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Summary record of the 2681st meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
2001, vol. I

Organization of work of the session (*continued*)

[Agenda item 1]

21. Mr. TOMKA (Chairman of the Drafting Committee) announced that Mr. Rodríguez Cedeño would take part in the work of the Drafting Committee on reservations to treaties.

The meeting rose at 11.10 a.m.

2681st MEETING

Tuesday, 29 May 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

State responsibility[1] (*continued*)* (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,[2] A/CN.4/517 and Add.1,[3] A/CN.4/L.602 and Corr.1 and Rev.1)

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the report of the Committee containing the titles and texts of the draft articles on responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading (A/CN.4/L.602 and Corr.1).**

2. Mr. TOMKA (Chairman of the Drafting Committee) said that the Drafting Committee had held 19 meetings from 3 to 23 May and had been able to complete the second reading of the draft articles. There was only one small issue still pending, on which the Committee would report to the Commission in plenary at the second part of the session.

3. The topic of State responsibility was unquestionably one of the most important the Commission had ever undertaken. Successive well-qualified and experienced special rapporteurs had put much of their energy and their intellectual talent into developing the relevant regime. The importance of the contribution of the late Roberto Ago, who had defined the overall approach and structure, could not be overemphasized. While Roberto Ago had created a solid foundation for the topic, it was the current Special Rapporteur, Mr. Crawford, who was largely responsible for its completion. He expressed deep appreciation to the Special Rapporteur for his full cooperation and efficient response to the need to revise the articles. The Special Rapporteur's mastery of the subject and perseverance in finding a solution to difficult and divisive issues had greatly facilitated the task of the Drafting Committee. He also wished to thank the members of the Committee for their cooperation and the constructive manner in which they had discussed the articles.

4. The Drafting Committee had provisionally adopted the draft articles on second reading at the fifty-second session, but had not had sufficient time to undertake a complete review. In addition, given the substantial time lapse between the completion of different parts of the topic, the breadth and the importance of the topic and developments in international law, the Commission had considered it prudent to allow Governments to reflect on the articles once more before finalizing them.

5. The Drafting Committee had reviewed all the draft articles taking carefully into account the comments made by Governments in the Sixth Committee, the comments and observations received from Governments (A/CN.4/515 and Add.1–3) and the views expressed by members of the Commission. It had also worked on the basis of understandings reached by the Commission on the settlement of disputes, serious breaches and countermeasures.

6. In discussing the articles, the Drafting Committee had avoided where possible reopening substantive issues that had already been resolved. For both practical reasons—reopening any major issues at the current late stage would risk delaying the completion of the draft—and for reasons of principle—the Committee had provisionally adopted an entire set of draft articles at the fifty-second session—the current review had therefore to be limited to the consideration of comments made on particular articles. Where justified by comments of Governments or of members of the Commission, however, particular issues had been carefully reconsidered and a number of important changes made. The resulting text was a balanced one that responded fairly and fully to the comments made and reflected reasonably the balance of opinion in the Committee and, he hoped, the Commission. The Committee had considered matters of translation into all the language versions in order to align the vari-

* Resumed from the 2677th meeting.

** Subsequently, A/CN.4/L.602/Rev.1 was issued. For an account of the changes made, see 2701st meeting, paras. 62–67.

[1] For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

[2] Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

[3] *Ibid.*

ous linguistic texts with the English original. Although he would refer to linguistic issues only when a particular formulation had been adopted for ease of translation, he invited members who noticed discrepancies in language versions other than English to inform him or the secretariat. At the current session, in contrast to the previous three sessions, the Committee was submitting its report with the recommendation that the Commission should adopt the articles.

7. As to the title, the Drafting Committee had been concerned about the possibility that "State responsibility" was not sufficiently clear to distinguish the topic from the responsibility of the State under internal law. It had considered different variants, such as "State responsibility under international law", "International responsibility of States" and "International responsibility of States for internationally wrongful acts". One of the advantages of the last formulation was that it facilitated translation into other languages by clearly differentiating the concept from that of international "liability" for acts not prohibited by international law.

8. The Drafting Committee had subsequently settled on the title "Responsibility of States for internationally wrongful acts", without the qualifier "international" before "responsibility", so as to avoid repeating the word "international" twice in the title. However, it would be explained in the commentary that the word "responsibility" was deemed to refer exclusively to "international responsibility". Since the draft articles covered only internationally wrongful acts and not any other wrongful acts, it had been deemed preferable to retain the reference to acts that were internationally wrongful. In terms of structure, the order of the articles adopted at the fifty-second session had been maintained, with a few exceptions.

9. The Drafting Committee had examined the possibility of modifying the title of Part One because it was thought to be too close to the new title of the entire topic. In particular, it had considered a proposal by France, in the comments and observations received from Governments, to adopt the title *Fait générateur de la responsabilité des États*, but it had been found difficult to translate into English. One possibility had been to revert to the title of Part One as adopted on first reading,[4] namely "Origin of international responsibility", but the Committee had decided that the implications of "historical origin" militated against such an approach. Another possibility had been to adopt a more generic title such as "International responsibility of States".

10. On balance, the existing title, "The internationally wrongful act of a State", had been considered to be the best rendering. As to the French version, while the Drafting Committee had considered the possibility of making an exception and using the proposal by France, it had decided that, in view of the change to the title of the draft as a whole, the concern underlying that proposal no longer existed. It had therefore been decided to use as the French title *Le fait internationalement illicite de l'État*.

11. For Part One, chapter I, the Drafting Committee had decided to retain the title "General principles", which was uncontroversial. In considering articles 1, 2 [3]*** and 3 [4], the Committee had noted that they were structural in nature, that they had been widely endorsed and that no criticism had been raised by Governments or in the Commission.

12. With regard to article 2 [3] (Elements of an internationally wrongful act of a State), subparagraph (*b*), the Drafting Committee had considered the possibility of rendering the term "obligation" as "legal obligation". That was particularly relevant to some of the language versions, such as Russian, where a distinction was made between "legal" and other commitments, such as political commitments. The Committee had decided that the English original would remain unchanged, since the context made it clear that the article dealt with an obligation under international law and that was explained in the commentary. Furthermore, the addition of the term "legal" would result in numerous amendments throughout the draft. The Committee had also been concerned that stressing the legal nature of the obligation would have the effect of implying that there were other obligations of a non-legal nature that could give rise to responsibility. Such a possibility was not envisaged under the draft articles.

13. Regarding article 3 [4] (Characterization of an act of a State as internationally wrongful), the Drafting Committee had considered a comment by one Government about duplication with article 32 [42] (Irrelevance of internal law), since both dealt with the irrelevance of internal law. The Committee had noted that some duplication was inevitable and that there seemed to be no inconsistency between the two articles. Article 3 [4] dealt with the characterization of an act, while article 32 [42] concerned reparation as a legal consequence of a wrongful act.

14. The Drafting Committee had also examined a proposal made in the Sixth Committee to change the title of article 3 [4] to "Law applicable for characterization of an act of a State as internationally wrongful" or "The applicable law". In rejecting such alternative wording as insufficient, the Committee had noted that article 3 [4] did not consider internal law to be irrelevant to the question of whether conduct was internationally wrongful; rather it provided that international law governed the question of characterization, taking into account internal law to the extent that it was relevant. In other words, there could be situations when internal law was relevant to the question of international responsibility, and that was reflected in the wording of article 3. The Committee had thus decided to adopt all three draft articles in chapter I in their existing form.

15. In the case of Part One, chapter II (Attribution of conduct to a State), the Drafting Committee had made small structural, as well as drafting, changes to the draft articles provisionally adopted at the fifty-second session. It had decided to reorder two of the articles to achieve a more logical grouping and to clarify the relationship between article 9 [8] (Conduct carried out in the absence or

[4] See 2665th meeting, footnote 5.

*** The numbers in square brackets correspond to the numbers of the articles adopted on first reading.

default of the official authorities) and a number of other articles. The articles were to be reordered in the following manner: articles 4 [5] (Conduct of organs of a State) and 5 [7] (Conduct of persons or entities exercising elements of governmental authority) retained the same numbering; new article 6 (Conduct of organs placed at the disposal of a State by another State), which had been article 8 [9]; new article 7 (Excess of authority or contravention of instructions), containing the substance of what had been article 9 [10]; new article 8 (Conduct directed or controlled by a State), which had been article 6 [8]; new article 9, which had been article 7 [8]; and articles 10 [14, 15] (Conduct of an insurrectional or other movement) and 11 (Conduct acknowledged and adopted by the State as its own), which retained the same numbering as at the fifty-second session. An additional benefit of the reordering had been the grouping together of the first four articles dealing with conduct of organs, persons or entities and the last four articles that dealt with other types of conduct.

16. The Drafting Committee had decided to standardize the various references to persons, entities and organs in chapter II. While it had first considered the formulation "person or body", it had settled for "person or entity" in article 4, paragraph 2, and articles 5 and 7, conforming to the language of the draft articles on jurisdictional immunities of States and their property.[5] Article 4, paragraph 1, and article 6 retained the reference to "organ", and the words "person or group of persons" had been kept in articles 8 and 9. The possibility of using a standard formula for all the articles had been rejected. The reference to "person or entity" had been retained to cover the situation of natural and legal persons in the relevant articles. Conversely, the phrase "person or group of persons" appeared in those articles dealing with aggregates of individuals or groups that did not have or did not need to have legal personality, but were nonetheless acting as a collective.

17. Regarding the title of chapter II, the Drafting Committee had been concerned about the possible implications of the phrase "act of the State" in relation to the Act of State doctrine, a legal term within some legal systems dealing with a completely different issue. The Committee had considered alternative formulations that more closely described the scope of chapter II, namely, attribution of conduct to the State. They had included "Conduct attributable to the State", "Attribution to the State", "Attribution of an act to the State" and "Attribution of conduct to the State under international law". The Committee had decided to adopt "Attribution of conduct to a State", a shorter version of the last-mentioned formulation that left out the reference to "under international law", which was clear from the context and which flowed from the application of article 3 [4]. As a consequence of the new title, the Committee had adopted shorter versions of the titles for each of the draft articles reflecting the particular conduct in question, it being understood that the entire chapter dealt with attribution to the State of such conduct.

18. Article 4 [5] contained a balance, worked out at the fiftieth session,[6] between the role of the internal law of the State and of international law in terms of the qualification of an entity as an "organ". Generally speaking, that balance had been maintained and the Drafting Committee had decided not to reopen the substance of the article.

19. The Drafting Committee had considered a proposal to delete the opening phrase to paragraph 1, "For the purposes of the present articles". It had been pointed out that because of the structure of the draft, including the absence of a provision on use of terms, a number of definitions appeared as, or within, separate articles, and that it would be inelegant to start those articles every time with the phrase "for the purposes of the present articles". In the view of the Committee, any definition in a legal instrument was intended for the purpose of application of that instrument. That understanding need not be reiterated at the beginning of every article defining a term, and the commentary to chapter II or to article 4 [5] would make a general reference to it. The Committee had therefore deleted the phrase in question in paragraph 1 and the corresponding phrase at the beginning of paragraph 2.

20. The Drafting Committee had also considered a proposal to amend "shall be considered an act" to "is an act" or "constitutes an act", but the view had emerged that "constitutes" might be too absolute and that it lost the sense of the process or intellectual operation implicit in the phrase "shall be considered". On balance, the Committee had decided to retain the phrase "shall be considered". As a consequence of its debate on article 7 [10], the Committee had decided to delete the reference to "acting in that capacity". The deletion should be seen, not as a change to the scope of article 4 [5], but as a means of reducing the overlap between articles 4 [5] and 7 [10]. The Committee had shortened the title of the article to "Conduct of organs of a State".

21. Article 5 [7] had a specific function, to cover situations where, under internal law, parastatal entities were given particular governmental functions, such as the exercise of immigration authority by an airline or certain licensing functions. The Drafting Committee had considered the suggestion by a Government that the phrase "elements of the governmental authority" be further clarified. It had taken the view that it was a commonly used phrase, that no additional language in the article itself was likely to clarify it further and that any such addition might in fact cause more confusion. Further clarification should be left to the commentary.

22. The Drafting Committee had agreed that the terminology used in article 4 [5], paragraph 2, and article 5 [7] had to be consistent. It had recognized that elements of governmental authority could be exercised by a large variety of entities, not all of which had legal personality, for example, militias and associations. The use of the broader phrase "person or entity" had been deemed preferable, to encompass all the possibilities that could arise in practice.

23. The Drafting Committee had also considered the use of the word "case" at the end of the article and had decided that the possible confusion with "case" in the sense of judicial proceedings called for an alternative formulation. Various suggestions had been made, such

[5] *Yearbook . . . 1991*, vol. II (Part Two), para. 28.

[6] For the draft articles adopted by the Drafting Committee at the fiftieth session, see *Yearbook . . . 1998*, vol. I, 2562nd meeting, para. 72.

as "matter", "issue" or "circumstances". The Committee had eventually decided to replace the last phrase, "in the case in question" with "in the particular instance". A new formulation had been decided for the title: "Conduct of persons or entities exercising elements of governmental authority", in line with the new formula for all titles in chapter II.

24. The Drafting Committee had considered a suggestion by a Government to include a proviso in article 6 [9], to cover a situation of the joint responsibility of a State, an organ of which had been put at the disposal of another State, and of that other State. It had decided that such a reference was not necessary since the articles in chapter II operated cumulatively. In addition, it was not entirely clear whether, when one State lent one of its organs to another State, the question of joint State responsibility necessarily arose. In certain circumstances there might be a joint organ of two States, an organ of State A acting also as an organ of State B—the Swiss authorities exercising immigration authority on behalf of Liechtenstein as well as on behalf of Switzerland, for example. In such situations the conduct would be attributable to both States by virtue of the general structure of chapter II. In other circumstances an organ of State A actually became an organ of State B. To attempt to cover all situations would make for a lengthy article. It was better to discuss the meaning of the phrase "placed at the disposal of" in the commentary, which could also address the issue of joint responsibility. The Committee had accordingly retained the text adopted at the fifty-second session, with a minor editing change, and had adopted a revised title, "Conduct of organs placed at the disposal of a State by another State".

25. The Drafting Committee had held a lengthy discussion on the scope of article 7 [10]. The purpose of the article was to cover negligent acts, acts *ultra vires* or abuse of authority in situations where individuals were acting within the scope of their authority, i.e. "in that capacity". The Committee had considered the term "exceeded", which some had felt was too emphatic. That had raised a question as to the limits of article 7 [10]. It had been deemed unnecessary to cover expressly in the draft articles a situation in which an organ of State A was corrupted and acted on the instructions of State B. That would be a special situation, and the corrupting State would be responsible under article 8 [8]. The question of the responsibility of State A towards State B could not arise, but there could be issues of the responsibility of State A towards a third party that would be properly resolved under article 7 [10]. A much more common case was conduct under the cover of official capacity, or "colour of authority". That concept was intended to be conveyed by the words "acting in that capacity". Indeed, the key aspect of the provision was not so much the fact that such persons or entities acted in excess of their authority, but rather that they had been acting in a certain capacity when they had committed such acts: they had been acting with apparent authority.

26. In the version adopted at the fifty-second session, article 7 [10] had been numbered 9 [10] and it had applied, without expressly saying so, to what had then been articles 4 [5], 5 [7] and 8 [9]. Without a proper indication in the text, however, the Drafting Committee had felt that the reader would not necessarily arrive at the correct conclusion. Various forms of clarification had been considered, including making an explicit cross-reference in the article to those articles to which it applied, something which would depart from the policy by the Committee of limiting cross-references to the extent possible. In the end, the Committee had decided to change the order of the articles, so that what was currently article 7 [10], previously article 9 [10], would follow all the articles to which it applied.

27. A further proposal had been made to replace the phrase "concerning its exercise" by a formulation such as "required by its exercise". The Committee had thought such a reference was unnecessary and had deleted the last phrase entirely, leaving the last part of the article to read simply: "exceeds its authority or contravenes instructions". It had revised the title to read: "Excess of authority or contravention of instructions", which focused more closely on the function of the article.

28. Governments had generally endorsed the language of article 8 [8]. In response to a proposal to merge articles 8 [8] and 9 [8], the Drafting Committee had noted that, while article 8 [8] dealt with the ordinary case of de facto agency, article 9 [8] dealt with more exceptional situations of conduct carried out in the absence or default of the official authorities. As such, the Committee had considered it appropriate to treat the two situations in separate articles. The Committee had also examined several proposed drafting changes, including deletion of the reference to "or control", but had decided to retain the text substantially as adopted at the fifty-second session. The title had been streamlined to read: "Conduct directed or controlled by a State".

29. The Drafting Committee had felt that a suggestion by one Government that the exceptional character of article 9 [8] should be stressed would best be reflected in the commentary. The commentary would also clarify the fact that the article might apply in a situation analogous to that of the occupying Allied forces at the end of the Second World War pending the transfer of power back to the legitimate authorities, for example in France and Poland. As to the terms "absence or default", the first covered a situation where the official authorities did exist but were not physically present at the time, and the second, where they were incapable of taking any action. Indeed, the reference to "default" had been added during the second reading specifically to cover such situations. The combination of "absence or default" had been considered appropriate to cover all possible scenarios.

30. The Drafting Committee had also considered the last phrase, "in circumstances such as to call for the exercise of those elements of authority". It covered cases where, for instance, a group of individuals not constituted as organs of the State took over the running of an airport and assumed responsibility for immigration during or in the immediate aftermath of a revolution. The emphasis was on the words "such as to call for". In that example, the situation was such as to call for the exercise of immigration authority, which was done by a de facto authority. The Committee, on second reading, had changed the wording "in circumstances which justified the exercise

of elements of authority" to "in circumstances such as to call for the exercise of those elements of authority" because it was not appropriate to refer to something as "justified" which, at least hypothetically, was a breach of international law. The phrase "call for the exercise" was more descriptive and less judgemental of the character of the act.

31. Accordingly, the Drafting Committee had decided to retain the wording of article 9 [8], with a minor editing change. It had also adopted a new title, "Conduct carried out in the absence or default of the official authorities", which conformed to the new standard formula for the titles in chapter II and also reflected more clearly the requirement of "absence or default".

32. Article 10 [14, 15] retained the same number as at the fifty-second session. The Drafting Committee had disagreed with the comment made by one Government that the article created an *a contrario* interpretation, implying that all acts of unsuccessful insurrectional movements were attributable to the State: that was not the case, unless under some other article of chapter II, for example article 9 [8]. To allay any concern, the Committee had been of the view that the commentary should make that point very clear.

33. The Drafting Committee had considered the words "under its administration" in paragraph 2 and whether the case of a union between States would be covered. A proposal had been made to delete the second half of the paragraph, leaving the question of administration or union to the development of customary international law. However, it had been decided that a deletion was not advisable at such a late stage, especially since paragraph 2 had not been called into serious question by any comments by Governments. In addition, the Commission had in related contexts used the phrase "in a territory under its administration". As to the question of union, paragraph 2 did not cover a situation where an insurrectional movement within a territory succeeded in its agitation for union with another State. That was essentially a case of succession and was outside the scope of the articles, whereas article 10 focused on the continuity of the movement concerned and the eventual new government or State, as the case might be.

34. The Drafting Committee had also looked into a suggestion to replace the words "or other" by "national liberation movement", which would cover more clearly the situation of decolonization. However, it had decided that national liberation movements were included in the term "insurrectional movement" and that it was not necessary, at the current stage, for the Commission to enter into a debate on national liberation movements.

35. The Drafting Committee had further considered the need to retain paragraph 3 in view of a suggestion that it could be dealt with in the commentary. On balance, however, it had decided to keep it, since deleting it could create the impression, for example, that the responsibility of the pre-existing State, which retained only part of its territory under paragraph 2, would somehow also be affected by the conduct of a movement that succeeded in establishing a new State in what used to be its territory. Other than for some minor technical changes, the article and its title had been adopted in the same form as at the fifty-second session.

36. As to article 11, the Drafting Committee had examined the proposal by a Government to delete the reference to an act of the State "under international law", but had decided to retain the phrase, as it was used throughout the draft. It had also decided to replace the existing reference to specific articles by the more general, "the preceding articles", i.e. those in chapter II. While at first there had been some question as to the applicability of article 7, it had been felt that there would be no harm in making such a reference. One of the functions of article 11 was to remove doubt where States decided to adopt the conduct as their own. As such, the article was useful in supplementing the other articles in the chapter.

37. The Drafting Committee also had considered a proposal to replace the phrase "acknowledges and adopts" by "acknowledges or adopts". Similarly, it had been proposed to delete the reference to acknowledgement, since that was implied in the word "adoption". However, at the fiftieth session the Committee had adopted "acknowledges and adopts" so as to make it clear that what was required was something more than a general acknowledgement of a factual situation. Such a formulation would thus require the State to identify the conduct and make it its own. The conditions were cumulative, and the order indicated the normal sequence of events. Furthermore, the Committee had also found the dual reference to "acknowledges and adopts" useful for translation of the concept into other languages. The commentary would explain that both conditions had to be satisfied together.

38. The Drafting Committee had also examined the question of the degree to which the conduct was attributable to the State, conveyed by the phrase "to the extent that". It had been felt that that allowed sufficient flexibility to encompass different scenarios where States elected to acknowledge and adopt only some of the conduct in question. That issue would be elaborated further in the commentary. In adopting the article, the Committee had retained the text of the draft at the fifty-second session, the sole change being the reference to the "preceding" articles, as well as some linguistic refinements. The title was a streamlined version of that adopted at the preceding session.

39. In the case of chapter III (Breach of an international obligation), Governments had generally welcomed the simplification carried out by the Commission at the fifty-first session.[7] In particular, there had been no demand for the reintroduction of any deleted provisions. The few comments and suggestions from Governments had been mainly of a drafting nature or called for a clearer explanation of some of the concepts introduced in the chapter.

40. The Drafting Committee had made no changes to the first article of the chapter, article 12 [16, 17, 18] (Existence of a breach of an international obligation), since the article had been found generally acceptable.

[7] For the draft articles adopted by the Drafting Committee at the fifty-first session, see *Yearbook . . . 1999*, vol. I, 2605th meeting, para. 4.

41. Article 13 [18] (International obligation in force for the State), which dealt with the principle of intertemporal law, had also been found acceptable and there had been no suggestions for changes. The Drafting Committee had, however, replaced the words "shall not be considered" by "does not constitute" in order to be consistent with the language of article 2, subparagraph (*b*). It had made no other changes.

42. As to article 14 [24] (Extension in time of the breach of an international obligation), the Drafting Committee had considered a drafting suggestion by one Government to replace the title of the article by the phrase: "The moment and duration of the breach of an international obligation", but had decided to retain the existing title, because the word "moment" was inappropriate.

43. Various drafting changes to paragraph 1 had been discussed. One proposal had been to replace the phrase "not having a continuing character" by "not extending in time", the words used in article 24 as adopted on first reading. Another had been to delete the phrase "having a continuing character" and replace it by the words "whose effects continue". The Drafting Committee had decided to retain the paragraph as it was. The Commission had discussed that issue at the fifty-first session and deliberately decided to use the words "having a continuing character". That the question as to when a breach actually occurred was not covered in the article had been intentional. That would depend on the facts and on the content of the primary obligation and could hardly be clarified by a single formulation. Furthermore, the distinction between the continuing character of the breach and the continuing character of the effects of that breach were complicated matters that needed to be explained and elaborated on in the commentary and not in the paragraph itself.

44. In relation to paragraph 2 the Drafting Committee had considered a proposal to add "occurs at the moment when the act is performed" after "continuing character" in order to be consistent with paragraph 1. It had decided not to make the addition, as there might be situations that would then not be covered by the provision. The Commission had earlier decided not to seek to cover all issues in the articles systematically. As a number of Governments had pointed out, such an approach was rigid and over-prescriptive and tended to trespass on the scope of the primary obligations. The various paragraphs of the article dealt with key issues that arose in practice, addressing each in its own terms.

45. One proposal had been made to delete the whole of paragraph 3, and another to delete the words "what is required by" as superfluous. The Drafting Committee had also considered a proposal to include a fourth paragraph covering breach of obligations of result, because paragraph 3 covered obligations of prevention. It had noted the extensive debate at the fifty-first session on the distinction between the obligation of conduct and the obligation of result; and had reached the conclusion that that was a classification of certain primary rules that had no specific context within the framework of the draft articles. The Committee had observed that the commentary would elaborate on the discussion of obligations of conduct and obligations of result.

46. One Government had suggested that the phrase "defined in aggregate as wrongful", in article 15 [25] (Breach consisting of a composite act), should be replaced by "capable of being regarded in aggregate as wrongful". The Drafting Committee had decided to retain the existing text, as the proposed language would involve various contingencies, whereas the article was concerned with a narrower case. The point would be explained in the commentary.

47. As for paragraph 2, the Drafting Committee had noted that the word "such", at the beginning of the paragraph, carried a heavy burden. It had considered replacing the words "In such a case" by "Such a breach", but decided to retain the paragraph as it was and to explain the reference to "such" in the commentary. It had also looked at a proposal to delete the words "of the series" in paragraph 2 as being unnecessary, but decided to leave them in for the sake of clarity.

48. As for chapter IV (Responsibility of a State in connection with the act of another State) of Part One, one Government had proposed the deletion of the chapter because it reflected primary rules, but others had indicated their support, and that had also been the general view in the Commission. Accordingly, the Drafting Committee had made only certain drafting suggestions. It had first considered the title of the chapter and decided to replace the words "in respect of" by "in connection with", to reflect the content of the chapter more accurately and also make it clear that responsibility was for the act of another State.

49. The Drafting Committee had considered a proposal to delete the reference to "internationally wrongful" in the title of article 16 [27] (Aid or assistance in the commission of an internationally wrongful act), which was repeated at various places in the body of the provision. It had decided that the words "internationally wrongful" must be repeated in the title of the article because they had been deliberately omitted from the title of the chapter.

50. Concerning the requirement in subparagraph (*a*) that the assisting State should have "knowledge of the circumstances", the Drafting Committee had considered a suggestion by some Governments to delete it and a proposal by one Government to redraft the subparagraph to include the words "or should have known". It had decided that the article should be retained in its entirety and as currently drafted. In particular, it had noted that the knowledge requirement was essential, as a narrow formulation of the chapter was the only approach acceptable to many States. The commentary would clarify the threshold at which aid and assistance became participation in the commission of the act.

51. The Drafting Committee had also examined a suggestion to qualify the aid or assistance by a "materiality" requirement, noting that that issue had been taken up at the fifty-first session, when it had been considered more appropriate to discuss such a qualification in the commentary. The Committee had followed the same view.

52. The Drafting Committee had considered a suggestion by a Government to broaden the scope of article 17

[28] (Direction and control exercised over the commission of an internationally wrongful act) by saying "or control" instead of "and control". It had concurred with the opinion of the Committee that had looked at that issue at the fifty-first session. At that time, the Committee had decided that to use the conjunction "or" would broaden the scope of the article too much. The two words were complementary and should be read together with the conjunction "and", which would provide more certainty and clarity regarding the narrow and specific intention behind the article. The position with article 8 [8] had been considered to be different, for in the case of article 17 [28] two States were involved, whereas in the context of article 8 [8], in practice only the directing State could be internationally responsible.

53. The Drafting Committee had considered the suggestion, also made in respect of articles 16 and 18, by Governments to delete the knowledge of the circumstances requirement in subparagraph (*a*) because it was implicit in the notion of directing and controlling. It had decided to retain the text as formulated for reasons already explained in connection with article 16.

54. Article 18 [28] (Coercion of another State) had been supported in general and thus the Drafting Committee had introduced no changes. It had agreed that the commentary should point out that, where the coercion was itself unlawful, the coercing State was responsible vis-à-vis the coerced State for its conduct, whereas article 18 [28] was essentially concerned with the position vis-à-vis a third party.

55. Article 19 (Effect of this Chapter) was a saving clause that had also commended the support of Governments, and the Drafting Committee had made no changes.

56. With reference to chapter V (Circumstances precluding wrongfulness), the Drafting Committee had had a lengthy debate on a proposal by a Government that the title should instead be rendered as "Circumstances precluding responsibility", repeating largely the debate the Committee had had at the fifty-first session, when chapter V had been adopted. While it had been recognized in the Committee, as it had been at the fifty-first session, that the proposal did have some merit in relation to some of the draft articles, it had been its view that changing the title would have significant substantive implications for the provisions of chapter V. In particular, the Committee had been concerned about the lack of consistency in the approach to justification and excuses in domestic legal systems. In view of that experience, no one terminological solution would be satisfactory. The Committee had eventually decided that, at the current advanced stage of the work, it was prudent to retain the title and deal with the matter in the commentary.

57. No Government had opposed the inclusion of article 20 [29] (Consent) in chapter V. It might be recalled that a proposal had been made in plenary to include an express provision restricting consent in the case of peremptory norms. The Drafting Committee had considered that "valid" consent was a reference to the rules of international law that might affect the validity of the consent of the State. Such rules included, by definition, peremptory norms. In fact, that had been the understanding of the Committee at the fifty-first session in adopting the text of that article, one that had been clearly stated by the then Chairman of the Committee when introducing the article. In that respect, the adoption of article 26 bis (Compliance with peremptory norms) made the matter clearer but made no substantive difference to the position. The title remained unchanged.

58. As to former article 21, the Drafting Committee had adopted a new formulation and decided to move the provision to later on in the chapter as article 26 bis The decision had arisen out of a proposal made in the Commission in plenary to have a general exclusion clause in chapter V to the effect that no State could rely upon a circumstance precluding wrongfulness in respect of conduct which breached a peremptory norm. The alternative was to retain the existing case-by-case approach, whereby the issue was expressly provided for in some, but not all, of the provisions in chapter V as adopted at the fifty-second session, for example, in article 26 [33], paragraph 2 (*a*), prohibiting reliance on necessity in the context of a breach of an obligation under a peremptory norm. Likewise, article 23 [30] (Countermeasures in respect of an internationally wrongful act) incorporated by reference the provisions on countermeasures in what was Part Three, including the restriction on the effect of countermeasures on peremptory norms, and which was currently included in article 51 [50] (Obligations not subject to countermeasures), paragraph 1 (*d*).

59. The Drafting Committee had proceeded on the basis of a written proposal containing a draft text of the provision, initially in the form of a second paragraph in former article 21. After a lengthy debate on the merits of including it, the Committee had decided instead to replace the text of the article by the following, "[N]othing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law." While there had been some support in the Committee for keeping the text of former article 21 as paragraph 1 and placing the new text as paragraph 2, it had been decided that the new, more general, formula was to be preferred. Adopting the new wording avoided the slight infelicity of suggesting, as the former text had, that the peremptory norm in question required an act, where in most cases it merely prohibited certain acts. Since the new text was construed in general terms so as to apply to all the various circumstances in the chapter, the Committee had decided to place it towards the end, after article 26 [33] (Necessity). It had also decided, as a consequence of the adoption of the new formula, to delete paragraph 2 (*a*) of article 26 [33]. The title remained unchanged.

60. As to article 22 [34] (Self-defence), the Drafting Committee had been of the view that the phrase "lawful measure of self-defence" was intended to incorporate by reference the legal regime applicable to self-defence under international law. Likewise, it had examined whether to retain the concluding phrase "taken in conformity with the Charter of the United Nations", which was viewed by some Governments as unnecessary in view of article 59 [39] (Charter of the United Nations). In considering the article on its merits, the Committee had preferred to retain the reference since it was essentially a *renvoi* to the

general international law position on self-defence, as effected by the Charter.

61. The Drafting Committee had further decided to keep the word "lawful". It had been noted that in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ had been of the view that even States acting in self-defence had to comply with certain basic rules such as rules of international humanitarian law. Similarly, lawfulness implied compliance with the requirements of proportionality and necessity.

62. The Drafting Committee had also recognized that all the provisions in chapter V were formulated as general provisions, which in turn incorporated by reference the respective legal regimes. The Committee had, as a general policy, refrained from entering into the details of each circumstance, which in most cases would constitute topics of their own. That was the case with article 22 [34], where the current drafting was meant to reflect the basic principle, while at the same time making a reference to the existing law on self-defence. The Committee had thus retained the text of the article and its title as they stood.

63. Whereas the Drafting Committee had not sought to elaborate the legal regime of self-defence or consent, the position with countermeasures was different, since they were specific responses to internationally wrongful conduct and fell within the scope of the articles. He would take up article 23 [30], which addressed the specific issue of countermeasures as a circumstance precluding wrongfulness, when he came to chapter II of Part Three, dealing with the whole question of countermeasures.

64. The Drafting Committee had noted that there had been no objection to including article 24 [31] (*Force majeure*) and had made no changes to paragraph 1. Regarding paragraph 2 (*a*), it had considered a drafting proposal from a Government that would emphasize the causal link between the wrongful conduct of the State invoking *force majeure* and the occurrence of *force majeure*. The issue had been whether to add "internationally wrongful" before "conduct" to clarify the point that the contributory conduct must itself have been wrongful. The Committee had decided against such an addition because, in principle, the provisions on circumstances precluding wrongfulness should be construed narrowly. Furthermore, including a reference to "internationally wrongful" would give rise to a new set of difficulties. Instead, the Committee had decided to consider the possibility of amending paragraph 2 (*a*) as an attempt to accommodate that concern. At the fifty-first session, the Committee had adopted the phrase "results, either alone or in combination with other factors" to establish a direct nexus with the conduct of the State, but it had considered different possibilities for further emphasizing such a link. They had included deleting "either alone or in combination with other factors"; explaining in the commentary that "results" did not mean that it was the only, but rather the dominant, causal factor; and replacing "results" by "is caused . . . by the conduct"; "is a consequence of" or "is due . . . to". The Committee had decided to adopt the last of these suggestions, replacing "results . . . from" by "is due . . . to", and to replace the term "occurrence" by "situation", since it was the situation of *force majeure*, having arisen, that was emphasized.

65. The Drafting Committee had considered a suggestion to add a reference in paragraph 2 (*b*) to "validly", "definitely" or "expressly" assuming the risk. However, it had felt that the matter was not one of validity but one of interpretation. The commentary would consider the question of the assumption of risk further. The Committee had nonetheless replaced the reference to "occurrence" by "situation occurring" so as to bring the language into line with that adopted in paragraph 2 (*a*). The title of the article remained unchanged.

66. As to article 25 [32] (Distress), the Drafting Committee brought the text of paragraph 2 (*a*) into line with that adopted in article 24 [31], i.e. it had changed the words "results . . . from" to "is due . . . to". Apart from minor technical changes relating primarily to tenses, no other changes had been made.

67. The Drafting Committee had examined the appropriateness of the title of article 26 [33], "State of necessity", considering a suggestion by a Government that the title should be shortened to "Necessity", since the reference to "state" was confusing. In addition, paragraph 1 only made reference to "necessity". Although it had been recognized that the term "state of necessity" had been widely used, particularly in civil law systems, the Committee had decided to adopt the shorter version in English, namely "necessity", so as to conform with the short form of titles adopted for the other articles in chapter V, but to retain *État de nécessité* in the French version, in both the title and the text of the article.

68. As to paragraph 1, the Drafting Committee had considered the difference between "essential interest" and "fundamental interests" in article 41, as adopted at the fifty-second session, and "collective interests" in article 49, paragraph 1 (*a*), as well as whether a distinction between "essential interests" and "fundamental interests" should be retained or whether the same expression should be used in articles 26 [33] and 41. In the context of necessity, the emphasis had normally been on essential—as distinct from non-essential—interests. Yet "fundamental interests" could not, by definition, be divided into "essential" and "non-essential". As such, the Committee had decided to retain the reference to "essential interests" as in the draft at the fifty-second session and also to delete the reference to "fundamental interests" in article 41.

69. Concerning paragraph 1 (*b*), the Drafting Committee had first looked at the question of the phrase "international community as a whole". Several Governments had proposed that "international community of States as a whole" should be used instead. The Committee had noted that the term "international community" was commonly used in numerous international instruments, that the phrase "international community as a whole" had been used in the preamble to the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly in 1999, and that the Commission had never used the phrase "international community of States as a whole". Likewise, ICJ had used "international community as a whole" in the *Barcelona Traction* case. There was only one international community, which States belonged to *ipso facto*. Moreover, States retained paramountcy in the making of international law, i.e. the establishment of international obligations, and

especially those of a peremptory character. Article 53 of the 1969 Vienna Convention was intended to stress that paramountcy and not to assert the existence of an international community consisting solely and exclusively of States. Everyone accepted that there were other entities besides States towards which obligations could exist. That issue would be explained in the commentary. Therefore, the Committee had eventually decided to retain the phrase "international community as a whole". It should be noted that paragraph 1 (*b*) was formulated disjunctively, in that necessity was disqualified as a defence if any of the conditions was met. That disjunctive nature of the provision was conveyed by the use of the word "or".

70. The Drafting Committee had considered deleting the opening phrase "in any case", in the *chapeau* of paragraph 2. That phrase had been adopted on first reading, by way of emphasizing that, irrespective of the balance in paragraph 1, necessity could not be raised as a defence in certain circumstances. The Committee, however, had decided to retain the phrase, primarily because article 26 was drafted in a negative form to stress the exceptional and limited nature of necessity.

71. As a consequence of the decision to include a general provision on peremptory norms as article 26 bis, the Drafting Committee had decided to delete paragraph 2 (*a*) of article 26 [33] adopted at the previous session and to renumber the remaining subparagraphs accordingly.

72. On new paragraph 2 (*a*), the Drafting Committee had also considered proposals to delete it and make it applicable to chapter V as a whole or to deal with it in the commentary. However, the Committee had decided to retain it both because of its expository value and also because certain obligations existed that expressly excluded the possibility of relying on necessity, for example in the field of international humanitarian law. Those were the examples the Committee had had in mind in previously adopting what was currently paragraph 2 (*a*). As to the argument that paragraph 2 (*a*) was equally applicable to the other circumstances in chapter V, the Committee had taken the view that the substance of paragraph 2 (*a*) might already be included in the individual regimes of each circumstance in chapter V, and would probably be covered by the *lex specialis* provision. On balance, as a matter of policy, the Committee had felt that, since necessity was the most marginal of the circumstances in chapter V, it was justified to have an express reference to the primary norm itself. The Committee had therefore decided not to make paragraph 2 (*a*) applicable to the entire chapter, but to retain it in article 26. That issue would be clarified further in the commentary.

73. Still with reference to paragraph 2 (*a*), he wished to reiterate the view of the Drafting Committee when it had adopted the article as article 33 at the fifty-first session, namely, that the basic assumption of the draft articles was that they applied both to conventional and to customary international law. While most examples of the type of international obligation contemplated in article 26 [33], paragraph 2 (*a*), were found in treaties, it was possible to envisage such obligation arising as a matter of customary international law or a unilateral undertaking which expressly or implicitly excluded the possibility of the invocation of necessity.

74. The Drafting Committee had decided to retain paragraph 2 (*b*) without any change. The Committee had considered a proposal to adopt the same basic formulation as in articles 24, paragraph 2 (*a*), and 25, paragraph 2 (*a*), for the sake of consistency, but had decided against doing so. The provision was phrased in broader and more categorical terms than the equivalent provisions in articles 24, paragraph 2 (*a*), and 25, paragraph 2 (*a*), again because of the general policy that necessity should be narrowly construed and changing the formulation as proposed would have the effect of broadening the scope of necessity. The commentary would explain further the question of contribution in the context of article 26 [33].

75. As explained earlier, in the context of former article 21, the Drafting Committee had adopted a new formulation for the article, and had decided to place it after current article 26, as article 26 bis.

76. The last article in chapter V, article 27 [35] (Consequences of invoking a circumstance precluding wrongfulness), dealt with two issues, namely, that circumstances precluding wrongfulness did not as such affect the underlying obligation so that, if the circumstance no longer existed, the obligation resumed its operation; and also the question of compensation. The text was framed as a without prejudice clause because the effect of the facts which gave rise to a circumstance precluding wrongfulness might independently give rise to the termination of the obligation, especially if it was a treaty obligation.

77. With regard to the opening clause of the article, the Drafting Committee had considered the words "invocation of" and proposals either to delete them or to replace them with "existence of". A further alternative had been to return to the original formulation of article 35 as adopted on first reading, namely "preclusion of the wrongfulness . . . ". Yet, the inference was that, if a State found itself in a situation where it wished to rely on one of the circumstances precluding wrongfulness, it should invoke it, and not wait until later on. The Committee had thus felt that there was some value in referring to "invocation". Furthermore, the existing text retained an element of flexibility whereby the State might decide not to invoke, for example, necessity, even though it might be entitled to do so. To clarify the matter further, the Committee had decided to retain "invocation" and replace the term "under" with the phrase "in accordance with", to reiterate that what was being referred to was invocation of a circumstance contemplated in chapter V.

78. As to subparagraph (*a*), in response to a proposal by a Government to delete the provision as being unnecessary, the Drafting Committee had thought it would be worthwhile to retain it so as to clarify the situation, and also because the principle had been confirmed by ICJ in the *Gabčíkovo-Nagymaros Project* case.

79. The Drafting Committee had next considered the possibility of reformulating subparagraph (*a*) so as to provide more detail, for example, by stating "if the obligation may still be performed" or "if execution is possible". However, doing so would run the risk of either developing a very complex text, or of not being sufficiently thorough. At the fifty-first session, the Committee had decided against providing a substantive statement on sub-

paragraph (*a*), for example on questions of termination of the underlying obligation, and against entering into a discussion as to the effects of circumstances precluding wrongfulness on the obligation in question, which related to other areas of law such as that covered by the 1969 Vienna Convention in the treaty context. Instead, it had preferred to leave such discussion to the commentary. The Committee had decided to follow that approach again at the current session, and had adopted subparagraph (*a*) without change.

80. The Drafting Committee had noted the proposal that, since no regime on compensation was fully established, subparagraph (*b*) should be deleted. It had also considered an alternative proposal going the opposite way, namely, to provide more detail on the regime relating to compensation. That there might be situations where compensation was required was clear. However, the Committee had been of the view that the elaboration of such a regime would require more particularization, which would be difficult, and that there was no justification for doing so in that subparagraph. In fact, at the fifty-first session the Committee had adopted a middle road between those proposals, by making the version adopted on first reading (which had been limited to some circumstances only) generally applicable. At the current session, the Committee had again decided to retain that basic balance, so as to ensure that the State invoking the circumstance would bear the costs, as a matter of equity, but not to go into more detail. The Committee had replaced the reference to "material harm or loss" by "material loss" in order to avoid any reference to the term "harm", which had been used in the draft articles on the prevention of transboundary harm from hazardous activities. The reference to "material loss" was purposely construed as narrower than the concept of damage elsewhere in the draft articles because what the Commission was concerned with in the current context was the adjustment of losses that occurred when a party relied on, for example, *force majeure*. Those matters were to be explained further in the commentary as well.

81. The Drafting Committee had therefore decided to retain article 27 and the title substantially as adopted at the fifty-second session, for it was useful in clarifying the law, even if its provisions were largely expository in nature.

82. The CHAIRMAN invited members to request clarifications or comments on individual titles and articles in Part One of the draft.

83. Mr. KATEKA asked for clarification as to whether national liberation movements constituted "insurrectional" or "other" movements within the meaning of article 10.

84. Mr. PELLET said that the Special Rapporteur's patience, diplomatic skills and sense of humour, and the firmness and scholarship of the Chairman of the Drafting Committee, had resulted in a very satisfactory, generally well balanced and sometimes remarkable set of draft articles. Although he was unable to endorse all the provisions contained therein, he would be able to join a consensus in favour of their adoption, on the understanding that no further amendments were made to the draft. However, he wished to seize what would be the last opportunity to state his position on certain important problems of principle that had not been resolved to his satisfaction.

85. Article 10, in chapter II of Part One, posed problems for him for two reasons. First, unlike article 14 adopted on first reading, it did not refer to the principle of the responsibility of the insurrectional movement itself. Secondly, he found it quite unacceptable that national liberation movements engaged in a legitimate struggle for self-determination should be summarily consigned to the dumping ground of the catch-all expression "insurrectional or other movement".

86. On chapter III of Part One, he continued to regret the disappearance of draft articles 20 to 23 adopted on first reading, which had contained useful additional detail on the influence of the nature and character of the obligations breached on the regime of State responsibility. He had never approved of the simplification of those provisions, which had involved reducing them to a mere skeleton. The same was true of the truncation of article 18 adopted on first reading, on the condition that the international obligation must be in force for the State, and, in particular, of its paragraph 2, the oversimplification of which had left it devoid of content—a criticism that applied to much of chapter III. In seeking to oversimplify the complex issues of international life and the law it encompassed, the new draft was less satisfactory than the version adopted on first reading.

87. Again, with reference to chapter III, articles 12 and 13 would have gained greatly from being merged. Once the subtle but useful distinctions of the earlier draft had been abandoned, it would have been sufficient to indicate in a single article 12 that the international obligation must be in force. There, in contrast to its practice elsewhere in the draft, the Drafting Committee had complicated matters.

88. As for chapter IV, article 16 was obscurely drafted and comprehensible only after several readings, perhaps also requiring recourse to the future commentaries. Chapter V, however, called for four brief remarks. First, it could be criticized for mixing two different categories of circumstances, namely, circumstances precluding wrongfulness and those precluding consequences arising out of responsibility. Some of the former were in fact circumstances attenuating responsibility, and it was regrettable that the Drafting Committee had not seized the opportunity to draw that distinction. Secondly, it had been unwise to include article 22 in the draft, since it simply referred to the Charter of the United Nations. That irrational muddling of the law of State responsibility and Charter law was regrettable. Thirdly, it was also regrettable that the idea of the consequences of invoking a circumstance precluding wrongfulness had been retained in article 27. In his view, the chapter as a whole, and the article in question, dealt with the consequences, not of invoking such a circumstance, but of the circumstance itself. The retention of the word "invoking" sent a wrong signal to States concerning the interpretation of chapter IV as a whole.

89. Fourthly, he welcomed the new drafting of article 21 as article 26 *bis*, which gave concrete form to the idea of the existence of an international community whose

minimum principles could never be transgressed. With those provisos, he could endorse the text of Part One as a satisfactory compromise.

90. Mr. LUKASHUK said that the new draft, while not irreproachable, was the best that could be achieved in the circumstances and an important contribution to the development of international law. Many of the provisions were substantially improved, not least the title, which had become legally precise. One point, however, had provoked his serious misgivings—as well as those of some Governments—from the outset, namely, article 17, subparagraph (*a*). Arguing *a contrario*, it was entirely unclear to him how a State that directed and controlled another State in the commission of an internationally wrongful act could possibly do so without the knowledge of the circumstances of the internationally wrongful act required by subparagraph (*a*). That matter should be clarified, at least in the commentaries.

91. Mr. PELLET said that article 17 posed a serious problem in the French version. However, he had refrained from commenting on that article, it being his understanding that the French text of the provision was not yet finalized.

92. Mr. CRAWFORD (Special Rapporteur) confirmed that Mr. Pellet's understanding was correct. The final texts in all languages would fully reflect the underlying intention of the draft. That was true even of the English language version: the continuing process of *toilettage* might necessitate the issuing of corrigenda. Needless to say, any corrections that the Commission might have to adopt would not affect the substance of the draft.

93. Mr. HAFNER said that the new version of Part One was a considerable improvement on the previous text. It should be made clear, however, that article 10, paragraph 1, did not exclude the possibility that one or more members of the new government referred to might not belong to the insurrectional movement in question. In such circumstances, article 10 would continue to be applicable. He also noted that the Russian and English texts of article 17 appeared not to correspond.

94. Mr. SIMMA said that, while he was all for introducing elements of community interest into the draft, he doubted whether article 26 *bis* was an appropriate way of achieving that aim. In cases of *force majeure* or distress, for instance, it must be possible to imagine situations in which wrongfulness would be precluded even if the rule breached was a peremptory norm of *jus cogens*.

95. Mr. LUKASHUK said he did not agree with Mr. Hafner. The Russian version of article 17 was a faithful rendering of the English original. However, perhaps it would be useful to establish a small unofficial drafting group to edit the Russian text, because that version would be used for the purpose of additional translations into other Slavonic languages and the languages of the Commonwealth of Independent States.

96. Mr. MOMTAZ expressed his appreciation of the work of the Drafting Committee and its Chairman. As to article 8 [8], he expressed the reservation that the three criteria mentioned—instructions, direction and control—were not cumulative. Moreover, "instructions" was a third element added to the "effective control" of the case law of ICJ and to "direction" as identified by the International Tribunal for the Former Yugoslavia. The result was confusing and did not help to clarify the prevailing situation in the international community. He had the same concern as Mr. Kateka about article 10 [14, 15] and would welcome an explanation from the Chairman of the Committee.

97. Mr. KAMTO said he experienced difficulty with the term "territorial unit" in article 4. The Commission had not established a proper link with the 1978 Vienna Convention, which established that acts by such units in the context of State succession did not engage the responsibility of the State. There was no *renvoi* to explain the link, not even in the "without prejudice" clauses at the end of the draft. He hoped the commentary would explain the link between State responsibility and State succession. Secondly, he was alarmed at the implications of the words "even if it exceeds its authority or contravenes instructions" in article 7[10]. Acts by a person or entity exercising governmental authority but acting contrary to instructions could of course be treated as a matter of internal law, but it should be made clear in the commentary, that international responsibility would only be engaged in such a case if the other State was unaware that the person or entity was exceeding its authority. There was also the problem of coercion, dealt with in article 18: what would the situation be if the person or entity acting as the agent of a State and exceeding authority was doing so as a result of coercion? It was a situation that was not envisaged in the Convention. The commentary should clarify that the responsibility of the State was not engaged in such a case if the other State demonstrably knew that the agent was acting in excess of its powers. As for insurrectional movements, they should not be treated as equivalent to national liberation movements for the purpose of article 8, since the status of the latter was already recognized in international law.

98. Mr. ROSENSTOCK said he agreed with the comment already made about article 26 *bis*. The validity of the provision was beyond doubt, but it was unclear why it had been thought necessary to include it. If it was an accurate reflection of the law, it was unnecessary; if not, it was unhelpful. It was also uncertain to what extent a rule was expected to emerge from the article.

99. Mr. TOMKA (Chairman of the Drafting Committee), replying to the points raised, explained that the Committee had discussed whether the phrase "a movement, insurrectional or other" in article 10 [14, 15] was intended to encompass national liberation movements, and had decided by a majority that it was. It should be borne in mind that the rules in the draft articles related only to State responsibility, not to international legal personality and recognition.

100. As for the points raised by Mr. Pellet, many of them related to the text adopted on first reading, and no Government had argued for restoring that text. Accordingly, there had been no proposal to reintroduce the original draft articles 20 to 23, the disappearance of which was regretted by Mr. Pellet. In any case, their content was largely covered by primary rules. The Drafting Committee had not supported Mr. Pellet's proposal to amalgamate articles 12 and 13. With regard to chapter IV and the

difficulties of comprehension, he expected those difficulties to be eased by the commentary. The title of chapter V had been thoroughly discussed in the 1970s, when work had begun on circumstances precluding wrongfulness, and it was too late at the current time to alter or subdivide it into two chapters, or indeed to include a reference to mitigating circumstances. Concerning article 22 [34], Mr. Pellet was expressing a personal view on the law of the Charter of the United Nations; the draft dealt with general international law, which could apply even if the law of the Charter did not.

101. The Drafting Committee had discussed and rejected a proposal to delete the term "invocation" in article 27 [35]. Article 26 bis represented a compromise among divergent views, and had been adopted after lengthy debate and an indicative vote. The intention of the Commission had been to enlarge the scope of peremptory norms, so that no deviation from the obligations imposed would be possible, even for *force majeure* or distress. Article 17, subparagraph (*a*), would be further explained in the commentary. Article 8 [8] represented the majority view within the Committee, which favoured amalgamating the jurisprudence of ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua* with that of the International Tribunal for the Former Yugoslavia in the *Tadić* case. Concerning Mr. Kamto's remark about article 4 [5], paragraph 1, the article was intended to establish the responsibility of a State for acts of a territorial unit or other subdivision that might have international repercussions. The rule would be relevant in the case of a federal State, such as Austria. The Committee had not taken any position on State succession. Mr. Kamto's comment on article 7 [10] seemed to draw a parallel with article 46 of the 1969 Vienna Convention. It had not, however, been the intention of the Special Rapporteur or the Committee to impose a requirement that the other party should be aware there had been an abuse of authority.

102. Proceeding with the report of the Drafting Committee on Part Two of the draft articles (Content of the international responsibility of a State), he explained that its title had been considered by the Committee in the light of the amendment made to the title of the draft articles as a whole. The Committee felt that the existing title accurately reflected the content of Part Two. It had made a small grammatical change by adding the word "the" before "international". The title of chapter I (General principles) had not presented any problems. Article 28 [36] (Legal consequences of an internationally wrongful act) was a link between Parts One and Two, and was essentially expository in nature. It had been extensively debated at the fifty-second session and was generally accepted by Governments. The Committee had decided to make only drafting changes, replacing "arises from" by "is entailed by", to bring the language closer to article 1. It had also replaced the words "entails legal consequences" by "involves legal consequences", in order to avoid repeating the word "entail".

103. The Drafting Committee had retained the text of article 29 [36] (Duty of continued performance) without change, since no objections or comments had been made by Governments. With regard to article 30 [41, 46] (Cessation and non-repetition), there had been general agreement to retain the *chapeau* and subparagraph (*a*), which presented no problems. The Committee had noted comments by some Governments questioning the legal basis for the provision in subparagraph (*b*), as well as comments by other Governments stating that they had no objections to the text. However, taking into account that the provision was *sub judice*, the Committee had decided to place it in square brackets and reconsider it during the second part of the session.

104. As to article 31 [42] (Reparation), while in principle there were no objections, comments by Governments had focused on two aspects of the article. The first set of comments related to the use of the notion of injury, which appeared for the first time in that article and in which it was defined. The second set of comments related to the notion of proportionality and its application to the article.

105. The Drafting Committee had not accepted a suggestion to merge paragraphs 1 and 2 in order to avoid the definition of "injury", nor had it agreed to a suggestion to replace the notion of "injury" by "damage". Taking into account the relationship between article 31 and articles 38 [45] (Satisfaction) and 43 [40] (Invocation of responsibility by an injured State) the Committee had thought it useful to use the two notions, "injury" and "damage", the former being broader than the latter. In addition, in view of the different and sometimes conflicting uses of the notions of "injury" and "damage" in different legal traditions, the Committee was convinced that there should be a definition of "injury" for the purposes of the draft articles, and that the definition should be broadly construed so as to take account of various forms of reparation provided for under the articles in Part Two. The Committee had agreed, however, that the definition of injury as contained in paragraph 2 of the article could cause confusion. In paragraph 2, injury was defined as consisting of any damage, whether material or moral. The word "consists" limited the notion of injury. The Committee had therefore replaced the word "consists" by "includes", which broadened the definition. Accordingly, injury was more than damage, whether material or moral. It included the so-called "legal injury" or moral damage to a State that might be entitled only to satisfaction. The Committee had also replaced the words "arising in consequence of" in paragraph 2 by the words "caused by", which seemed more descriptive.

106. As for the inclusion of the notion of proportionality in the general provision on reparation, the Drafting Committee was of the view that "proportionality" applied differently to different forms of reparation. The notion of proportionality was addressed in individual articles describing various forms of reparation and could not therefore be attached, in addition, as a general condition to reparation. That issue could, however, be addressed in the commentary to the article.

107. The Drafting Committee had considered a proposal by some Governments to place article 32 in Part Four. It had noted that the article was especially relevant to the issue of reparation and should be retained in its current place. It had further noted that, if it were moved to Part Four, among other difficulties there might be some confusion as to how the article would relate to counter-

measures. Moreover, Part Four contained mainly saving clauses or articles explaining the scope of the text, which did not actually apply in the field of responsibility, unlike article 32. The Committee had not, therefore, made any changes to the article and had retained it in its original place.

108. Article 33 [38] had been moved to Part Four and would be introduced in that context. As for article 34 (Scope of international obligations set out in this Part), the Drafting Committee had first considered whether to move it to the beginning of the chapter, on the basis that an article on "scope" might be more appropriate at the beginning. It had nonetheless decided that the article could stay at the end of chapter I, because the whole chapter contained general principles applicable to Part Two as a whole. It had also noted that, with respect to the title of the article, the French term *portée* reflected the aim of the article better than "scope", but no alternative had been found for the English text. The Committee had, however, decided to change the expression "covered by" in the title to "set out in", in order to make it more consistent with the terminology used in the article itself.

109. The Drafting Committee had found that Governments had made only a few drafting suggestions for article 34. One suggestion, relating to the formulation of the expression "international community as a whole", had already been discussed by the Committee in the context of article 26 [33]. Another proposal by a Government had been to delete the last phrase in paragraph 1: "and irrespective of whether a State is the ultimate beneficiary of the obligation". The Committee had noted that the phrase was not strictly necessary and did not add much to the text. The words "content of the international obligation" in fact covered what was intended by the last phrase. It had therefore decided to delete the phrase in order to shorten the text, and to explain its intention in the commentary.

110. The Drafting Committee had also considered a proposal to delete the phrase "depending on the character and content of the international obligation and on the circumstances of the breach" as being superfluous. It had nevertheless considered that there was value in retaining the phrase, and had decided to add the words "in particular" after "depending", to make it clear that the series of factors was not exhaustive and could operate cumulatively or alternatively, as well as to retain flexibility within the provision.

111. The Drafting Committee had considered a proposal by a Government to delete paragraph 2 of article 34. It had noted that the provision concerned the invocation of the rules on State responsibility by a non-State entity and was important for it dealt with the discrepancy between the scope of Parts One and Two. It was therefore necessary to retain the paragraph. In response to a proposal to delete the word "directly", the Committee had decided to soften the wording of the paragraph to read: "which may accrue directly to any person . . . ".

The meeting rose at 1.05 p.m.

2682nd MEETING

Wednesday, 30 May 2001, at 10 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

State responsibility[1] (*continued*) (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,[2] A/CN.4/517 and Add.1,[3] A/CN.4/L.602 and Corr.1 and Rev.1)

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING (*continued*)

1. The CHAIRMAN invited the members to continue their consideration of the report of the Drafting Committee containing the titles and texts of the draft articles on responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading (A/CN.4/L.602 and Corr.1). He invited the Chairman of the Drafting Committee to complete his introduction of Part Two of the draft articles.

2. Mr. TOMKA (Chairman of the Drafting Committee), introducing Part Two, chapter II, began by indicating that the title had been modified, since the Drafting Committee had found it inelegant to have the same title for the chapter and for article 35 [42] (Forms of reparation). After considering various alternatives, it had settled on "Reparation for injury" for the title of the chapter and had decided to retain the title of the article as adopted at the fifty-second session.

3. In considering article 35 [42], and indeed all of the articles in chapter II, the Drafting Committee had kept in mind its drafting changes to article 31 [42] (Reparation). For example, a Government had proposed to replace the term "injury" by "damage", but, as the Committee had already decided to retain "injury" in paragraph 1 of article 31 [42], it had to be retained in article 35 [42] as well.

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[1] For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

[2] Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

[3] *Ibid.*