, he agreed that it should say “directs or controls” rather than “directs and controls”.

7. The same comment could be made about article 28: the internationally wrongful act was in itself wrongful, regardless of the coercion. The point of the article was to define the responsibility of the coercing State, not to determine the wrongfulness of the act of the coerced State, but it could be interpreted to mean that, if there had been no coercion, there would have been no wrongful act.

8. Mr. CANDIOTI (Chairman of the Drafting Committee), summing up the debate, generally referred the members of the Commission to the arguments he had put forward in his presentation of the report of the Drafting Committee (2605th meeting) on the use of the words “direction and control”. Several members now wished to change those words to “direction or control”. However, the Drafting Committee had suggested that wording because it had felt that mere “direction” was not enough, as it was not a strong enough concept to be used as a criterion for responsibility, especially as the coerced State had the freedom not to follow the coercing State’s direction. The idea that the coercing State was exercising a kind of dominance over the coerced State’s will must be added; hence the word “control”. The terms went together.

9. The condition set in article 27 bis, subparagraph (b), had also been explained at length in his presentation (ibid.). It was an essentially restrictive clause and the Drafting Committee had seen fit to put it not only in article 27 bis, but in articles 27 and 28 as well.

10. Concern had been expressed that article 28 on coercion might overlap with chapter V. He noted that article 28 did not seek to define a circumstance exonerating the coerced State, although it probably would be exonerated, but to establish the responsibility of the coercing State. The dividing line was quite clear.

11. With regard to Mr. Pellet’s concern about the words “commission of an ... act” in the title and in the text of article 27, according to the definition in article 3 an act could consist of an action or an omission. Mr. Pellet was right to fear that there might be a reference to “the commission of

an omission”, but the Drafting Committee had found no better solution.

12. Mr. CRAWFORD (Special Rapporteur) said that the matter of choosing the appropriate conjunction, “and” or “or”, in article 27 bis was not so important. The Drafting Committee’s idea, which he found convincing, was that “direction and control” went together.

13. In reply to Mr. Lukashuk, who had said that the case covered by article 28 related to private law—by analogy, for example, with a concept such as complicity—whereas the entire draft was a public law construct, he said that article 28 had to cover both bilateral obligations between States, which came under the law of contracts, as well as obligations *erga omnes*, which came under public law. The problem with the draft articles as adopted on first reading was that they referred only to obligations *erga omnes*: nothing else was mentioned in the commentary. As article 28 also had to apply to bilateral treaties, the conditions provided for in subparagraphs (a) and (b) had been added. The article would thus operate as a public law rule in respect of obligations *erga omnes* or obligations under multilateral treaties and as a private law rule in respect of bilateral obligations. It had been formulated with a view to achieving that versatility.

14. With regard to the comment that article 28, specifically subparagraph (a), contained a reference to force majeure (art. 31), he said there was a logical connection between the two provisions. Article 31 stated that the conduct of a State acting under irresistible force was not wrongful. If it had stated that the act remained wrongful, but that responsibility was precluded, it would not have been necessary to include article 28, subparagraph (a), setting the basic condition for wrongfulness. However, it said that a State which acted under irresistible force could not be committing a wrongful act. Article 28 could not contradict article 31 by stating that that same State was in a situation of wrongfulness. If article 28 was changed, then article 31 also had to be changed.

15. The Drafting Committee had considered the possibility of drawing a clear distinction in chapter V between circumstances precluding wrongfulness, such as self-defence and consent, and circumstances precluding responsibility, such as force majeure, distress and state of necessity, but it had decided that that was too sharp a distinction to serve as a link with that part of the law of responsibility.

16. Mr. AL-BAHARNA, referring to articles 27 and 27 bis, said that the use of the words “that State” was confusing, especially in subparagraph (b) common to both articles. Perhaps the State in question should be indicated each time, by wording such as “the aiding State” or “the assisting State”.

17. Article 28 might imply that the coerced State was completely innocent. Just as degrees of coercion existed, so might degrees of responsibility. The article should be more finely shaded.

18. Mr. PAMBOU-TCHIVOUNDA said that the words “internationally responsible” were used several times in chapter IV. They were not usually found in international law and in fact did not indicate exactly what responsibility

was meant. It would be clearer to delete “internationally” and simply say “a State ... is responsible”.

19. Mr. PELLET endorsed Mr. Pambou-Tchivounda’s comment. However, he could not agree with Mr. Crawford that the difference between “direction and control” and “direction or control” was minimal. In fact, the concept of control was already quite political and had to be handled with the greatest care. He would ask the Commission to take a formal vote on the matter at the appropriate time.

20. Mr. TOMKA said that article 28 did not clearly state its purpose, which was simply that the State which had exercised coercion was responsible not because of the coercion, but as a result of the ensuing act. If the wrongfulness of the act was precluded, on the ground that the coerced State was in a situation of force majeure, what was the coercing State responsible for? The corresponding provision of the draft adopted on first reading, contained in article 28, paragraph 2, had been clearer.

21. Mr. CANDIOTI (Chairman of the Drafting Committee) said that article 28 referred to responsibility for the wrongful act, not to responsibility for the coercion. Despite possible similarities with article 31, he believed that article 28 was in its proper place. And article 28 bis, which had been added to chapter IV, offered a kind of safeguard clause in relation to the other aspects of international responsibility not covered in chapter IV.

22. The comments on terminology (“internationally”, “that State”) would be taken into account when the text was put into its final form.

23. Whether the coerced State was completely innocent was clearly a matter for the judge to determine depending on the circumstances of the case and on the primary rules violated by the breach. As Mr. Al-Baharna had pointed out, there might be some remaining responsibility on the part of the coerced State.

24. The CHAIRMAN invited the Commission to take up the cluster of articles under chapter V of the draft, (arts. 29, 29 bis, 29 ter, 31, 32, 33 and 35).

25. Mr. PELLET noted that the French version of article 29 again spoke of the *commission ... d’un fait*. The term was not appropriate, even if alternative wording was not found. In French, in any event, the “commission of an act” could in no way cover the case of an “omission”. Article 29 also spoke of *consentement valable*, which was surprising, as the expected adjective would be *valide*. The wording used in article 29 adopted on first reading, *consentement valablement donné*, had been far better. He also wondered why the form of article 29 was so different from that of articles 29 bis, 29 ter, 31 and 32, whereas all had been drafted according to the same model. It was important not to give the impression that that had been deliberate.

26. Article 29 bis was completely satisfactory. However, it referred to “peremptory norms of general international law”, which still had to be defined. Article 53 of the 1969 Vienna Convention did provide a definition, but stated that the definition was valid only “for the purposes of the present Convention”.

27. Concerning article 29 ter, he regretted the fact that the Drafting Committee had reproduced the phrase contained in article 34 as adopted on first reading, “in conformity with the Charter of the United Nations”. The Charter was certainly a major source of law, but self-defence, which was the subject of article 29 ter, was not inexorably linked to it. As the Charter itself said, self-defence was an inherent right and the idea of “conformity with the Charter” restricted its scope. He therefore advised the Commission not to mention the Charter and to speak simply of a “lawful measure of self-defence”.

28. Article 33 was well drafted and generally satisfactory, although he had reservations about it because he found it dangerous. However, he doubted the value of the expression “In any case” at the beginning of paragraph 2, which was not usually found in legal texts. If it was needed, the commentary should explain why.

29. Mr. ECONOMIDES noted that, according to the Chairman of the Drafting Committee, article 29, paragraph 2, as adopted on first reading, which provided for peremptory norms of international law on an exceptional basis, had been deleted on the ground that it did not apply in all cases and that there were situations in which peremptory norms might, as it were, be disregarded. That was new to him, as, to his knowledge, a peremptory norm, a rule of *jus cogens*, could be derogated from only through a new rule of the same nature, i.e. a rule which was itself a rule of *jus cogens* and not a mere treaty provision, much less a unilateral act such as consent. It was a grave matter for the Commission to be the first to raise the possibility of disregarding, through consent, a rule of *jus cogens*. In that connection, the example given by the Chairman of the Committee was not relevant; if a State gave another State the power to bring military forces into its own territory, the situation would be one of alliance rather than military intervention, which occurred against the will of the State concerned. In his view, the deletion of former article 29, paragraph 2, could be explained by the adoption of new article 29 bis, but certainly not by the arguments given by the Chairman of the Committee.

30. A second comment of a general nature related to the expression “not in conformity with an international obligation”, which appeared in some articles and not in others for no apparent reason. The Commission should carefully examine that question at its fifty-second session and decide either to use the expression in all cases or not to use it at all, but the commentary would have to include a rational explanation of why the decision had been taken.

31. Article 35, subparagraph (b), which referred to “harm or loss”, should also refer to “innocent victims”, whether States or persons.

32. Mr. HAFNER asked whether Mr. Pellet’s position on the expression “in conformity with the Charter of the United Nations” in article 29 ter did not arise from the fact that, in the French text, the word “defence” was doubly qualified, as *licite* and *légitime*, whereas, in the English text, it was qualified only as “lawful”. He wondered whether the problem could not be solved by finding a French translation for “self-defence” which did not include the word *légitime*.

33. Mr. PELLET said that there was no linguistic misunderstanding; the English and French texts matched. His opposition to the phrase “in conformity with the Charter of the United Nations” was based on the idea that it was not for the Commission to cast itself as the defender of the Charter in a specific draft article by stating that measures of self-defence had to be taken in conformity with the Charter, for example, when a non-member State was involved. It was enough to state that such measures had to be lawful measures of self-defence. In its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, ICJ had in fact stated that Charter law and general international law did not coincide exactly in that area. Thus, in his view, the last phrase of article 29 ter was unnecessary and dangerous in that it left States which were not bound by the Charter, such as Switzerland and the Federal Republic of Yugoslavia, outside the regime covered by the draft articles.

34. Mr. LUKASHUK said that, for reasons of form, the last phrase of article 29 ter could not be deleted. Many bilateral and multilateral instruments contained a standard formula to the effect that self-defence could be exercised only in conformity with the Charter of the United Nations. That feature was firmly established in practice. Concerning Mr. Pellet’s argument relating to non-member States, he noted that the Charter clearly stated that the United Nations also functioned with respect to non-member States, especially in situations where peace and security were involved. Therefore, the rules of international law embodied in the Charter were in fact generally accepted rules which would be followed even by non-member States. From the standpoint of principle, also, it would be a mistake to delete the phrase.

35. With regard to article 29 bis, he believed that, beyond “peremptory norms”, there were many other norms of a higher rank, such as the decisions of the Security Council, which, according to Article 103 of the Charter of the United Nations, prevailed over obligations under any other international agreement. A hierarchy of norms also existed at a lower level, in that, when States concluded an agreement, they could stipulate that they would accept no other obligations which might be contrary to those deriving from the agreement. Thus, if a State complied with the higher-ranking rule, but violated obligations deriving from a lower-ranking rule, was the resulting situation contradictory or not? The Commission should consider that question carefully.

36. The CHAIRMAN, speaking as a member of the Commission, said that, although it was true that other international instruments referred to the Charter of the United Nations, such references were often indirect, as in article 52 of the 1969 Vienna Convention, which used the words “in violation of the principles of international law embodied in the Charter of the United Nations”. He therefore agreed with Mr. Pellet that the Commission should reconsider the question and give some thought to whether such a “short-cut” was justified.

37. Mr. CRAWFORD (Special Rapporteur) said that article 29 ter used the wording of the text adopted on first reading, which had been generally, though not universally, approved by Governments. Although there had been a full debate on the issue at the current session, the Com-

mission could return to it later on. He regretted that the Commission had rejected his proposal for paragraph 2, which, in his view, had been a definite improvement.

38. With regard to article 33, paragraph 2, the words “In any case” were already present in the article as adopted on first reading. In his view, they had been added to avoid the infelicity of repeating the formula at the beginning of paragraph 1, “Necessity may not be invoked”. The problem would not have arisen if paragraph 1 had said “Necessity may be invoked”, as paragraph 2 might then begin with the words “Necessity may not be invoked” or “None-theless, necessity may not be invoked”.

39. As to Mr. Economides’ suggestion, he said that the Commission might consider including a reference to “innocent victims” in article 35, subparagraph (b).

40. Mr. TOMKA, referring to article 29 bis, said that, although the Commission was fascinated by the concept of *jus cogens*, he continued to doubt that that article belonged in the articles on State responsibility. According to a general principle of law, if a person was bound to a certain obligation by a legal rule and fulfilled that obligation, that could not be contrary to law. Moreover, it was difficult to conceive of two customary rules being contradictory, with one requiring a certain type of conduct and the other requiring a different type. By definition, there could not be two customary rules with conflicting content. There could be a conflict between treaty rules, but that would be an issue of the application and applicability of treaties.

41. Concerning article 33, he believed that, in the French text, the wording of paragraph 1 adopted on first reading, *L'état de nécessité ne peut pas être invoqué par un Etat ... à moins que ...* was preferable to the proposed wording, *Un État ne peut invoquer la nécessité ... que si ...*. In paragraph 2 (c), the deletion of the words “invoking necessity”, as indicated in a corrigendum to the report of the Drafting Committee (A/CN.4/L.574/Corr.3), would create confusion. To avoid that confusion, he wondered whether the Commission might not use the expression in the text adopted on first reading, “the State in question”.

42. Mr. PAMBOU-TCHIVOUNDA said that there was a need to harmonize the provisions of chapter V in general. Like Mr. Pellet, he regretted that article 29 had been worded differently from articles 29 bis and 29 ter. Likewise, regarding the negative form used in article 33, paragraph 1, although the concern to circumscribe the concept of necessity was understandable, that could have been done through a different formulation. In his view, the precaution rendered negatively in article 33, paragraph 1, had no doubt arisen from a desire to reflect the precaution rendered positively with respect to force majeure in article 31. The concepts of force majeure, distress and necessity, which were all related, were subjective and dangerously loaded. As there was not the slightest indication to give those who would be using them an idea of their objective meaning, there was a risk that those draft articles would be improperly used; in each case, it would be necessary for a third party, such as an arbitrator or judge, to provide the clarifications which the Commission had not included in its draft.

43. More specifically, he believed that the Chairman of the Drafting Committee should take account of Mr. Economides' comments on article 29 bis, namely, that there could be no possible consent to derogation from *jus cogens*. He also strongly supported the idea expressed earlier that the law governing responsibility should include a concept corresponding to the category of a peremptory norm of international law and clearly expressed in the draft. He would also be in favour of the deletion of the words "not in conformity with an international obligation of that State" in articles 31 to 33 because they were unnecessary coming after the expression "the wrongfulness of an act". Either wrongfulness occurred or it did not and wrongfulness was measured in terms of the international obligation.

44. The drafting of articles 32 and 33 also needed to be harmonized and a positive indication of what necessity was should be given in article 33; that might be done by combining paragraphs 1 (a) and 1 (b) with paragraph 2 corresponding to the system for utilizing, or invoking, a state of necessity.

45. Mr. LUKASHUK said that he did not agree with Mr. Tomka that the rules of international customary law could not contradict one another. On the contrary, a single treaty could contain rules that were so divergent that they contradicted one another when applied to concrete situations. Such contradictions could also appear in connection with peremptory norms, as it was conceivable for principles of international law to contradict one another, and that did happen. Numerous articles had been written about the potential contradiction between the principle of self-determination and the principle of territorial integrity. Moreover, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations<sup>4</sup> had shown how important those elements were. The authors of the Declaration had stressed the fact that each of the principles could be interpreted on its own, but also in the light of the other principles; otherwise, contradictions might arise. The Commission should therefore base itself on the idea that it was quite possible for contradictions to exist between the provisions of different treaties, between the provisions of the same treaty and between the rules of international law, including peremptory norms.

46. Mr. CRAWFORD (Special Rapporteur), replying to Mr. Economides' comment on peremptory norms, said it was not being suggested that norms of *jus cogens* could be derogated from by consent; it was simply a question of recognizing the broad view taken of consent in the context of chapter V.

47. Mr. GAJA said he would try to lighten the burden of the Chairman of the Drafting Committee by defending certain points in the draft. First, the expression *En tout cas* at the beginning of article 33, paragraph 2, of the French text consisted of more or less the same wording as the text adopted on first reading, i.e. *En tout état de cause*. The idea was to stress the draft's limitative attitude towards necessity.

48. He believed that the words "not in conformity with an international obligation" had been left out of articles 29, 29 bis and 29 ter, but included in articles 31 to 33 because those articles covered cases involving an excuse under the particular circumstances rather than a general derogation from the obligation, as was the case with articles 29, 29 bis and 29 ter.

49. Concerning the Chairman's comments about the indirect reference to the Charter of the United Nations in article 52 of the 1969 Vienna Convention, he pointed out that article 30 of the Convention contained a direct reference to the provisions of Article 103 of the Charter. He believed the reason why the reference to the Charter in article 29 ter had been kept was that it appeared in the draft adopted on first reading. As the members of the Commission knew, ICJ had already endorsed the draft articles to a large extent, and that explained the Drafting Committee's relative caution with regard to certain articles, including article 33.

50. Mr. CANDIOTI (Chairman of the Drafting Committee) said that formal aspects such as translation and presentation problems had been settled; other points would have to be taken into account in the general review of the draft as a whole. For the moment, he had taken due note of the interesting points raised by the members, including Mr. Economides' comment on the question of peremptory norms. He would amend the paragraph in question in order to avoid any misunderstanding about the nature of peremptory norms.

51. Mr. AL-BAHARNA noted that the Chairman of the Drafting Committee had the intention of taking the views of all the members into account. In his own view, article 33, paragraph 2, should begin with the word "Necessity", which would strengthen its drafting. No other changes were needed in article 33. He would prefer that draft articles 29, 29 bis and 29 ter remained as they stood. The Commission was emphasizing the idea of consent by beginning article 29 with the words "Valid consent", as was currently the case. Moreover, the drafting of articles 29, 29 bis, 29 ter and 33 was the same in the draft articles adopted on first reading, and that was another reason why extensive changes should not be made.

52. The CHAIRMAN said that the Commission had concluded its consideration of the draft articles proposed by the Drafting Committee. He took it that the Commission wished to take note of the report of the Drafting Committee, as suggested by the Chairman of the Committee, on the understanding that it would review the topic at its next session.

*It was so agreed.*

53. Mr. CRAWFORD (Special Rapporteur) said that the Commission was starting on a four-year programme to complete the second reading of the draft articles and not a one-year programme to complete part one. He had carefully noted all the points raised during the debate and would return to them to the extent necessary. He assured the members that all the points would be taken into account in the Commission's further work. Certain issues in relation to chapter II (The "act of the State" under international law) on attribution had not been fully resolved and would be settled only when the Commission consid-

<sup>4</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

ered part two. The Commission must work with the whole text in mind. He hoped that a text acceptable to all members would be reached, although some compromise would be necessary on all sides.

**Draft report of the Commission on the work of its fifty-first session (continued)\***

**CHAPTER IV. Nationality in relation to the succession of States (continued)\* (A/CN.4/L.581 and Add.1)**

**E. Text of the draft articles on nationality of natural persons in relation to the succession of States adopted by the Commission on second reading (concluded)\* (A/CN.4/L.581/Add.1)**

**2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (concluded)\***

*Commentary to article 21*

*The commentary to article 21 was adopted.*

*Commentary to articles 22 and 23*

*The commentary to articles 22 and 23 were adopted.*

*Commentary to articles 24 to 26*

54. Mr. PELLET said that the wording *qui pourrait survenir dans l'avenir* at the end of paragraph (2) of the French version implied that the substantive rules embodied in articles 24 to 26 related at best to the progressive development of international law and did not apply to situations which had already arisen. Even if that were so, he did not see why States could not use them to settle problems concerning cases of decolonization already settled on the basis of articles 24 to 26. He proposed that the phrase should be deleted and a full stop placed after the word *l'indépendance*. The equivalent change in the English version would be to delete the words "possible future", with the end of the paragraph reading: "in any case of emergence of a newly independent State". Once again, he regretted the fact that no specific draft articles had been drafted to cover decolonization.

55. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission accepted Mr. Pellet's proposed amendment.

*It was so agreed.*

*The commentary to articles 24 to 26, as amended, was adopted.*

*Section E, as amended, was adopted.*

56. The CHAIRMAN invited the Commission to continue its consideration of chapter IV paragraph by paragraph.

**A. Introduction (A/CN.4/L.581)**

Paragraphs 1 to 6

*Paragraphs 1 to 6 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session**

Paragraphs 7 to 9

*Paragraphs 7 to 9 were adopted.*

Paragraph 10

57. Mr. ECONOMIDES said that the Commission should inform the Sixth Committee of the widely divergent views expressed during the adoption of paragraph (3) of the commentary to article 3, which five members had agreed by show of hands should not be included in the draft.

58. Mr. ROSENSTOCK (Rapporteur), speaking on a point of order, said that the Commission had adopted the final version of the draft articles and the commentaries thereto: the debate had been closed.

59. The CHAIRMAN said he agreed with the Rapporteur that members should refrain from making comments on the draft articles and commentaries already adopted by the Commission. The paragraph under review was purely a matter of information and form, and it would be quite atypical to insert comments on the opinions expressed within the Commission. Such opinions, were, of course, contained in the summary records of the meetings in question. In addition, according to the Commission's working methods over a 50-year period, dissenting opinions did not appear in commentary adopted on second reading. The commentary to article 3 had been adopted. The decision in question was a decision of the Commission which bound both the members and the Chair.

60. Mr. KABATSI said that Mr. Economides' concern might be accommodated by the insertion of a footnote to paragraph 10 indicating that there had been a fair amount of dissent concerning paragraph (3) of the commentary to article 3.

61. Mr. ECONOMIDES said that he was prepared to withdraw his proposal if the Secretary to the Commission could assure him officially that there had never been an exception to the rule that dissenting opinions, even when held by several members, were not mentioned in the final result of the Commission's work.

62. Mr. MIKULKA (Secretary to the Commission), replying to Mr. Economides, said that the working method in question had been developed at the first to third sessions of the Commission, from 1949 to 1951, when the Commission had decided that the final text of the commentaries reflected the view of the Commission as a whole and would make no reference to dissenting opinions, even when shared by several members. He was not in a position to say that the Commission had never departed from that rule; to do so, he would have to analyse all the commentaries adopted since the first session. To his knowledge, however, the rule had always been followed. Of course, if the Commission wished, it could always reopen discussion on the commentary to article 3 and amend it.

\* Resumed from the 2604th meeting.

63. Mr. TOMKA said that paragraph 10 merely reflected the facts. It was true that a vote by show of hands had taken place, but the commentary to article 3 had been adopted without a vote. The Sixth Committee would not be considering the commentary, but the text itself. The views expressed during the debate would be reflected in the summary records and become part of the preparatory work; they could be consulted by anyone who so wished.

64. Mr. KATEKA said that, while he agreed with the views expressed by the Chairman and the Secretary to the Commission, a compromise was possible: the Chairman might, when submitting the report of the Commission on the work of its fifty-first session to the Sixth Committee, indicate that there had been some dissension concerning the adoption of paragraph (3) of the commentary to article 3.

65. Mr. ROSENSTOCK (Rapporteur) said that, in giving effect to Mr. Kateka's proposal, the Chairman would achieve the very result which the Commission had always tried to avoid in refraining from mentioning dissenting opinions in texts it adopted on second reading. It would be extremely unwise to introduce such a practice, but he would not formally object to Mr. Kateka's proposal.

66. The CHAIRMAN said that he had taken careful note of Mr. Kateka's proposal; he took it that the Commission wished to adopt chapter IV, paragraph 10, of its report indicating that it had adopted the commentaries to the aforementioned draft articles at its 2603rd, 2604th and 2606th meetings.

*It was so agreed.*

*Paragraph 10 was adopted.*

*Section B was adopted.*

### C. Recommendations of the Commission

Paragraph 11

*Paragraph 11 was adopted.*

Paragraph 12

67. Mr. PELLET said that he was a bit frustrated: he certainly agreed that the work on nationality in relation to the succession of States was coming to a close as a result of States' obvious lack of interest in the problems of the nationality of legal persons, but he had always felt that the rights and obligations of legal persons in relation to the succession of States was an extremely interesting subject and one of great practical importance, especially as the end of the cold war had made such issues, which used to divide States deeply, less sensitive. He would therefore like to see that question mentioned somewhere in the report of the Commission, either in paragraph 12 or in the section on the long-term programme of work.

68. Mr. KABATSI said that, like Mr. Pellet, he was troubled by the finality expressed at the end of paragraph 12. He proposed that the words "for the time being" should be added before the last word of the paragraph, "concluded".

69. Mr. ROSENSTOCK (Rapporteur) pointed out that Mr. Pellet had made a compromise proposal; taking into account paragraph 468 of the report of the Commission on the work of its fiftieth session,<sup>5</sup> cited in paragraph 12, it would not be appropriate to redraft the paragraph. It was, however, entirely appropriate, even necessary, to include Mr. Pellet's remark that the issue might be taken up in connection with the Commission's future work in the section of the report covering the Commission's long-term programme of work.

70. Mr. KABATSI noted that, as States had not shown interest in the question, it was not likely that they would approve its inclusion in the list of subjects for possible future work. In his view, it would be preferable to make the last sentence of paragraph 12 less final.

71. Mr. TOMKA said that the sentence in question was dictated by the decision reproduced in paragraph 12, which had been taken by the Commission the preceding year and which could not be reopened, and by the lack of interest shown by the Member States. The Working Group had proposed two approaches for future study of the topic, both of which would require a new mandate from the General Assembly. The Commission should try to complete its work on the other items on its agenda during the current quinquennium, but that would not prevent it from coming back to the topic of nationality of legal persons in relation to the succession of States if it received a mandate to do so from the General Assembly.

*The meeting rose at 6.15 p.m.*

<sup>5</sup> *Yearbook ... 1998*, vol. II (Part Two), p. 89.

## 2607th MEETING

*Tuesday, 20 July 1999, at 3.05 p.m.*

*Chairman:* Mr. Zdzislaw GALICKI

*Present:* Mr. Addo, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.