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Summary record of the 2644th meeting

Topic:
State responsibility

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basis of analogy, but one could not leap straight from a national legal system into international law without going through the necessary intermediary of finding a common basis in the different legal systems from which to infer that something was a general principle of law. With regard to "mixed agreements", annex IX of the United Nations Convention on the Law of the Sea mandated special treatment of a particular situation, but the legal position under all "mixed agreements" was not the same, contrary to the prevailing assumption.

The meeting rose at 1 p.m.

2644th MEETING

Friday, 21 July 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

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

State responsibility[1] (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,[2] A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of chapters II and III of the Special Rapporteur's third report (A/CN.4/507 and Add.1–4).

2. Mr. MOMTAZ said it was unfortunate that he had not had more time to study chapters II and III closely, as it dealt for the first time with some very sensitive issues that were of crucial importance to the Commission's future work. As a general comment, he said that the distinction between a crime and a delict made in article 19 of the draft articles as adopted on first reading was relevant in respect of a number of the articles proposed, particularly article 46 quater, on loss of the right to invoke responsibility, and article 46 quinquies on a plurality of injured States. In those two cases, the questions raised were quite different if a violation of a fundamental rule of general international law was involved. The validity of that argument was confirmed in paragraph 233 of the report, where the Special Rapporteur said that an injured State might not be able on its own to absolve the responsible State from its continuing obligations. The question was whether that statement implied that, in cases of a violation of fundamental or *erga omnes* rules, the State that was directly injured could not on its own take the decision to absolve the responsible State from its obligations, as the interests of the international community as a whole were at stake. If the answer to that question was yes, it could only be concluded that, once again, the Special Rapporteur's refusal to take account of the debate on the distinction in article 19 posed a problem for the Commission.

3. As far as the contents of chapters II and III were concerned and with regard to paragraph 237 on the form which an invocation of responsibility should take, he wondered whether the injured State's claim could not be made in the framework of the political organs of an international or regional organization to which that State had referred the conflict between itself and the State responsible for the wrongful act. In some cases, the injured State had no intention of submitting a claim to those organs, which were anyway not competent to examine it. Nonetheless, the positions taken within those organs, by calling into question the responsibility of the State responsible for the allegedly wrongful act, might be considered as a somewhat informal way to invoke responsibility. The question had been raised in the case concerning the *Aerial Incident of 3 July 1988* without ICJ being called upon to give a decision. On the other hand, in the *Oil Platforms* case, which was still pending before the Court , the quite lengthy period of time between the destruction of the Islamic Republic of Iran's oil platforms in the Persian Gulf and the referral of the matter to the Court by the Islamic Republic of Iran had not prevented the Court from declaring itself competent. Indeed, in those two cases, the Islamic Republic of Iran had invoked the positions it had taken within the framework of the political organs of international organizations.

4. With regard to paragraph 241, the question of the exhaustion of local remedies should be considered as a rule relating to the admissibility of claims in the area of diplomatic protection and, in any case, the rule did not apply to cases of massive and systematic violations of human rights, including, obviously, those involving aliens living in the territory of the State responsible for the internationally wrongful act.

5. Mr. CRAWFORD (Special Rapporteur) said that paragraph 233 of the report actually referred to a slightly different distinction between peremptory and other norms. Unquestionably, in cases of the continuing violation of a peremptory norm, unless provided for by the norm itself, the injured State could not absolve the responsible State from its continuing obligations, as that was a matter of more general interest. In fact, that paragraph drew attention to the possible consequences of that

[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, chap. III, sect. D.

[2] Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

situation with respect to questions of restitution. He had been grappling with the issues surrounding article 19 since the beginning of his mandate and intended to tackle them squarely in chapter IV of his report.

6. Mr. LUKASHUK said that he approved of the Special Rapporteur's intention to study the question of gross and serious breaches of obligations towards the entire international community and he hoped that he would be able to settle that extremely complex question with the help of all the members of the Commission. One extremely important aspect of that question concerned countermeasures in cases of breaches of obligations towards the international community as a whole. A more specific and practical question was raised in paragraph 232 of the report, where the Special Rapporteur referred to the freedom of the injured State to choose between the available forms of reparation, without, however, mentioning the right of the responsible State in that respect. In his opinion, the form of reparation should always be the subject of agreement between the parties.

7. With regard to the formal requirements for the invocation of responsibility, the Special Rapporteur's conclusions on the judgment handed down by ICJ in the case concerning *Certain Phosphate Lands in Nauru* needed to be qualified. While it was true that the Court did not seem to have attached much significance to formalities in that case, it had also expressly stated that such an approach was justified by the particular and exceptional nature of the relationship between Australia and Nauru. A general rule could not therefore be drawn from it and, consequently, it should be specified in article 46 ter, paragraph 1, that the injured State should "officially" give notice of its claim. That point seemed all the more justified as in paragraph 238 the Special Rapporteur stated that it seemed appropriate to require that notice of the claim should be in writing.

8. As to the question of the exhaustion of local remedies, paragraph 241 referred to the "minimum standard of treatment of aliens", an expression used by the Special Rapporteur without prejudice, but one which had unfortunate connotations at the international level. It was actually an expression used by the major Powers when they were demanding that other countries should apply to their nationals a legal regime in conformity with the standards established by those Powers themselves—in other words, a privileged regime. Such an approach had certainly provoked a storm of protest. As the Commission would undoubtedly come up against that expression again when it considered the topic of diplomatic protection, it would be sufficient, in the framework of the topic under consideration, to refer to generally accepted human rights.

9. He did not think that the *non ultra petita* principle limited the competence of the body dealing with the claim to award, on the basis of all the circumstances of the case, reparation that was higher than that requested. To do that would of course be the exception, but it was not unthinkable, for example, in the case of an action to which developing countries were parties. The Special Rapporteur was therefore right to recommend that a separate article should not be devoted to that principle.

10. Draft articles 46 quinquies and 46 sexies, on cases of a plurality of States, reflected the need, in the framework of contemporary international relations, to take an increasingly multilateral approach and those articles should certainly be referred to the Drafting Committee. In the comments on those articles, it was stated, in paragraph 267, that the conduct of a State organ did not lose that quality simply because it was in conformity with a decision of an international organization. It was therefore questionable whether, in cases where the Security Council took a decision on sanctions and where the implementation of that decision would require the suspension of bilateral agreements, the State refusing to fulfil its obligations under the treaty, in applying the decision of the Council, was nevertheless held responsible.

11. With regard to the plurality of injured States, he agreed with paragraph 279, which seemed to him to be in line with the principles of law whereby it was recognized that the State which had been injured the most had the right to use unilaterally the whole defensive arsenal available to it as countermeasures. Thus, in cases of massive violations of human rights in a given State, all other States might of course be considered injured, but the State whose nationals had been particularly injured as a result of those violations was entitled to exercise diplomatic protection on their behalf.

12. With regard to article 46 quater, subparagraph (*b*), the phrase "and the circumstances are such that the responsible State could reasonably have believed that the claim would no longer be pursued" was too subjective and the first part of subparagraph (*b*) adequately dealt with the problem referred to there.

13. Lastly, with regard to the relationship between the concepts of responsibility and opposability or non-opposability of a wrongful act, in principle there was no direct relationship between opposability and responsibility. Opposability was not linked to a violation. In his opinion, it would take a great deal of effort and a great deal of time to settle that question, which was not even posed clearly in legal practice. It could only therefore be dealt with in the commentary.

14. In conclusion, he supported the proposed draft articles and was in favour of referring them to the Drafting Committee.

15. Mr. BROWNLIE said that the questions referred to in chapter III had been treated very substantially and that any remaining difficulties would be better left to the Drafting Committee, to which the draft articles should be referred as soon as possible. His remarks would therefore be limited to a few technical points.

16. Turning to the issue raised by the Special Rapporteur in paragraph 238, namely, a minimum requirement of notification by one State against another of a claim of responsibility, so that the responsible State was aware of the allegation and in a position to respond, he personally thought that the answer offered at the end of that paragraph was too narrow. Moreover, the analogy drawn, in the footnote to that paragraph, with article 23 of the 1969 Vienna Convention, which dealt with reservations, was not particularly cogent. The Special Rapporteur had not cited any jurisprudence or authority in support of that solution. It was not certain that, in practice, States always communicated in writing. Furthermore, since "writing"

had not been defined, did it mean a note verbale, an informal, but contemporaneous and reliable record of talks between two diplomats or a subsequent report? In the case concerning *Certain Phosphate Lands in Nauru*, for example, where the questions of waiver and delay had arisen, as the Special Rapporteur had pointed out in the commentary, ICJ had adopted a fairly flexible general approach, in that it had accepted an affidavit from the Nauruan Head Chief stating that he had raised the question of the claims with the Australian authorities on several occasions. Although he himself was unwilling to proffer a solution, the Drafting Committee might re-examine the Special Rapporteur's proposal, which did not appear to reflect existing experience or the standards adopted by international courts.

17. The treatment of the question of delay raised in paragraphs 257–to 259 of the report might be improved in the commentary, although it had not been completely settled in the draft article either. The dilemma stemmed from the fact that, although delay, as such, was not a ground of inadmissibility, all the text books tended to be lazy and generally gave the impression that a principle of extinctive prescription existed and the commentary had wrongly taken the same view. Admittedly, as a general principle of comparative law, a general concept of extinctive prescription of action did exist, but, on analysis, that notion broke down into two elements: waiver implied from the conduct of the parties and, secondly, the fact that because of the ancient character of a claim, the allegedly responsible State was seriously disadvantaged in the sphere of evidence and procedural fairness. Those matters had been attended to in the commentary, but the distinction was not reflected in the draft articles.

18. In some rare cases, extinctive prescription arose when, for example, a special agreement laid down a particular period of years after which any claim would be automatically excluded, but it should not be regarded as forming part of general international law and the commentary made no claim that it did.

19. Mr. CRAWFORD (Special Rapporteur) said he feared that the members of the Commission might be somewhat baffled by the contrast between the proposed article 46 ter, which stated that the responsible State must have notice from the injured State, whereas the corresponding commentary specified that notice must be in writing. Having looked at the source materials, he had come to the conclusion that a requirement of notice in writing was too categorical. He therefore accepted the criticism, but noted that a debate had started and that some members, like Mr. Lukashuk, favoured notification in writing. In his own opinion, the formula "to require notice" was more flexible and, at the same time, it struck a balance because there were certain things that the allegedly responsible State could not be expected to know and needed to be told if a claim was to be brought. In other situations, however, it was obvious that a claim existed and the idea that someone had to present himself and recite the claim would not seem to be attractive. The reason for a discrepancy between the commentary and the draft article was that he had changed the text of the latter without amending the commentary, for which he apologized. Nevertheless, the issue was before the Commission by reason of the commentary and other members might well have differing views on the subject. Personally he was in favour of the more flexible formula stating that a claim had to be notified, but without stipulating that it had to be submitted in writing.

20. Mr. LUKASHUK said that he understood the Special Rapporteur's doubts and the stance he had taken. As a compromise which would satisfy him, he therefore proposed that the words "shall officially notify" should be used instead of the words "must notify in writing".

21. Mr. DUGARD, commenting on some questions which were of particular interest to him as Special Rapporteur on diplomatic protection and therefore on article 46 ter, paragraph 2, said that, on the whole, he was satisfied with that provision. The draft article adopted on first reading had not included any provision on the nationality of claims, and that was perfectly normal, since it had been decided to drop the subject and to depart from the approach of the first Special Rapporteur on the topic of State responsibility, Francisco García Amador. Having read chapters IV and V of the report, which had been unofficially circulated, he was delighted to see that, in paragraph 428, the Special Rapporteur had discussed the question of a saving clause on the subject of diplomatic protection and the nationality of claims and had taken the view that there was no need for any saving clause other than that embodied in article 46 ter, paragraph 2 (*a*). Obviously, the whole question of the nationality of claims would be dealt with in the report on diplomatic protection and much time had already been devoted to the subject at the current session. Nevertheless, he had some reservations about the wording of the draft provision; the double negative in the introductory paragraph and subparagraph (*a*) ("The responsibility of a State may not be invoked … if … the claim is not brought …") was infelicitous, but it was a matter for the Drafting Committee.

22. The principle of the exhaustion of local remedies was a more difficult issue. Article 22 adopted on first reading had included a provision on that subject and it had been discussed at previous sessions. That article was essentially the brainchild of Special Rapporteur Ago and reflected the view he had argued unsuccessfully in the *Phosphates in Morocco* case. Incidentally, it would be interesting to know whether he had disclosed his own interest in the case, when that matter had been debated in the Commission. In his own opinion, it was a healthy sign that members of the Commission did clearly indicate the cases in which they had acted as counsel, so that everyone knew what their professional interests were. At all events, if a provision like article 22 were to be included, it would tie the hands of the Special Rapporteur on diplomatic protection. He frankly had an open mind on the subject and did not strongly support either the substantive or the procedural view. Like former Special Rapporteur García Amador, he found merit in both approaches. The context in which the rule of the exhaustion of local remedies was invoked was very important. He would like to be able to consider the matter more fully. If the report on diplomatic protection was to deal with the subject, it would be wrong to discuss it in any detail in the draft articles under consideration.

23. For that reason, he approved of the way the rule had been handled in article 46 ter: a mere reference, but no taking of a position on the approach to be adopted and no

attempt to deal in detail with the matter. As it had been decided by the Commission that the matter should be referred to in the study on diplomatic protection, it would be wrong to go any further. Mr Hafner had suggested that article 46 ter, paragraph 2, could be dispensed with completely. Perhaps he had made that suggestion in anticipation of a saving clause being incorporated at a later stage. His own view was that paragraph 2, as it stood, would be preferable to a saving clause and he was very happy with that provision.

24. Mr. HAFNER explained that he had not proposed the deletion of the whole of paragraph 2, but only that it should be shortened.

25. Mr. GAJA said that he endorsed Mr. Hafner's view that the text of the provision could be shorter. The current text certainly leaned towards the procedural theory because it assumed that responsibility had already occurred. Perhaps a vaguer formulation could be found. Mr. Dugard's comments had embarrassed him, because he wondered whether he had to disclose that he had taken the procedural approach when pleading in the *ELSI* case after writing a book which had been a defence of the substantive view. As for Mr. Dugard's allusion to Ago's interests, the latter had never made a secret of the fact that he had appeared in the *Phosphates in Morocco* case which anyway dated back to the time of the League of Nations.

26. Mr. CRAWFORD (Special Rapporteur) drew attention to the fact that he had dealt with article 22 in detail in his second report on State responsibility.[3] It had emerged from the debate on the subject that the Commission wished to leave both possibilities open. In some cases, it was clear that a breach had already occurred and the exhaustion of local remedies was a procedural prerequisite which could be waived. In other cases, the denial of justice formed the substance of the claim, but there might be some cases in between, which were difficult to classify.

27. The formulation of article 46 was not intended to prejudice that, but it was clear that in that context it was a matter not of judicial admissibility, but of the admissibility of claims at the State-to-State level and it therefore belonged in the draft articles. It should, however, be presented in such a way that it left the substantial questions open to examination within the framework of the topic of diplomatic protection. Similarly, it was necessary to leave open the possibility that the rule of the exhaustion of local remedies applied to individual human rights claims under general international law as distinct from claims of mass violations. It was significant that the articles in the human rights treaties which applied the exhaustion of local remedies rule referred to general international law and did not simply apply a rule taken from another context. The implication was that the rule was generally applicable. Although the position he had personally adopted in the second report had tended towards the procedural view, he thought that the Commission could leave the point relatively open.

28. Mr. DUGARD said Mr. Gaja had stated that article 46 ter, paragraph 2 (*b*), inclined towards the procedural position, perhaps because it was placed in the chapter which was generally concerned with procedural matters. He agreed with Mr. Gaja and the Special Rapporteur that, at the current stage, the Commission should not decide whether it was substantive, procedural or something in between. When the matter was referred to the Drafting Committee, the latter should pay special attention to keeping the range of possibilities open.

29. Mr. PELLET said he acknowledged that the draft articles submitted by the Special Rapporteur in paragraph 284 of his third report were extremely opportune.

30. It was interesting to ponder on the spirit in which those proposals were formulated. Setting aside the "prehistoric" period presided over by García Amador, four successive special rapporteurs had been entrusted with that important topic. First, Ago, whose genius for unifying and theorizing—and perhaps also a spirit of vengeance—had profoundly altered the traditional conception of the topic of State responsibility. Then, after the Riphagen interlude, which had exerted no real influence on account of its excessive abstraction and rigidity, the more moralizing and insufficiently technical approach adopted by Mr. Arangio-Ruiz. Currently, with Mr. Crawford, while he did not depart from very strict doctrinal precedents, except on the question of crimes, it was pragmatism in the best sense of the word that prevailed. He had the impression that the Special Rapporteur's chief concern was to complete the draft articles and to make them fully functional, particularly by filling the many lacunae that had characterized Part Two in particular of the earlier draft. Chapter I of Part Two bis was a happy illustration of that excellent programme, although he remained perplexed at the curious terminology used by the Special Rapporteur to explain his intentions, particularly in paragraph 227 of the report, in which he used and abused the word "secondary" to describe both the consequences of the internationally wrongful act (namely, responsibility alone, the consequence of the internationally wrongful act) the consequences of responsibility (which was, one might say, a "tertiary" consequence of the wrongful act) and perhaps even the "quaternary" procedural consequences of the wrongful act.

31. That being said, the overall scheme was clear, even if the vocabulary was not: the task was to ascertain, as the title of chapter I indicated, in what circumstances a State could invoke the responsibility of another State to which an internationally wrongful act could be attributed. More specifically, the question was what consequences the injured State could draw from that responsibility. In his view, the first of those conditions appeared to be that the State had suffered an injury, but that belonged to the discussion of article 40 bis, at least in the broad sense, and there would certainly be an opportunity to refer to the question again during the consideration of the text by the Drafting Committee.

32. Turning to the articles proposed by the Special Rapporteur, he noted that article 46 ter raised the largest number of questions of principle, not so much because of what it said as because of what it omitted to say. The Special Rapporteur had proposed changing the drafting of the articles in Part Two by shifting the emphasis from the rights of injured States to the obligations of responsible

[3] See 2614th meeting, footnote 5.

States, as was noted in paragraph 232 of his report. Like most members of the Commission, he had supported that change, but his approval was clearly subject to a clear presentation in Part Two bis of the corresponding rights of the injured State or States, for that seemed to be the underlying spirit of the new structure proposed by the Special Rapporteur: Part Two was concerned with the obligations of the responsible State, whereas Part Two bis stressed the rights (or obligations) of the injured State.

33. One of the main problems in that regard was whether, and, if so, to what extent, the injured State could elect as between the various forms of reparation. That crucial problem was dealt with in paragraphs 227, 231, subparagraph (*a*), 232 and 233 of the report (and had already been discussed in paragraphs 25 and 26). The Special Rapporteur's clear and categorical reply to that question was that the injured State had the right to elect the form of reparation. That position had the merit of firmness—it was perhaps a little too categorical—but it also had one major drawback: despite the statement in paragraph 233 that the election must be "valid", it was not taken up in article 46 ter. The latter article dealt only with the form and the procedure (in the broad sense), not with the actual content of the possible subject of the claim.

34. It thus seemed that, before article 46 ter, there should be another article, clearly setting forth the principle of election residing with the injured State, regarding which there seemed to have been broad agreement among members of the Commission, to judge from the debate on articles 43 and 44. That agreement seemed to him to concern only the principle of the freedom of the injured State to elect as between restitution and compensation. The Commission had seemed to agree that the injured State could require restitution pursuant to the provisions of article 43, in other words, whenever that was materially possible and would not involve a disproportionate burden on the responsible State. The fundamental reason for that was that the wrongdoing State must not be accorded the possibility of "buying off" a violation of international law —something that would in any case be contrary to the principle of equality among States, as some States had the resources to buy off a wrongful act, whereas others did not. That explanation should also appear somewhere in the commentary, for it was the only truly convincing explanation of the right of the injured State to require restitution rather than compensation. But it also seemed to him that the members of the Commission had agreed in considering that the injured State could not waive restitution (at least, of course, where it was possible) in the case of a crime or, perhaps more generally, in the case of a violation of a peremptory norm of general international law, for, in that case, compliance with the obligation concerned not only the injured State, but the international community as a whole.

35. The problem of satisfaction also arose. In his view, nothing prevented a State from waiving restitution or compensation in favour of satisfaction. It also seemed to him that the Special Rapporteur admitted as much, at least implicitly, in his comments devoted to the waiver of reparation. But, there again, nothing was said on the question in the draft article itself. And that, in turn, raised another problem: it seemed to be accepted that the injured State was entitled to satisfaction if that was a necessary component of full reparation for the harm. But could it require a specific form of satisfaction? Article 46 ter, paragraph 1 (*b*), seemed to provide for that, but article 45, on the other hand, was very vague on that point. If there was no clear answer to that question, it might be possible to avoid referring to that difficulty in the draft articles and merely to point to the problem in the commentary. But in any case it should not simply be passed over in silence, as was currently the case, as the report did not deal with the problem in that form.

36. On the other hand, he considered it indispensable to state explicitly, somewhere in the draft articles themselves—probably between article 40 bis and article 46 ter —that "the injured State is entitled to require restitution rather than compensation in the circumstances set forth in article 43" and he thus wished to make a formal proposal to that effect.

37. Once that prior condition of control, subject to certain limitations, by the injured State over the form reparation should take was established, article 46 ter did not raise any very great difficulties, even though it could probably be considerably simplified. Paragraph 1 could be reduced to the current *chapeau*, as its subparagraphs (*a*) and (*b*) posed problems to which other members of the Commission had drawn attention and were in any case probably not exhaustive. Any attempt to supplement them would require entering into the sort of details that were best left to diplomatic practice to work out. With regard to the *chapeau*, he proposed two changes: first, instead of "which seeks to invoke", one could simply say "which invokes". That was the point at issue; the words "seeks to" were ambiguous and added nothing. Secondly, instead of *doit notifier*, the French text could simply read *notifie*, so that the text would then read: "An injured State which invokes the responsibility of another State shall give notice of its claim to that State"—the words "under these articles" also being dispensable. Moreover, like Mr. Brownlie and Mr. Simma, and for the reasons they had given, he thought it unnecessary to specify that the claim should be "in writing", despite the argument set forth in paragraph 238 of the report, which was in any case not taken up in the text of the draft article. At all events, the form was unimportant: what mattered was that the State whose responsibility was invoked should be aware that there was a problem.

38. As for paragraph 2, it had to be acknowledged that it encroached on the preserve of the Special Rapporteur on diplomatic protection, for it dealt, on the one hand, with the nationality of the individual who had suffered the initial injury and, on the other, with the exhaustion of local remedies; in other words, the two conditions to which diplomatic protection was traditionally subordinated. He therefore wondered whether it was right to be so specific and whether it would not be better simply to refer to diplomatic protection. That could fairly easily be done, but probably elsewhere than in article 46 ter, perhaps in the *chapeau* to article 40 bis, which might be drafted so as to read: "Subject to the rules applicable to diplomatic protection, a State has the right to invoke the responsibility of another State …". Another possibility would be to include in the future Part Four a provision stating that: "These draft articles are without prejudice to the rules applicable to diplomatic protection". A third

possibility would be to devote a new article 46 ter (bis) to the question, perhaps worded: "The responsibility of a State may be invoked in the case of injury to an individual by an internationally wrongful act only if the conditions necessary to the application of diplomatic protection are fulfilled". In any event, two things in the current paragraph 2 of article 46 ter troubled him: first, it was somewhat inconsistent that it should appear in the same article as paragraph 1, dealing with the formal conditions for invocation of responsibility, which was a very different matter; and secondly, that it was too specific, yet at the same time perhaps incomplete, as the Commission had decided to separate diplomatic protection from responsibility.

39. With regard to article 46 quater, noting that Mr. Simma had criticized the word "waiver" in the English text, he said he had no very definite proposal for a more suitable word, but that he had considerable doubts as to the suitability of the word "acquiescence", which risked referring not to the consequences of responsibility, but to the engagement of responsibility, a danger against which the Special Rapporteur warned in paragraph 254 of his report. Consent to the wrongfulness was different from a waiver of reparation. In any case, the word *renonciation*, used in the French text, was perfectly correct. Noting, moreover, that Mr. Hafner had criticized the expression "or in some other unequivocal manner" at the end of subparagraph (*a*) of article 46 quater, he said that he found the expression entirely appropriate and very well justified in paragraph 256 of the report.

40. Subparagraph (*b*) also demonstrated almost all the virtues and, once again, he could not join Mr. Lukashuk and Mr. Simma in their criticisms of the flexible and appropriate formulation that appeared to allude discretely to estoppel by conduct, conditions for which were more flexible in international law than in common law and which did not refer exclusively to the conduct of one of the protagonists, but rather to the interaction between the parties as they reacted to one another's conduct. In the French text of the same subparagraph, the word *lésion* should be replaced by *préjudice*.

41. Although he approved of article 46 quater, he nevertheless felt that it lacked some element, to which a second paragraph or a separate article should be devoted and to which he had already alluded, namely, the case of a partial waiver, not of the right to invoke responsibility, but of those most frequently manifested forms of reparation, restitution and/or compensation, in favour of satisfaction alone. Perhaps it would be sufficient to say: "The injured State may partially waive the full reparation that is due", with the proviso that a waiver of restitution was impossible where a rule of *jus cogens* had been violated.

42. With regard to articles 46 quinquies and sexies, he agreed with Mr. Hafner and Mr. Simma, both of whom had dwelled on the fact that the problems raised by a plurality of injured States and of responsible States were more complex than those two articles might lead one to believe, although he was reluctant to go along with Mr. Simma or Mr. Lukashuk, both of whom seemed to advocate the Commission taking up the case of a plurality of States, whether in respect of active or of passive responsibility, in the context of the question of international organizations. In any case, the Commission had decided, rightly or wrongly, to exclude all problems closely or distantly relating to international organizations and he thought it best, at the current juncture, to stand by that decision, as was firmly advocated by the Special Rapporteur in paragraphs 276 (*a*) and 282 of his report. That being said, he entirely agreed with the Special Rapporteur's view, to be found in paragraph 283, that questions relating to a plurality of injured and responsible States must, as far as was possible, be clarified in the actual text of the draft articles.

43. Turning to article 46 sexies, he said that, as to the substance, although he had had occasion to plead in several cases before ICJ in which the problem had arisen, he had no clearly formulated ideas on the question, except that it was extremely risky to draw analogies with internal law in that area. That being said, it was not accurate, as the Special Rapporteur stated far too categorically in paragraph 275 of his report, that the sources of international law as reflected in Article 38, paragraph 1, of the Statute of the Court did not include analogy from national legal systems. In his view, that was precisely the object and purpose of "the general principles of law" cited in subparagraph (*c*) of that provision, which applied to the principles common to States *in foro domestico*. But, in the case in point, where joint and several liability mechanisms were involved, national systems differed widely, again contrary to the impression one might gain from paragraph 272 of the report. Thus, though for a reason totally different from that adduced by the Special Rapporteur, he joined him in believing that little could be derived from an analogy with national legal systems. There was thus no choice but to make do with international law and the Special Rapporteur conclusively demonstrated that practice in that area was scanty and not absolutely decisive. He thought, however, that the few examples the Special Rapporteur had found were fairly convincing, except for that of the Convention on International Liability for Damage Caused by Space Objects, which established a treaty regime of objective responsibility, and thus one covering acts not internationally wrongful, so that consequently that Convention proved absolutely nothing in the sphere of interest to the Commission. But, for the rest, the examples given by the Special Rapporteur, including that of the *Corfu Channel* case, the relevance of which some members had questioned, seemed to show that international law inclined towards joint and several liability, as opposed to joint liability. That meant that, if internationally wrongful acts of several States had contributed to the same damage, each of those States was obliged to make reparation for the harm as a whole, although it could also have recourse to the other responsible States. That seemed to be the conclusion reached by Judge Shahabuddeen in his separate opinion in the case concerning *Certain Phosphate Lands in Nauru* cited by the Special Rapporteur in paragraph 277 of his report, and which he appeared to endorse, although the end of that paragraph was extremely cryptic. Moreover, it was also the "scenario" actually adhered to by the litigant States in that case. He readily conceded that that was not an absolutely clear conclusion, in the light of the scanty practice in that area, but it was the most plausible and also the most convenient for the victim. Thus, in the absence of clear customary law to be codified, the Commission might take up that principle in the context of the progressive development of international law, which was actually nothing more than the con-

solidation of trends that could be discerned from an unbiased analysis of practice. However, the drafting of article 46 sexies was somewhat surprising: while the Special Rapporteur had engaged in that objective analysis and seemed to have reached the same conclusions as himself, the text of article 46 sexies seemed to strike out in the diametrically opposite direction. It was incontestable that "the responsibility of each State [responsible for one and the same unlawful act] is to be determined in accordance with the present draft articles", but that was not at all what was at issue: the determination of responsibility was the subject of Part One of the draft and what was important in the current context were the consequences of responsibility. Yet paragraph 1 made no reference thereto, whereas paragraph 2 added to or subtracted from a principle not set forth in paragraph 1. In his view, paragraph 1 should be drafted quite differently, so as to read, for example: "When two or more States are responsible for one and the same internationally wrongful act, each of them is obliged"—or to err on the side of caution, "may be obliged"—"to make reparation for all damage caused by that act".

44. Once that principle was stated, paragraph 2 became comprehensible. The principle did not permit a State to recover more than the damage suffered (para. 2 (*a*)) and was without prejudice to the possibility for a State from which total reparation was claimed to require a contribution from the other responsible States (para. 2 (*b*) (ii)). Paragraph 2 (*b*) (i), meanwhile, did not belong in the draft article; there should be a more general provision stating that the whole of Part Two of the draft was without prejudice to current rules of procedure and competence before international courts and tribunals.

45. The wording of article 46 sexies also called for a number of comments. In paragraph 2 (*a*), it did not seem appropriate to mention persons or entities other than States, since such matters related to the law of diplomatic protection or indeed to national legislation. He also wondered whether that paragraph should be limited to compensation; he had in mind particularly the restitution of a sum of money. "Reparation" would be perhaps more comprehensive and certainly more accurate than "compensation". Lastly, in paragraph 2 (*b*) (ii), the French translation of "requirement for contribution"—*exigence de contribution*—was a common law phrase. It would be preferable to use a more neutral expression, simply stating that paragraph 1 was without prejudice to the possibility of any State that might be required to provide full reparation to take action against the other responsible States. It might be worth adding the words "with a view to recovering a sum proportional to the contribution of each of those States to the wrongful act" or "to the harm".

46. He had fewer comments to make about article 46 quinquies, not because it seemed free of problems but because there was no way of resolving them. All things considered and without full knowledge of the relevant practice (perhaps there was none, aside from the *Forests of Central Rhodopia* case), it seemed to state a sensible rule, although so obvious that it could be asked whether it needed to be included at all. In his view, the answer should be in the affirmative, if only for the sake of balance with the crucial article 46 sexies. He only wondered whether the Commission should not decide between the position adopted by the Special Rapporteur in paragraph 281 of the report—which he was inclined to favour—and that taken by the arbitrator in the *Forests of Central Rhodopia* case, Östen Undén. The Special Rapporteur had made no specific proposal. The Drafting Committee might wish to consider the matter.

47. Lastly, he reiterated his view that, despite his critical comments, most notably with regard to some lingering flaws, the articles proposed by the Special Rapporteur were, in intention at least, extremely useful and undoubtedly added to the value of the draft articles as a whole. They should therefore be examined and finalized by the Drafting Committee.

48. Mr. ROSENSTOCK said that, if memory served, Mr. Pellet had been among those who thought that not enough emphasis had been given to the idea that the injured State should be able to choose the form of reparation. In those circumstances, he wondered why Mr. Pellet was in favour of deleting article 46 ter, paragraph 1 (*b*).

49. Mr. GALICKI considered that, contrary to what Mr. Pellet had said, it had been perfectly legitimate for the Special Rapporteur to cite, in paragraph 272 of the report, the example of the Convention on International Liability for Damage Caused by Space Objects . Indeed, in his view, article VI of the Convention, which brought together the elements of liability and responsibility, should also be cited.

50. Mr. CRAWFORD (Special Rapporteur), referring to Mr. Rosenstock's comment, said that his intention had indeed been, in article 46 ter, paragraph 1 (*b*), to emphasize that the injured State had a choice as to what form reparation should take. In reply to Mr. Pellet's comment, he said that the word "responsibility" in article 46 sexies, paragraph 1, referred to Parts One and Two of the draft in their entirety. It seemed to him that Mr. Pellet was in agreement with him on the principle, if not the wording.

51. Mr. PELLET, replying to the Special Rapporteur, said that, for him, the problematic word was "determined", since it referred to the origin of the responsibility.

52. Further, he was in total disagreement with Mr. Galicki. It was risky to invoke conventions laying down special regimes of responsibility, since that would obliterate the distinction between liability and responsibility.

53. As for Mr. Rosenstock's remark, article 46 ter, paragraph 1 (*b*) was, as it stood, simply a procedural provision indicating that the State should specify what form reparation should take. It had nothing to do with the right of the injured State to choose the form of such reparation.

54. Mr. ECONOMIDES said he regretted that there had not been enough time to study the French version of the text, owing to its having been issued late. His remarks on the draft articles before the Commission could therefore be only preliminary.

55. Article 46 ter did not seem to cover the situation of a State which was not injured but was nonetheless entitled to invoke the responsibility of another State. Since that situation arose in particular when the fundamental interests of the international community as a whole had been seriously affected, that factor should be taken into

account, as Mr. Gaja had said. More specifically, he pointed out, with regard to paragraph 1 (*b*), that the injured State did not have an absolute right to choose the form of reparation, particularly when restitution in kind was possible. Otherwise, the principle according to which restitution took priority over reparation, except where otherwise agreed between the parties, would make no sense. Moreover, the choice of the form that reparation should take depended on the basic provisions already adopted regarding restitution, compensation and satisfaction. Article 46 ter was certainly not the right place to deal with the issue.

56. Moreover, the article was not complete. The injured State could claim for much more than mere cessation, yet the proposed text did not so provide. If the provision had to be retained, it should specify that the list of elements to be included in the claim was meant to be purely indicative, not restrictive. Furthermore, the form reparation should take was often determined as the result of a long-term process; it could not be defined immediately or unilaterally. In fact, the only useful aspect of article 46 ter was the requirement of written notice of the claim by the injured State. That aspect should therefore be retained in a special provision, along the lines proposed by Mr. Pellet, or else the question of giving notice of a claim should be mentioned in the commentary.

57. Article 46 ter, paragraph 2, should contain a completely separate provision, which might be entitled "Conditions for the exercise of diplomatic protection". It was, incidentally, naïve to refer to responsibility "invoked under paragraph 1", since a State's responsibility did not arise out of paragraph 1, but rather out of the regime established under the draft articles as a whole. Paragraph 2 did not, therefore, concern direct responsibility between States, since it dealt with the case of a State acting on behalf of one of its nationals, whether a physical or a moral person. Such a situation should be covered in some way and he would propose the following text:

> "A State may invoke the responsibility of another State on the grounds of diplomatic protection only:
>
> "(*a*) If its request is in conformity with the rules regarding nationality of claims;
>
> "(*b*) If any effective local remedies available to the person or entity on whose behalf the diplomatic protection is exercised have been exhausted."

If it was thought unwise to enter into detail, the text could be made even more concise, with the following wording: "A State may not invoke the responsibility of another State on the grounds of diplomatic protection when the conditions for exercising such protection are not fulfilled."

58. With regard to article 46 quater, subparagraph (*a*), he agreed with Mr. Simma that the term "waived" was not used in its technical sense. The phrase "unqualified acceptance of an offer of reparation" simply meant settlement of the dispute, not through waiver, but, rather, because the injured party had received satisfaction. Moreover, the phrase "or in some other unequivocal manner" could include waiver and any other modality of the loss of the right to invoke responsibility. It should therefore be reviewed by the Drafting Committee.

59. Article 46 quater, subparagraph (*b*), was considerably more problematic, since it dealt with the issue of prescription. If prescription was to be provided for at all, it came under primary rules. Introducing it into the draft articles by means of a secondary rule was what he would qualify as getting into contortions. First of all, the rule relating to "reasonable time" did not apply to all offences: it applied to delicts, but not to crimes, as defined in article 19. In today's world, it was considered that the most serious breaches affecting the international community as a whole were imprescriptible. Secondly, the provision was incomplete. It contained no clear statement of what was expected of States and it was too vague. It should be deleted in its entirety.

60. Article 46 quinquies, by contrast, seemed most useful. He regretted that it did not present all the possible variations: it dealt with the situation of an injured State or several injured States, but not with the situation in which all States were injured by an extremely serious breach affecting the interests of the international community as a whole. That was a flaw, but he acknowledged that he did not know how to fix it.

61. With regard to article 46 sexies, it would be better, as Mr. Pellet had recommended, to restrict it to the invocation of the responsibility of each State, rather than referring to "determining" such responsibility, as the current wording of paragraph 1 had it. The determination of responsibility came under a different part of the draft articles. Moreover, paragraph 2 (*b*) (i) was in the wrong place, unlike paragraph 2 (*b*) (ii). The wording of the latter, however, should be improved, especially in the French text. Paragraph 2 (*a*) constituted a useful provision, but it would be preferable to delete the reference to "person or entity". There should simply be an explanation in the commentary that, in some cases, the provision applied not to a State, but to institutions or private persons.

62. Mr. ADDO said that article 46 ter made provision for an obvious situation: the only way of invoking the responsibility of a State was to give it notice of a claim and to specify what conduct was required to ensure cessation of the wrongful act and what form reparation should take. In that regard, in paragraph 1 the words "should specify" should, as previous speakers had said, be replaced by "shall specify", which would carry more weight. Paragraph 2 (*a*) dealt with the rule on the nationality of claims, which limited the right accorded to States under international law to exercise diplomatic protection. That right was also limited by the rule on the exhaustion of local remedies contained in paragraph 2 (*b*). It was clear from that subparagraph that, if the available local remedies were not effective, there was no point in resorting to them. It was equally clear that, where remedies existed, but the authorities of the State of origin prevented access to them, the rule on the exhaustion of local remedies might be considered to have been complied with. That had been confirmed by ICJ in, for example, the *Barcelona Traction* case (*Preliminary Objections*). The wording proposed by the Special Rapporteur for the draft article was therefore adequate.

63. He also favoured proposed article 46 quater, if it was understood that the "reasonable time" mentioned in

subparagraph (*b*) was assessed on a case-by-case basis and in the light of the particular circumstances. Articles 46 quinquies and sexies were also acceptable. He therefore considered that chapter I of Part Two bis, as proposed by the Special Rapporteur, should be referred to the Drafting Committee.

64. Mr. LUKASHUK, referring to article 46 ter, paragraph 1, said that the word "should" ought to be retained and not, as some members had suggested, replaced by the word "shall", which implied obligation. If an injured State were obliged to specify in its claim what form reparation should take, that might be interpreted as meaning that an injured State which did not request compensation, for example, was subsequently not entitled to make such a claim.

The meeting rose at 12.40 p.m.

2645th MEETING

Tuesday, 25 July 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility[1] (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,[2] A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. HE said the Special Rapporteur was to be congratulated on his initiative in putting together the new Part Two bis on implementation of State responsibility, which was marked by its comprehensive nature and well reasoned and balanced argumentation. It would undoubtedly occupy an irreplaceable position in the draft articles.

2. Article 46 ter, paragraph 1, contained a crucial element in the invocation of responsibility: the need for the injured State to give notice to the responsible State of its claim. Paragraphs 234 and 236 of the third report (A/CN.4/507 and Add.1–4) stressed the need for the injured or interested State to respond to the breach, the first step being for it to call the attention of the responsible State to the situation so that it would cease the breach and provide redress. According to paragraphs 236 and 237, care should be taken not to over-formalize the notification procedure, as ICJ did not attach much significance to formalities. The various forms of notification, from an unofficial or confidential reminder to a public statement or formal protest, could be taken as suitable means of notification, as circumstances required, but failure to make such notification to the responsible State could entail serious legal consequences, including loss of the right to invoke responsibility.

3. With all those requirements specified for notification of a claim of responsibility, one thing might appear to be missing: the time factor. Was there any time limit for notification? The answer lay in article 46 quater, subparagraph (*b*), which indicated that the claim had to be made known to the responsible State "within a reasonable time" after the injured State had notice of the injury. Accordingly, the time factor should be mentioned in the commentary.

4. He agreed with the Special Rapporteur that paragraph 2, subparagraphs (*a*) and (*b*), of article 46 ter, referring to nationality of claims and exhaustion of local remedies, set out general legal principles whose coverage was not confined to cases of diplomatic protection, i.e. those concerning treatment of foreign nationals and corporations, and that the principles should be treated as general conditions for the invocation of State responsibility. Like other members, however, he thought that paragraph 2 should be incorporated in a separate article, since it dealt with the conditions under which a State's responsibility could not be invoked, whereas paragraph 1 concerned the need to give notice.

5. He welcomed the adoption of the traditional distinction between waiver and delay in article 46 quater and especially liked the wording of subparagraph (*b*), which struck a fair balance between the interests of the injured State and those of the responsible State. Some difficulties arose, however, with regard to settlement. Admittedly, under subparagraph (*a*), unqualified acceptance by the injured State of reparation tendered by the responsible State could be regarded as a type of waiver. Nevertheless, in most circumstances unilateral action by one State was not enough: settlement had to be reached through the actions of both States with a view to achieving a solution that benefited both. In general terms, settlement could not therefore be categorized as a kind of waiver and must be treated separately.

6. In the absence of a specific solution with regard to a plurality of injured States (art. 46 quinquies) and a plurality of States responsible for the same internationally wrongful act (art. 46 sexies), it was desirable to follow the

[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, chap. III, sect. D.

[2] Reproduced in *Yearbook . . . 2000*, vol. II (Part One).