

Document:-
A/CN.4/SR.2701

Summary record of the 2701st meeting

Topic:
<multiple topics>

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

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carry out did not duplicate the work of the Commission and its Special Rapporteur on the topic, Mr. Pellet.

86. Mr. BENÍTEZ (Observer for the Council of Europe) said he wished to reassure the Commission that the Council of Europe in general and CAHDI in particular would not only do nothing to jeopardize the work of a universal nature being carried out by the Commission, but would also take the fullest account of that work and do everything possible to strengthen cooperation with the Commission.

87. It must be noted that the instruments adopted by the Council of Europe often took on an extra-European dimension. For example, at the request of non-European observers, the word “European” had been removed from the Model Code of Conduct for Public Officials adopted by the Committee of Ministers in connection with action to combat corruption.

88. He also noted that the Committee of Ministers and CAHDI had decided to publish the reports of the Committee of Ministers on reservations to international treaties, which had previously been confidential, and that they would be communicated to the Commission. In that connection, he drew attention to the importance the Committee of Ministers attached to the dialogue it entered into with member States in order better to understand the reasons why they formulated the reservations. CAHDI would continue to play its role as the European observatory of reservations to international treaties, to try to understand the reasons underlying the formulation of reservations and to make States aware of the dangers that some of those reservations could entail.

The meeting rose at 1.05 p.m.

2701st MEETING

Friday, 3 August 2001, at 10 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. Goco, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, 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.

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

CHAPTER VI. *Reservations to treaties (continued)* (A/CN.4/L.609 and Add.1–5)

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission (*continued*) (A/CN.4/L.609/Add.2–5)

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO ADOPTED AT THE FIFTY-THIRD SESSION (*continued*) (A/CN.4/L.609/Add.3–5)

Commentary to guideline 2.3 (Late formulation of a reservation) (A/CN.4/L.609/Add.4)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to guideline 2.3 was adopted.

Commentary to guideline 2.3.1 (Late formulation of a reservation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

1. Mr. PELLET (Special Rapporteur), responding to a comment by Mr. SIMMA, proposed that in the first sentence the word “hypothesis” should be replaced by the word “possibility”.

It was so agreed.

2. Mr. ECONOMIDES queried the inclusion of the footnote concerning the extremely fine distinction made between reservations and reservation clauses as it seemed unnecessary.

3. Mr. PELLET (Special Rapporteur) said that the footnote drew attention to the incorrect use of the term “reservation” in the Convention referred to in paragraph (3). What was meant were reservation clauses, provisions in treaties that authorized reservations under certain conditions.

4. Mr. SIMMA proposed replacing the word “hypothesis” in the footnote on article 38 of the Hague Convention by “provision”.

It was so agreed.

5. Mr. GALICKI, supported by Mr. PELLET (Special Rapporteur), drew attention to the need for editing corrections to the references in paragraph (3) to the Warsaw Convention, the Chicago Protocol and the Hague Protocol.

6. The CHAIRMAN said that the corrections would be made.

Paragraph (3) was adopted on that understanding.

Paragraph (4)

7. Mr. HAFNER suggested that it might be useful to the reader to indicate that there were some difficulties with the designation of certain declarations as reservations. To that end, a sentence might be added at the end of paragraph (4), to read: "Although this kind of declaration does not comply with the definition of reservation under guideline 1.1, it is necessary to use the term reservation in order to conform to practice."

8. Mr. MELESCANU said that adopting Mr. Hafner's amendment would mean that the Commission was clearly against the formulation of late reservations but condoned certain kinds of declarations which did not conform to the definition of reservations. It was a major departure from the approach the Commission had taken so far, namely to avoid encouraging a practice that it considered detrimental to the stability of international agreements but at the same time to avoid rejecting it outright, since it was applied in State practice. He was not opposed to an addition along the lines suggested by Mr. Hafner, but thought a more neutral formulation should be sought.

9. Mr. SIMMA said that Mr. Hafner's idea had been aired when the Commission had been discussing the definition of reservations and the inclusion of across-the-board reservations. In essence, it was that, if a declaration did not fit within all the parameters of the 1969 Vienna Convention, it was not a reservation. But that was not the policy the Commission had been following up to now. The majority of members had acquiesced in giving the name "reservation" to something that did not prima facie fit the definition, namely, late reservations. Even though he did not approve of late reservations, he thought the Commission should remain firm in its stance of not saying that they were not true reservations.

10. Mr. PELLET (Special Rapporteur) endorsed the comments by Mr. Melescanu and Mr. Simma and said the sentence proposed by Mr. Hafner would be acceptable only if preceded by wording such as "Some members took the view". If it was true that late reservations were not reservations, then every treaty that mentioned the possibility of formulating a reservation after ratification would be referring to something that was not a reservation. Article 30 of the Convention on Mutual Administrative Assistance in Tax Matters, for example, stated that, after the entry into force of that instrument, a Party could make one or more reservations.

11. There was another substantive objection to Mr. Hafner's proposed amendment. States could derogate from the indications in the Guide to Practice and the 1969 Vienna Convention if they decided to do so unanimously, and that was precisely what the Commission wished to retain in respect of late reservations. In other words, if States considered unanimously that, for the purposes of a given convention, the definition of reservations should be

set aside, then that should be feasible. Mr. Hafner's proposal would make that impossible, however. The effect of a late reservation was, after all, precisely the same as that of a reservation.

12. Mr. HAFNER said he had thought it would be useful for the reader to have an explanation of the inconsistency between guideline 1.1 and the definition of reservations. The proposed amendment was not really a departure from the position of the Commission. It simply stated that certain declarations did not conform to the definition in guideline 1.1, which was indisputably the case. He had no objection, however, to preceding the wording with a formulation such as "According to the view of some members".

13. Mr. TOMKA proposed that, in the amendment, the words "does not comply with" should be replaced by "is not covered by".

14. In response to a question raised by Mr. SIMMA, Mr. GALICKI and Mr. KATEKA said that they supported the views advanced by Mr. Hafner.

15. Mr. BROWNLIE said that he, too, supported those views. The Special Rapporteur had undertaken his task by using a photographic approach of surveying what States did and avoiding a judgemental approach. The Commission had gone along with that, but it would do no harm for the commentary to record that it was considered questionable by some members of the Commission whether certain declarations were compatible with the 1969 Vienna Convention.

16. Mr. HAFNER, revising his proposal in the light of Mr. Brownlie's remarks, suggested that it should read: "According to some members of the Commission it was questionable whether that kind of declaration was compatible with the definition of reservations under guideline 1.1."

It was so agreed.

17. Mr. PELLET (Special Rapporteur) said that the proper place to insert the amendment was not in paragraph (4) but at the beginning of paragraph (2).

18. Further to a discussion about the placement of minority views in relation to those of the majority, in which Mr. GOCO, Mr. HAFNER, Mr. KAMTO, Mr. ROSENSTOCK and Mr. TOMKA took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph (4) unamended and to insert the amendment proposed and revised by Mr. Hafner at the beginning of paragraph (2).

It was so agreed.

Paragraph (4) was adopted.

Paragraph (5)

19. Mr. SIMMA said that, since the European Commission on Human Rights no longer existed, in the first

sentence the words “is flexible ” should be replaced by “was flexible”.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (11)

Paragraphs (6) to (11) were adopted.

Paragraph (12)

20. Mr. SIMMA asked whether Belgium’s reservation, referred to in the first footnote, was a true reservation in the sense of the definition of the Commission.

21. Mr. PELLET (Special Rapporteur) said that it might be clearer to refer to the “declaration” made by Belgium.

Paragraph (12) was adopted.

Paragraphs (13) to (16)

Paragraphs (13) to (16) were adopted.

Paragraph (17)

22. Mr. SIMMA proposed that “this word”, in the footnote to the paragraph should be replaced by “the word ‘objects’”.

Paragraph 17, as amended, was adopted.

Paragraph (18)

23. Mr. GAJA said that the word “the” in square brackets in the first sentence existed in the original text and that the brackets should be removed.

Paragraph 18, as amended, was adopted.

Paragraph (19)

Paragraph (19) was adopted.

Paragraph (20)

24. Mr. GAJA proposed that the first sentence and the corresponding footnote should be deleted because the reference it made to his work, in which he was seeking to make a distinction between opposition and objection, was not accurate.

Paragraph (20), as amended, was adopted.

Paragraphs (21) to (23)

Paragraphs (21) to (23) were adopted.

The commentary to guideline 2.3.1, as amended, was adopted.

Commentary to guideline 2.3.2 (Acceptance of late formulation of a reservation)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

25. Mr. LUKASHUK proposed that the words “now well-established”, in the first sentence, should be deleted and said that depositaries could be international organizations or States. Accordingly, it should be made clear that the latter were not being referred to.

26. Mr. PELLET (Special Rapporteur) accepted the first proposal but said he was firmly opposed to the second.

27. Mr. LUKASHUK said that he would not press his proposal to expand the paragraph.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were adopted.

Paragraph (9)

28. Mr. GAJA, referring to the second sentence, said that a “reservation dialogue” usually took place after a reservation had been formulated. What was meant in the present instance was a dialogue held before acceptance even of the possibility of a reservation being made. The reference was misleading and he proposed that the sentence be deleted.

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (12)

Paragraphs (10) to (12) were adopted.

The commentary to guideline 2.3.2, as amended, was adopted.

Commentary to guideline 2.3.3 (Objection to late formulation of a reservation)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

29. Mr. SIMMA said that the first sentence would be clearer if the word “they”, was replaced by “while these” and the word “whereas” was deleted.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

The commentary to guideline 2.3.3, as amended, was adopted.

Commentary to guideline 2.3.4 (Subsequent exclusion or modification of the legal effects of a treaty by means other than reservations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

30. Mr. SIMMA said that the paragraph should be made more precise and should relate more closely to what the draft guideline actually said. It did not speak of the principle that a reservation could not be formulated after the expression of definitive consent to be bound, but that later interpretations of reservations could not exclude or modify the legal effects of a treaty. It was not concerned with the formulation of a reservation at a certain point in time.

31. Mr. KAMTO said that “definitive” was a problematic adjective and should perhaps be deleted.

32. Mr. PELLET (Special Rapporteur) agreed, but said that he had not understood the point being made by Mr. Simma.

33. Mr. MELESCANU, supported by Mr. SIMMA, proposed that the paragraph be amended to read: “The principle that a party may not modify the legal effect of a treaty by a unilateral interpretation after the formulation of the reservation after the expression of . . .”.

34. Mr. GALICKI said that he strongly supported Mr. Simma’s view. The inconsistency in the paragraph might be dealt with if the word “formulated” was replaced by “reformulated”.

35. Mr. GAJA said that it was essential to avoid stating that a party could not modify a reservation. It was done all the time. He would prefer an amendment that was more limited than the one being proposed at the current time.

36. Mr. GOCO said he saw no ambiguity in the paragraph. The key words were “after the expression of definitive consent”. The paragraph should be adopted unchanged.

37. Mr. PELLET (Special Rapporteur) said that he was still experiencing difficulty understanding the proposed amendment. The Inter-American Court of Human Rights could not be made to say something it had not said.

38. Mr. SIMMA said that the Inter-American Court of Human Rights had stated that a reservation, once made,

“escaped” from its author and no effort could be made to interpret it in another way later on. The second paragraph quoted from the advisory opinion of the Court equated that course of action with a reservation that was made late.

39. Mr. MELESCANU said that the question was of a practical nature. The draft guideline dealt with an interpretation or unilateral declaration, which sought to modify the legal effect of provisions of a treaty. If the paragraph was presenting arguments in favour of the idea that subsequent modification of the legal effect of a treaty by procedures other than reservations and late formulations of a reservation should be excluded, then an attempt should be made to show a practice, which was opposed to that. The paragraph should begin by setting out what guideline 2.3.4 really said.

40. Mr. GAJA proposed adding a first sentence to the paragraph, to read: “After the expression of its consent, a State may not, through the interpretation of a reservation, avoid certain obligations established by a treaty.” The paragraph would then continue: “That principle appeared to be sufficiently established . . .”, thereafter continuing unchanged.

Paragraph (3), was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

41. Mr. MOMTAZ noted that the “*Loizidou* judgment of 23 March 1995 rendered in the same case” related to a case cited in paragraph (5) as “the *Chrysostomos et al.* case” and in footnote 38 as the “*Chrysostomos* and *Loizidou* cases”. If all those citations related to one and the same case, they should perhaps be referred to throughout as “the *Chrysostomos-Loizidou* case”.

42. Mr. BROWNLIE said that the two cases had originally been considered jointly but had later been separated. To refer to them as the *Chrysostomos-Loizidou* case could give rise to confusion.

43. Mr. SIMMA suggested that the problem could be solved by deleting the words “rendered in the same case”.

44. Mr. PELLET (Special Rapporteur) said that Mr. Simma’s proposal was acceptable.

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

45. Mr. ECONOMIDES said that mention should be made somewhere in the commentary of the fact that some members had remained unconvinced of the need for the inclusion of guideline 2.3.4 in the Guide to Practice. The

main reason given had been that its terminology was insufficiently precise.

46. Mr. PELLET (Special Rapporteur) said he had no objection to the inclusion of an additional paragraph reflecting the concerns raised by Mr. Economides.

47. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt an additional paragraph, paragraph (9), reflecting those concerns.

It was so agreed.

The commentary to guideline 2.3.4, as amended, was adopted.

CHAPTER IV. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities) (concluded) (A/CN.4/L.607 and Add.1 and Add.1/Corr.1)

E. Draft articles on prevention of transboundary harm from hazardous activities (concluded)

1. TEXT OF THE DRAFT ARTICLES

ARTICLE 17 (A/CN.4/L.607/Add.1 and Corr.1)

48. The CHAIRMAN said that a reformulated text of article 17, prepared by the Chairman of the Drafting Committee, was available at the current time. The text read:

“The State of origin shall, without delay and by the most expeditious means, at its disposal, notify the State likely to be affected by an emergency concerning an activity within the scope of the present articles of such emergency and provide it with all relevant and available information.”

49. Mr. GALICKI expressed dissatisfaction with the reformulated text, which, even linguistically, left a good deal to be desired. More important, however, was the fact that retention of the wording “likely to be affected by an emergency” introduced a new concept into the draft articles. The term “State likely to be affected” was defined in article 2 (Use of terms), which contained no reference to emergencies. Article 28, paragraph 2, of the Convention on the Law of the Non-navigational Uses of International Watercourses, which formed the basis for article 17, established a clear requirement for a State to “notify other potentially affected States [. . .] of any emergency”. The best solution, one already proposed by Mr. Candioti, would be to replace the words “notify the State likely to be affected by an emergency” by “notify the State likely to be affected of an emergency”—thereby reflecting the wording of the title of the article, namely: “notification of an emergency”; and of articles 16 and 2.

50. Mr. CANDIOTI and Mr. GOCO supported Mr. Galicki’s comments.

51. Mr. KAMTO said that the reformulation proposed by the Chairman of the Drafting Committee did not solve the problem already noted with regard to the French text.

52. Mr. Sreenivasa RAO (Special Rapporteur) said he would be happy to accept the text proposed by the Chairman of the Drafting Committee, but would not oppose the wording proposed by Mr. Candioti and Mr. Galicki.

53. Mr. ROSENSTOCK said there was a slight substantive difference between the two formulations. If the wording “affected by” was adopted, the obligation would be to inform a State which was itself likely to be affected by an emergency, whereas the wording “notify . . . of” established an obligation to notify all States of an emergency, whether or not those States were likely to fall prey to it. The latter approach was the one adopted in the Convention on the Law of the Non-navigational Uses of International Watercourses. Either requirement was perfectly reasonable, but he personally favoured the latter formulation.

54. In response to a request for clarification by Mr. MELESCANU, Mr. CANDIOTI reiterated his own proposal, namely, that the article should read:

“The State of origin shall, without delay and by the most expeditious means at its disposal, notify the State likely to be affected of an emergency concerning an activity within the scope of the present articles and provide it with all relevant and available information.”

55. Mr. PELLET said he supported Mr. Candioti’s proposal for the English text, and drew attention to a grammatical error in the French text.

Article 17, as amended by Mr. Candioti, was adopted.

Section E.1, as amended, was adopted.

Section E, as amended, was adopted.

C. Recommendation of the Commission (A/CN.4/L.607)

56. The CHAIRMAN said that a paper had been circulated containing the proposed text of a recommendation of the Commission to the General Assembly regarding the draft articles, to be inserted. The text read:

“At its 2701st meeting, on 3 August 2001, the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly the elaboration of a convention by the Assembly on the basis of the draft articles on prevention of transboundary harm from hazardous activities.”

Section C was adopted.

D. Tribute to the Special Rapporteur

57. The CHAIRMAN drew members’ attention to the proposal, contained in the same paper, for a tribute to the Special Rapporteur, to be inserted. The proposal read:

“At its 2701st meeting, on 3 August 2001, the Commission, after adopting the text of the draft preamble and draft articles on prevention of transboundary harm from hazardous activities, adopted the following resolution by acclamation:

The International Law Commission,

Having adopted the draft preamble and draft articles on prevention of transboundary harm from hazardous activities,

Expresses to the Special Rapporteur, Mr. Pemmaraju Sreenivasa Rao, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft preamble and draft articles on prevention of transboundary harm from hazardous activities.

“The Commission also expressed its deep appreciation to the previous Special Rapporteurs, Mr. Robert Q. Quentin-Baxter and Mr. Julio Barboza, for their outstanding contribution to the work on the topic.”

Section D was adopted.

Chapter IV, as amended, was adopted.

Unilateral acts of States (*concluded*)* (A/CN.4/513, sect. C, A/CN.4/519¹)

[Agenda item 4]

REPORT OF THE WORKING GROUP

58. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that, as decided at the previous session, the Working Group was to consider the topic of invalidity, with particular reference to article 5,² as contained in the third report.³ It was also to consider the possibility of drafting a specific provision on the conditions for validity, as well as other aspects of the topic, which was complex and contained a number of elements on which there were divergent views. Those considerations had had to be put to one side, however, to enable the Group to turn again to a question it considered fundamental, namely State practice. The issue was crucial not only to the formulation of unilateral acts but to the interpretation that States put on their own and other States' unilateral acts. Stress had been laid on the need to obtain more information on such practice, so that it could be established when a given act by a State was, in its own view, unilateral and produced international legal effects. The Working Group had therefore decided to draw up specific questions for States in order to obtain reliable information on practice, with regard to both their own and other States' unilateral acts.

59. The Working Group had produced a document with a brief general introduction dealing with basic issues that would help Governments to reply. The questions to be

transmitted to Governments by the Secretariat were the following:

1. Has the State formulated a declaration or other similar expression of the State's will which can be considered to fall, inter alia, under one or more of the following categories: a promise, recognition, waiver or protest? If the answer is affirmative, could the State provide elements of such practice?

2. Has the State relied on other States' unilateral acts or otherwise considered that other States' unilateral acts produce legal effects? If the answer is affirmative, could the State provide elements of such practice?

3. Could the State provide some elements of practice concerning the existence of legal effects or the interpretation of unilateral acts referred to in the questions above?

60. Efforts to obtain more information on practice should, however, go beyond merely asking Governments for their experience. The Working Group had therefore agreed to approach academic foundations and institutions for financial assistance in organizing a short-term investigation project so that as much information as possible on State practice could be compiled.

61. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to the recommendation of the Working Group and to request the Secretariat to circulate a questionnaire to Governments asking for additional information.

It was so agreed.

State responsibility⁴ (*concluded*)* (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,⁵ A/CN.4/517 and Add.1,⁶ A/CN.4/L.602 and Corr.1 and Rev.1)

[Agenda item 2]

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

62. The CHAIRMAN invited the members to consider 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/Rev.1).**

63. Mr. GAJA, speaking on behalf of the Chairman of the Drafting Committee, who had been called away, said that the Committee had held two additional meetings during the second part of the session to discuss the pending issue of assurances and guarantees of non-repetition, in article 30 (Cessation and non-repetition), subparagraph

* Resumed from the 2683rd meeting.

** Issued on 26 July 2001.

⁴ 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.

⁵ Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

⁶ *Ibid.*

* Resumed from the 2696th meeting.

¹ Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

² *Yearbook . . . 2000*, vol. II (Part Two), para. 605.

³ *Ibid.*, vol. II (Part One), document A/CN.4/505.

(b), and article 48 (Invocation of responsibility by a State other than an injured State), paragraph 2 (a), because the issue had been *sub judice* during the first part of the session.

64. On second reading, the Drafting Committee had considered that, since assurances and guarantees of non-repetition were akin to cessation rather than reparation, in that they concerned future rather than past conduct and, moreover, probably future conduct in cases other than the case that had given rise to the dispute, they should be included in article 30, subparagraph (b). That position had been generally endorsed. The Committee had begun with the understanding that, while some Governments questioned whether a provision on assurances and guarantees of non-repetition could have a normative basis, others had expressed no objection to the inclusion of such a text.

65. The question of assurances and guarantees of non-repetition had been a central issue in the *LaGrand* case and the discussion in the Drafting Committee had understandably revolved around the interpretation that should be placed on the ruling of ICJ in that case. Some members of the Committee had seen the Court's ruling as support for the retention of article 30, subparagraph (b), while others considered that the Court had not taken a clear position on the obligation to provide assurances and guarantees of non-repetition. Some members had thought that the Court had avoided taking up a clear-cut position, while, according to others, the Court had mainly envisaged the consequences of a hypothetical wrongful act that could occur in the future. It had, however, been agreed that, while the decision in the *LaGrand* case was important, it was not the only basis on which the Committee should decide on the issue of assurances and guarantees of non-repetition. In the end, the Committee had decided to retain article 30, subparagraph (b), and article 48, paragraph 2 (a), on the grounds that the provisions were drafted with great flexibility and introduced a useful policy. In particular, the words "if circumstances so required" clearly indicated that such guarantees and assurances did not form a necessary part of the legal consequences of all internationally wrongful acts. Some members of the Committee, however, had held that the provision lacked substantial roots in existing State practice and that there was no clear evidence of an emerging principle of international law in that direction.

66. The Drafting Committee had also reconsidered the question of the relationship between assurances and guarantees of non-repetition, on the one hand, and satisfaction as a form of reparation, on the other. While reiterating the view that such assurances and guarantees were generally related to cessation, the Committee had agreed that, in certain instances, they could form part of the remedy of satisfaction, which, being of a flexible nature, could take many different forms. The commentary to article 37 (Satisfaction) should therefore indicate that such assurances and guarantees could sometimes be provided as a form of the remedy of satisfaction.

67. The Drafting Committee had taken a further look at the articles for the purposes of a *toilette finale* and consistency in the various language versions. It had made minor

editing changes to some articles and, in those with multiple paragraphs or subparagraphs, it had inserted the words "or" or "and", in order to clarify whether they should be understood as alternative or cumulative requirements. French, Russian and Spanish language groups had further reviewed the text that had emerged from the Committee for consistency with the original drafting language, English, and the articles had been renumbered sequentially and in their final form. He recommended that the Commission should adopt the set of draft articles, which also included changes made after the Commission had taken decisions on them during the first part of the session.

68. Mr. PELLET expressed grave misgivings about the placement of article 30, subparagraph (b): the text was perfectly acceptable, but it belonged in article 37. The Commission had, to his disapproval, decided to wait for the ruling by ICJ in the *LaGrand* case, which had, however, confirmed that one consequence of a State's assumption of responsibility was that it might have to provide assurances and guarantees of non-repetition.

69. The draft articles were logically structured. Under article 30, a State was under an obligation of cessation and, under article 31, of reparation: two distinct sets of consequences, specific details of which appeared in articles 34 to 38. Yet the retention of subparagraph (b) in article 30 sent out the clear message that assurances and guarantees of non-repetition did not form part of reparation. In other words, they did not constitute a possible element of satisfaction. All the commentary in the world would not alter that message. He was opposed to that interpretation, not least because ICJ had also ruled against it, having linked assurances and guarantees of non-repetition with the concept of apologies. It had specifically stated that, since apologies which were indubiously parts of satisfaction might not suffice in some cases, they could be extended by assurances and guarantees of non-repetition.

70. In any case, one could hardly envisage a situation in which assurances and guarantees of non-repetition were not linked with satisfaction. For that reason article 30, subparagraph (b), should rightfully appear in article 37, in conformity with the position of ICJ.

71. He wished to point out that he had withdrawn his reservations about the fact that assurances and guarantees of non-repetition might be withheld, but he was taken aback by the fact that the Drafting Committee considered them a part of cessation. Mr. Gaja's explanation was not convincing. There was still time for the Commission to make the necessary change. Furthermore, the placement of the subparagraph also affected the provisions of article 48, paragraph 2 (a), which currently provided that a non-injured State could demand assurances and guarantees of non-repetition. That, presumably, was why some members were so keen to retain the provision in article 30. Personally, however, he found it shocking that a State, which had not been injured, could demand such assurances and guarantees rather than apologies. The issue was not of secondary importance, as it might seem.

72. Mr. LUKASHUK said that the provision contained in article 30, subparagraph (b), was well founded. Not only was it supported by practice and doctrine, but it

applied to wrongdoing States the elementary psychology applied by mothers to their children. Recalcitrant States were simply asked to promise that they would not do it again.

73. Mr. SIMMA said that he did not agree with Mr. Pellet's reading of the ruling by ICJ in the *LaGrand* case. Mr. Pellet attached too much weight to one sentence in which the Court had said that in certain cases it was not sufficient for the wrongdoing State to apologize and that it should take further measures. It was misguided to take that as meaning that assurances and guarantees of non-repetition properly belonged with satisfaction rather than with cessation. As for Mr. Pellet's concern about article 48, paragraph 2 (a), the situation would remain unchanged even if his advice were followed. Under article 48, a State other than an injured State could demand reparation, which also comprised satisfaction, and the corollary was that, even if assurances and guarantees of non-repetition were bracketed with satisfaction, they would still be contained in article 48.

74. Mr. ECONOMIDES said that the role of assurances and guarantees of non-repetition under article 30 was simply to act as an optional complement to cessation. That was not, however, to say that such assurances and guarantees could not also play a positive role in satisfaction. Various kinds of satisfaction were possible, after all. He therefore agreed with the form of the draft as it stood.

75. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the titles and texts of the draft articles on responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading.

It was so agreed.

76. Mr. YAMADA said it was a cause for satisfaction that the entire set of draft articles had been adopted, the whole of the second reading having been completed within the relatively short period of five years. It was a significant achievement, for which credit was due to the successive special rapporteurs and, in particular, to Mr. Crawford. The final text showed a significant improvement over the previous one and more or less reflected the current customary rules and State practice. That did not mean, however, that he necessarily endorsed every article.

77. When a State committed an internationally wrongful act—a breach of an international obligation—the rights of the other States concerned were affected. That was the concept of “injury”. Mr. Brownlie had written in his *Principles of Public International Law*⁷ that the term “breach of duty” denoted an illegal act or omission, an “injury” in the broad sense. It was doubtful, however, whether the definition of “injury” set out in article 31, paragraph 2, corresponded with Mr. Brownlie's or his own understanding. The article gave “injury” a broader scope than that of “damage”.

78. That was not the only example of broadening the scope of “injury” in the draft articles. According to article 48, if the obligation *erga omnes* was breached, States other than injured States could claim cessation or non-repetition, as provided for in article 30, even though they could not directly claim reparation because they had not suffered injury. It could therefore be said that those interested States had suffered something other than “injury” through the breach of the obligation in question—what might be termed “infringement of interests of a legal nature”—but that, too, was covered by the draft articles, giving a broader scope to “injury” as defined in article 31, paragraph 2. The relationship and demarcation among the three concepts—damage, injury and infringement of interests of a legal nature—remained ambiguous. He hoped that they would be clarified as case law and State practice developed.

79. In his view, the addition of subparagraph (b) (ii) to article 42 (Invocation of responsibility by an injured State) gave too wide a scope to the concept of the injured State. It was argued that the so-called integral obligation existed in the 1969 Vienna Convention, in article 60, paragraph 2 (c), and it should be retained because the new provisions on countermeasures did not permit recourse to it by States other than the injured State. There had been no cases, however, of treaties being terminated on the basis of article 60, paragraph 2 (c). The integral obligation element of treaties was too important to be discarded; a treaty could be paralysed if individual countermeasures were allowed. Integral obligation was best safeguarded by relying on the self-contained mechanism of the treaty in question. If the paragraph had been put to the vote, therefore, he would have voted against it.

80. He had serious reservations about articles 40 (Application of this Chapter) and 41 (Particular consequences of a serious breach of an obligation under this Chapter). Admittedly, such breaches existed and they were qualitatively different from other breaches. What he could not accept was that there were particular legal consequences arising out of serious breaches. The legal consequences in the case of article 41 were not something special and did not warrant the retention of the category of such breaches in the State responsibility regime. Again, he would have voted against articles 40 and 41 if they had been put to the vote.

81. He also had serious reservations about article 48, paragraph 2 (b), particularly the last phrase “or of the beneficiaries of the obligation breached”, which could give rise to many difficulties. Whereas article 31 stipulated that the responsible State was under an obligation to make full reparation for the injury, article 48 related to States that had suffered no injury. Article 48, paragraph 2 (b), must therefore be authorizing such a State to claim performance of the reparation obligation for injured individuals who were not its own nationals. According to his understanding, reparation should, in the context of State responsibility, be made by States to other States, not to individuals. It could therefore be said that reparation under article 48, paragraph 2 (b), was actually an “obligation in the air”, which claimants could not invoke for themselves. That raised a serious problem about “to whom the obligation of reparation is owed” and “to

⁷ See 2689th meeting, footnote 4.

whom reparation due shall be allocated”. The confusion was compounded by the phrase “obligation owed to the international community as a whole”, appearing in article 33 (Scope of international obligations set out in this Part) and elsewhere, which could be construed as including the responsibility of States to individuals and non-governmental organizations, not only to other States. Yet the work of the Commission dealt only with the relationship between States. The phrase “international community of States as a whole”, as proposed by the Governments of France, Mexico, the United Kingdom and others, was therefore preferable, in order to avoid confusion. Accordingly, he could not endorse the last phrase of article 48, paragraph 2 (b).

82. The provisions on countermeasures had been improved greatly, although he still had some doubts about the narrow definition of the object of countermeasures in article 49 (Object and limits of countermeasures) and about the fact that proportionality, as defined in article 51 (Proportionality), did not seem to rally with the object of countermeasures. He was, however, at one with the Commission in recommending the draft articles as a whole to the General Assembly.

The meeting rose at 1 p.m.

2702nd MEETING

Monday, 6 August 2001, at 10 a.m.

Chairman: Mr. Peter KABATSI

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

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

CHAPTER V. *State responsibility* (A/CN.4/L.608 and Corr.1 and Add.1 and Corr.1 and Add.2–10)

A. Introduction (A/CN.4/L.608)

Paragraph 1

1. Mr. GALICKI proposed that, in the footnote, something should be added to refer to the reports of the first Special Rapporteur on State responsibility, F. V. García Amador, in order to re-establish the balance with the references to the reports of the other special rapporteurs.

Paragraph 1, as amended, was adopted.

Paragraphs 2 to 11

Paragraphs 2 to 11 were adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.608 and Corr.1)

Paragraphs 12 to 16

Paragraphs 12 to 16 were adopted.

Paragraph 17

2. Mr. PELLET proposed that the words “to discard the concept of ‘international crimes of State’” in the second sentence should be replaced by the words “not to make reference to the concept of ‘international crimes of State’”, which were more neutral.

Paragraph 17, as amended, was adopted.

Paragraph 18

3. Mr. GAJA proposed that in the last phrase of the paragraph the word “consequences” should be added before the words “were neither”.

4. Mr. ECONOMIDES proposed that, at the end of the fourth phrase of the second sentence, the word “general” should be added before the words “international law” because very specific traces of punitive damages were to be found in regional international law.

5. Mr. CRAWFORD (Special Rapporteur) said that he accepted the two proposed amendments and noted that, at the end of the fourth phrase of the second sentence, the text should read: “which were not available under general international law at present”.

Paragraph 18, as amended, was adopted.

Paragraphs 19 to 32

Paragraphs 19 to 32 were adopted.

Paragraph 33

6. Mr. GAJA proposed that part of the last sentence should be deleted. The sentence would then read: “Furthermore, codification conferences tended to make very few changes to consensus texts prepared by the Commission.”