

Document:-  
**A/CN.4/SR.2609**

**Summary record of the 2609th meeting**

Topic:  
**Other topics**

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assistance in taking a decision rather than simply raising a question before the Commission.

71. Mr. CRAWFORD (Special Rapporteur) proposed that the first sentence of paragraph 18 should be replaced by the following sentence: "A number of Governments had raised the problem of conflicting obligations", which, in his view, was historically more accurate.

72. Mr. CANDIOTI (Chairman of the Drafting Committee) said that, as a logical consequence of that change, the words "In his opinion" at the beginning of the following sentence should be replaced by the words "In the opinion of the Special Rapporteur".

73. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission accepted the proposed amendments.

*It was so agreed.*

*Paragraph 18, as amended, was adopted.*

Paragraphs 19 to 28

*Paragraphs 19 to 28 were adopted.*

*The meeting rose at 1 p.m.*

## 2609th MEETING

*Wednesday, 21 July 1999, at 3.05 p.m.*

*Chairman:* Mr. Zdzislaw GALICKI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

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

**CHAPTER V. State responsibility (continued) (A/CN.4/L.582 and Add.1-4)**

#### **A. Introduction (concluded) (A/CN.4/L.582)**

Paragraph 5 (concluded)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of chapter V of the

draft report. He had received confirmation from the secretariat that the Commission had decided at its twenty-seventh session, in 1975, to include the question of the settlement of disputes and the implementation of international responsibility in part three of the draft articles. If he heard no objection, he would take it that the Commission wished to adopt paragraph 5.

*It was so agreed.*

*Paragraph 5 was adopted.*

*Section A, as amended, was adopted.*

#### **B. Consideration of the topic at the present session (continued) (A/CN.4/L.582 and Add.1-4)**

2. The CHAIRMAN invited the members of the Commission to continue their consideration of chapter V, section B, starting with paragraph 29.

Paragraph 29 (A/CN.4/L.582/Add.1)

*Paragraph 29 was adopted.*

Paragraph 30

3. Mr. CRAWFORD (Special Rapporteur) proposed that, in the second sentence, the word "sources" should be replaced by the word "norms".

*Paragraph 30, as amended, was adopted.*

Paragraphs 31 to 53

*Paragraphs 31 to 53 were adopted.*

Paragraph 54

4. Mr. CRAWFORD (Special Rapporteur) proposed that the word "positive" should be deleted before the word "guarantee".

*Paragraph 54, as amended, was adopted.*

Paragraphs 55 to 59

*Paragraphs 55 to 59 were adopted.*

Paragraph 60

5. Mr. TOMKA requested the secretariat to adopt a uniform method of referring to the judgments of ICJ in footnotes.

6. Mr. SIMMA proposed that, in the first sentence, the words "it was to be pointed out" should be replaced by the words "it was pointed out".

*Paragraph 60, as amended, was adopted.*

Paragraphs 61 to 73

*Paragraphs 61 to 73 were adopted.*

Paragraph 74

7. Mr. SIMMA said that he objected to the words “had nothing to do with” in the second sentence.

8. Mr. CRAWFORD (Special Rapporteur) and Mr. ROSENSTOCK (Rapporteur) proposed that, in the second sentence, the phrase after the colon should read “the subsequent offer of compensation could not erase the breach”.

*Paragraph 74, as amended, was adopted.*

Paragraphs 75 to 119

*Paragraphs 75 to 119 were adopted.*

Paragraph 120

9. Mr. ROSENSTOCK (Rapporteur) proposed that, at the end of the paragraph, the words “seemed to share” should be replaced by the word “shared”.

*Paragraph 120, as amended, was adopted.*

Paragraphs 1 to 21 (A/CN.4/L.582/Add.2)

*Paragraphs 1 to 21 were adopted.*

Paragraph 22

10. Mr. HAFNER suggested that, in the last sentence, the words “it had been unable” should be replaced by the words “it was obviously impossible”.

11. Mr. CRAWFORD (Special Rapporteur) said that the word “obviously” was not necessary.

*Paragraph 22, as amended, was adopted.*

Paragraph 23

12. Mr. HAFNER suggested that, in the last sentence, the words “would amount to” should be replaced by the words “could amount to”.

13. Mr. CRAWFORD (Special Rapporteur) said that he preferred the original wording which better reflected the intention to adopt a neutral position.

*Paragraph 23 was adopted.*

Paragraph 24

*Paragraph 24 was adopted.*

Paragraph 25

14. Mr. ECONOMIDES suggested that, in the second part of the first sentence of the French text, the words *une partie de la discussion* should be replaced by the words *l'essentiel de la notion*.

15. Mr. CRAWFORD (Special Rapporteur) said that he agreed with the proposal, as it reflected the debate which

had taken place. The equivalent in English might be “the essence of this idea”.

16. Mr. ROSENSTOCK (Rapporteur) suggested that the clause should be further amended to read: “..., although it was noted that the essence of that view should be retained in the commentary”. The role of the commentary was to say that some members expressed one opinion and some another, rather than to endorse a particular viewpoint.

17. Mr. ECONOMIDES said that the first sentence would make no sense if its second part was amended along the lines just proposed. In his view, the second clause could be deleted altogether. He proposed that only the first part of the sentence should be retained, with a full stop after the word “Commission”.

18. Mr. CRAWFORD (Special Rapporteur) said that he accepted that proposal.

*Paragraph 25, as amended, was adopted.*

Paragraphs 26 and 27

*Paragraphs 26 and 27 were adopted.*

Paragraph 28

19. Mr. BROWNLIE said he was uneasy about the implication in the paragraph that one murder could not constitute genocide. For example, a case in which documents were published relating to the intention behind the first murder would constitute at least an attempt at genocide. Perhaps the remedy would be to include a footnote.

20. Mr. CRAWFORD (Special Rapporteur) said he took that point and recalled that he had referred to the notion of attempt in the discussions on the article. Attempted genocide was, moreover, specifically mentioned in the Convention on the Prevention and Punishment of the Crime of Genocide. Although he found it difficult to imagine that a lone individual who killed one other person was committing genocide regardless of his intent, it was clear that, in theory at least, he could be deemed to be attempting genocide in pursuit of some grandiose scheme. Technically, he agreed with Mr. Brownlie that, in a case in which a properly documented plan to commit a series of murders was thwarted at a very early stage, the first murder in the series, if committed, could certainly constitute attempted genocide and possibly genocide itself in conjunction with the other evidence. In order to meet the objection which had been raised, he proposed that the word “necessarily” should be added after the word “not” in the third sentence.

*Paragraph 28, as amended, was adopted.*

Paragraphs 29 to 50

*Paragraphs 29 to 50 were adopted.*

Paragraph 51

21. Mr. CRAWFORD (Special Rapporteur) proposed that the word “individual” should be deleted from the phrase “individual violations under customary international law”, as it was clear from the context that such violations were committed by States.

*Paragraph 51, as amended, was adopted.*

Paragraphs 52 to 66

*Paragraphs 52 to 66 were adopted.*

Paragraph 67

22. Mr. SIMMA said that, in the first sentence, it would be better style to refer to *pacta tertiis nec nocent nec prosunt* as a Latin maxim, rather than as a Latin tag.

*Paragraph 67, as amended, was adopted.*

Paragraphs 68 to 71

*Paragraphs 68 to 71 were adopted.*

Paragraph 72

23. Mr. AL-BAHARNA said that, in the second sentence, the word “has” should replace the word “have” before the word “knowledge”.

24. Mr. CRAWFORD (Special Rapporteur) said that he had deliberately used the subjunctive mode. He was happy to use the indicative in the context, but the phrase in question would then have to read: “that it had knowledge of the fact”.

*Paragraph 72, as amended, was adopted.*

Paragraphs 73 to 75

*Paragraphs 73 to 75 were adopted.*

Paragraph 76

25. Mr. GAJA proposed that, in the penultimate sentence, the words “of general international law” should be replaced by the words “of obligations under other rules”. He also proposed that the last sentence should be deleted.

26. Mr. CRAWFORD (Special Rapporteur) said that he agreed with the sense of the proposal and suggested the following wording: “but also of obligations under other rules to which both States were subject.”

*Paragraph 76, as amended, was adopted.*

Paragraph 77

27. Mr. CRAWFORD (Special Rapporteur) said that, in the second sentence, to refer to “set conditions of liability” in the context of the topic was likely to lead to com-

plications. He proposed that the word “liability” should be replaced by the word “responsibility”.

*Paragraph 77, as amended, was adopted.*

Paragraphs 78 to 86

*Paragraphs 78 to 86 were adopted.*

Paragraph 87

28. Mr. HAFNER proposed that, in the first sentence, the word “risk” should be deleted and that, in the last sentence, the words “as an alternative condition to that of unlawful use of force” should be inserted after “to article 28”.

29. Mr. CRAWFORD (Special Rapporteur) said the second proposal was acceptable and reflected a suggestion made by Mr. Yamada in the Drafting Committee.

*Paragraph 87, as amended, was adopted.*

Paragraph 88

30. Mr. HAFNER said that, since the first and second sentences dealt with two wholly unrelated matters, the word “also” should be inserted in the second sentence between the words “The question was” and “not”.

31. Mr. CRAWFORD (Special Rapporteur) said he agreed that there was a need to show that the two subjects were different, but proposed that the words “In any event” should be added at the beginning of the second sentence and the words “it was said” deleted.

*Paragraph 88, as amended, was adopted.*

Paragraphs 89 and 90

*Paragraphs 89 and 90 were adopted.*

Paragraph 91

32. Mr. SIMMA said that, in the second sentence, the word “savings” should be replaced by “saving”.

*Paragraph 91, as amended, was adopted.*

Paragraph 92

*Paragraph 92 was adopted.*

Paragraphs 1 to 4 (A/CN.4/L.582/Add.3)

*Paragraphs 1 to 4 were adopted.*

Paragraph 5

33. Mr. KUSUMA-ATMADJA suggested that, in the first sentence, the words “or something else” should be replaced by more precise wording.

34. Mr. CRAWFORD (Special Rapporteur) endorsed that suggestion and proposed that the words “for example” should be added between the words “in considering” and “whether”; that the word “or” should be added between the words “of necessity” and *force majeure*; and that the words “or something else” should be deleted.

35. Mr. SIMMA asked why the word “displaced” was used in the second sentence.

36. Mr. CRAWFORD (Special Rapporteur) explained that it meant that an obligation was no longer extant at the time in question, without prejudice to the question of its future termination. There was a distinction between an excuse for non-performance of a subsisting obligation, the termination of the obligation entirely and an intermediate case when the obligation was displaced or excluded. He proposed that the word “displaced” should be replaced by the words “set aside” and that the word “Instead” at the beginning of the third sentence should be deleted.

*Paragraph 5, as amended, was adopted.*

Paragraphs 6 to 12

*Paragraphs 6 to 12 were adopted.*

Paragraph 13

37. Mr. SIMMA suggested that, in the fifth sentence, the word “displaced” should also be replaced by the words “set aside”.

38. Mr. CRAWFORD (Special Rapporteur) said that he was uncomfortable with that replacement in that particular context. No one was suggesting that a norm of *jus cogens* could be set aside by consent. There were some norms of *jus cogens*, such as the rules relating to the use of force, to the application of which the consent of a particular State was relevant. Mr. Economides had, moreover, drawn attention to the need for great care on that subject. He therefore suggested that the words “the operation of the norm” should be replaced by the word “consent”.

39. Mr. AL-BAHARNA asked whether the last part of the fifth sentence should be retained or deleted.

40. Mr. ECONOMIDES suggested that it should be deleted, together with the first part of the sentence amended by the Special Rapporteur, as the example given was inaccurate.

41. Mr. CRAWFORD (Special Rapporteur) said that the example given in the last part of the sentence was accurate. Consent to the use of armed force on the territory of the consenting State would normally be effective, even though the underlying norm of *jus cogens* continued to exist. Mr. Economides argued that that was because the norm relating to the use of force allowed for consent by the State concerned, and he agreed with that argument, because that was precisely the sort of case in which consent would be permitted by the norm. He had therefore proposed the deletion of consent in chapter V, but the Commission had decided otherwise. Since the subject of

paragraph 13 was article 29 on consent, and not article 29 bis on compliance with a peremptory norm, however, he was prepared to agree with the suggestion made by Mr. Economides.

42. Mr. TOMKA said that paragraph 13 merely reflected the contents of the second report of the Special Rapporteur on State responsibility<sup>1</sup> and not the views of the members of the Commission. The last part of the fifth sentence should therefore be retained.

43. Mr. SIMMA said that he agreed with Mr. Tomka. It was not for the Commission to edit what the Special Rapporteur had written in his report. The last part of the fifth sentence accurately reflected the report’s contents and clarified a very important point. It must therefore be retained.

44. Mr. ECONOMIDES said he would not press for the adoption of his proposal. Paragraph 13 reflected the views of the Special Rapporteur, but his own opinion was that displacement was impossible except on the basis of new rules of *jus cogens*. If that was not the case, then the hypothesis was not in keeping with international law.

45. Mr. CRAWFORD (Special Rapporteur) said his position was that a norm of *jus cogens* could not be displaced in the relations between two States other than by a later norm of *jus cogens*. There were some norms of *jus cogens*, however, whose application was affected by the consent, either of a State in the case of the rule on the use of force, which was a norm of *jus cogens*, or by the consent of another group. For example, the consent of a people was relevant in the application of the principle of self-determination, which was a norm of *jus cogens*. He therefore suggested that in the last sentence the word “displaced” should be replaced by the words “relevant in the application of such norms”.

*Paragraph 13, as amended, was adopted.*

Paragraphs 14 to 27

*Paragraphs 14 to 27 were adopted.*

Paragraph 28

46. Mr. TOMKA, referring to the fifth sentence, requested clarification of the reference to the “1938 treaty between the Third Reich and Czechoslovakia”.<sup>2</sup> If the treaty in question was the Munich agreement, then it was an agreement between four Powers that had later been accepted by Czechoslovakia under duress. The issue of nullity had been a matter of controversy in the 1970s and a compromise formula had been found which had been interpreted differently by Germany and Czechoslovakia.

47. Mr. CRAWFORD (Special Rapporteur) said his understanding was that Germany had expressly recognized the treaty in the post-war period, but, if the reference was problematic, it could be deleted. He therefore proposed that the words “The 1938 treaty between the

<sup>1</sup> *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/498 and Add.1-4.

<sup>2</sup> See 2587th meeting, footnote 17.

Third Reich and Czechoslovakia was a case in point, but” should be deleted.

*Paragraph 28, as amended, was adopted.*

Paragraph 29

48. Mr. CRAWFORD (Special Rapporteur) proposed that, in the first sentence, the word “apparently” should be inserted between the words “implication” and “being that” and that the word “had” should be replaced by the words “might have”.

49. Mr. GAJA suggested that, in the first sentence, the phrase “regime the responsibility for invoking the inconsistency of a treaty with *jus cogens* lay with the parties themselves” should be replaced by the phrase “only the parties to a treaty are entitled to invoke inconsistency of the treaty with *jus cogens*”.

50. Mr. LUKASHUK said that the second sentence could be construed to mean that the rules of *jus cogens* were not rules of general international law. That was surely not the intention. He therefore proposed that the word “other” should be added before the word “obligations”.

51. Mr. CRAWFORD (Special Rapporteur) endorsed that proposal and suggested that the words “of inconsistency” should be added between the words “That problem” and “could also”.

52. Mr. SIMMA said that the Special Rapporteur apparently believed that, if a treaty was inconsistent with *jus cogens*, the parties had a genuine choice of electing in favour of the treaty and against the norm. The phrase “the potential invalidating effects of *jus cogens* on the underlying obligation seemed excessive” in the penultimate sentence created the impression that the Special Rapporteur shared the view expressed in the implication in the first sentence. He sought clarification from the Special Rapporteur.

53. Mr. CRAWFORD (Special Rapporteur) said that that was why he had proposed the change. The text now read: “the implication apparently being that parties might have the choice.” That was not his view; he merely drew attention to the dichotomy between the apparently absolute effect of *jus cogens* under the primary rule in the 1969 Vienna Convention and its apparently bilateral and specific consequences under the dispute settlement provisions of that instrument. It was simply pointing out an inconsistency; he was not the first to do so.

*Paragraph 29, as amended, was adopted.*

Paragraphs 30 to 32

*Paragraphs 30 to 32 were adopted.*

Paragraph 33

54. Mr. SIMMA asked whether the Commission was really certain that ICJ had never used the term *jus cogens*.

55. Mr. CRAWFORD (Special Rapporteur) said that he was not aware that the Court had ever used the terms *jus cogens* or “peremptory norms”. It was perfectly clear that, in order to achieve a consensus, the words “intransgressible norms” had been used in its advisory opinion in the case of the *Legality of the Threat or Use of Nuclear Weapons* to avoid speaking of “peremptory norms”. There were probably other examples of recent judgments in which allusions to that category had been made, without the term actually being employed. Hence, he thought that the statement in paragraph 33 was accurate.

56. Mr. ECONOMIDES said that the wording could be softened by saying that the Court had not used the term *jus cogens* up to now.

57. Mr. CRAWFORD (Special Rapporteur) said that he endorsed that proposal.

58. Mr. BROWNLIE said that the term *jus cogens* had certainly been used by individual members of the Court in separate opinions.

59. Mr. CRAWFORD (Special Rapporteur) said that Mr. Brownlie’s point was well taken. The problem was that, as Mr. Economides had pointed out, the statement had been made and was literally accurate. The difficulty was that the Commission was trying to amend the debate retrospectively so as to make the debate better than it had been. The Commission should probably leave it unchanged because Mr. Brownlie’s point had not been made at the time, although it probably should have been.

60. Mr. SIMMA said that, as he understood it, the Special Rapporteur had indicated that he favoured the wording agreed just before Mr. Brownlie had taken the floor, namely, that “the International Court of Justice had up to now not used the term *jus cogens*”, on the understanding that that meant majority judgments and not individual dissenting opinions. That seemed quite practical.

61. Mr. CRAWFORD (Special Rapporteur) suggested that the words “in any judgment or opinion” should be added after the words “had up to now not used the term *jus cogens*” to make it clear that it was the judgment or opinion of the Court, and not of the individual members.

62. Mr. CANDIOTI suggested saying “advisory opinion” to avoid confusion with individual or dissenting opinions.

63. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the paragraph with the suggested amendments.

*It was so agreed.*

*Paragraph 33, as amended, was adopted.*

Paragraph 34

64. Mr. LUKASHUK said that he was somewhat troubled about the reference at the beginning of the second sentence to “Any State”. No one had said that any State could do that: only certain States could arrogate that right to themselves. Also, would not the Sixth Committee regard that phrase as a kind of indirect reference to one

particular State? Perhaps the sentence could simply be deleted.

65. Mr. CRAWFORD (Special Rapporteur) suggested that the words “Third States” could be used because the sentence would then refer back to the earlier comment about the bilateral provisions of the 1969 Vienna Convention.

66. Mr. SIMMA said that he had a conceptual difficulty with using the term “third State” in cases of human rights violations simply because there was no “second State”. He therefore proposed that the second sentence should begin: “The provision could be read as implying that any State.”

*Paragraph 34, as amended, was adopted.*

Paragraphs 35 to 37

*Paragraphs 35 to 37 were adopted.*

Paragraph 38

67. Mr. CRAWFORD (Special Rapporteur) said that, in the last sentence, the word “whereby” was a mistake and should be replaced by the word “because” and “would have eliminated” should read “would eliminate”.

68. Mr. GAJA said that, first, he did not understand why the first sentence referred to article 29 on consent, which was not really the topic of discussion. Secondly, paragraph 35 had already raised the problem of what happened if an obligation was in conflict with obligations under the Charter of the United Nations. The answer which had been given by the Special Rapporteur and which was not recorded was that there would be a provision somewhere else dealing with the relationship to the Charter. That was an important point because, otherwise, it looked as though the Commission was foregoing Article 103 of the Charter.

69. Mr. CRAWFORD (Special Rapporteur), referring to Mr. Gaja’s first point, said that the word “indicated” in the first sentence should be replaced by the word “recalled” because, during the debate, he had drawn a distinction between the discussion on the place of consent and the discussion on the place of *jus cogens*. That amendment would show why reference was being made to article 29.

*Paragraph 38, as amended, was adopted.*

Paragraph 39

70. Mr. CRAWFORD (Special Rapporteur), referring to Mr. Gaja’s second point, suggested that the following phrase should be added at the end of the second sentence: “and this would be covered by article 39 of the draft, on the assumption that that article would apply to the draft as a whole.”

71. Mr. ECONOMIDES said that the words “all States were called upon to prevent” at the end of the third sentence were much too weak and should be amended to read: “all States were required to prevent.”

72. Mr. SIMMA said that he had a problem with the first sentence, which sounded like a highly undesirable conse-

quence. According to the 1969 Vienna Convention, if a treaty was in conflict with *jus cogens*, the entire treaty was invalid; individual provisions could not be dealt with separately.

73. Mr. CRAWFORD (Special Rapporteur) said that the problem was that a treaty dealing with a whole range of issues might contain just one minor potential inconsistency in a sub-clause: in such a case, it was excessive to invalidate the whole treaty. Perhaps the first sentence could be rephrased to read: “Another difficulty that had been pointed out was that *jus cogens* invalidated the whole treaty even in the event of an occasional inconsistency with a single provision.”

74. Mr. SIMMA said that that point had not been mentioned during the debate and it was thus a bit strange for the Special Rapporteur, in summarizing the debate, to say that the problem had arisen.

75. Mr. CRAWFORD (Special Rapporteur) said that, actually, the first sentence could be deleted because the following sentence would then flow more clearly from the preceding paragraph. To provide a link, the words “In fact” could be added at the beginning of the second sentence.

*Paragraph 39, as amended, was adopted.*

Paragraph 40

*Paragraph 40 was adopted.*

Paragraph 41

76. Mr. ECONOMIDES said that, in the second sentence of the French text, the words *de droit international* should be amended to read: *selon le droit international*.

*Paragraph 41, as amended in the French version, was adopted.*

Paragraphs 42 to 49

*Paragraphs 42 to 49 were adopted.*

Paragraph 50

77. Mr. HAFNER suggested that the words “, in particular, if connected with the word ‘measures,’” should be added after the word “lawful”.

*Paragraph 50, as amended, was adopted.*

Paragraphs 51 and 52

*Paragraphs 51 and 52 were adopted.*

Paragraph 53

78. Mr. SIMMA said that he did not understand what was meant by the first sentence. He thought that self-defence was a circumstance precluding wrongfulness in relation to the use of force.

79. Mr. CRAWFORD (Special Rapporteur) said that the problem could be solved by inserting the word “only” before the words “in relation to”.

*Paragraph 53, as amended, was adopted.*

*The meeting rose at 6.05 p.m.*

## 2610th MEETING

*Thursday, 22 July 1999, at 10 a.m.*

*Chairman:* Mr. Zdzislaw GALICKI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

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

#### CHAPTER V. *State responsibility (concluded) (A/CN.4/L.582 and Add.1-4)*

##### B. *Consideration of the topic at the present session (concluded)*

1. The CHAIRMAN invited the Commission to resume its consideration of chapter V, section B, starting with subsection 29.

Subsections 29 and 30 (A/CN.4/L.582/Add.3)

*Subsections 29 and 30 were adopted.*

Subsection 31

2. Mr. SIMMA said that the word “apparently” in the penultimate sentence of paragraph 63 should be deleted.

3. Mr. PAMBOU-TCHIVOUNDA, noting that some words had been omitted from the French version of paragraph 64, requested that the secretariat should correct the drafting.

4. Mr. CRAWFORD (Special Rapporteur), referring to the suggestion by Mr. GAJA, proposed that the second sentence of paragraph 65 should be amended to read: “Moreover, the purpose of countermeasures, as expressed

in article 47, was very different from the purpose of the proposed article embodying a narrow *exceptio*.”

*Subsection 31, as amended, was adopted.*

Subsections 32 to 38

*Subsections 32 to 38 were adopted.*

Subsection 39

5. Mr. TOMKA said that the third sentence of paragraph 96 was not correct, in that the necessity argument had been taken up by only one of the parties in the *Gabčíkovo-Nagymaros Project* case and the other party had expressed its views on that argument.

6. Mr. CRAWFORD (Special Rapporteur) proposed that the third sentence of paragraph 96 should consequently be amended to read: “Article 33 was referred to by both parties in the *Gabčíkovo-Nagymaros Project* case, and the International Court of Justice expressly endorsed it as a statement of general international law.”

7. Mr. DUGARD said that the second sentence of paragraph 101 did not capture the original intention, which had been to state that, as a result of the amendment to article 33, the finding of ICJ in the *South West Africa* cases would no longer prevail.

8. Following an exchange of views in which Messrs DUGARD, PAMBOU-TCHIVOUNDA and TOMKA, took part, Mr. CRAWFORD (Special Rapporteur) proposed that the second sentence of paragraph 101 should be redrafted to read:

“For example, in the *South West Africa* cases, the implicit argument for South Africa was that the policy of apartheid in South West Africa was necessary for the good governance of the territory. However, the question did not affect the individual interests of Ethiopia or Liberia but the interests of the people of South West Africa.”

*Subsection 39, as amended, was adopted.*

Subsection 40

*Subsection 40 was adopted.*

Subsection 41

9. Mr. CRAWFORD (Special Rapporteur) said that the first sentence of paragraph 111 would be clearer if, beginning with the word “because” it was amended to read: “because paragraph 2 excluded the violation of a peremptory norm of general international law”, with the words “from circumstances precluding wrongfulness” deleted at the end of the sentence.

*Subsection 41, as amended, was adopted.*