89. Mr. PELLET said that at the beginning of the fifth sentence the words “But it is neither exhaustive nor exclusive” should be amended to read: “But it is not exclusive” because it made no sense to say that a distinction was exhaustive.

90. Mr. CRAWFORD (Special Rapporteur) said that he agreed with Mr. Pellet’s comment.

Paragraph (11), as amended, was adopted.

Paragraph (12) was adopted.

Commentary to article 13 (International obligation in force for a State)

Paragraph (1)

91. Mr. GAJA said that in the first sentence the words “the obligation is in force for the State” should be amended to read “the State is bound by the obligation”.

92. Mr. ECONOMIDES said that the wording of article 13 was entirely suitable for treaty obligations, but, for other obligations (customary and deriving from peremptory norms of international law), the important element was the existence of the rule.

93. Mr. TOMKA (Chairman of the Drafting Committee) said that the two elements were important. There had to be an obligation and the State had to be bound by that obligation.

94. Mr. CRAWFORD (Special Rapporteur) said that there were rules of international law by which States were not bound. The fact that a State was bound was therefore an important element.

95. Mr. KUSUMA-ATMADJA said that he agreed with the Special Rapporteur. The provision, as it stood, was simple and clear.

96. Mr. PAMBOU-TCHIVOUNDA said that, throughout the draft articles on State responsibility, reference should be made to “an act of the State” and not “an act of a State”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

97. Mr. KAMTO said that it should be made clear at the beginning of paragraph (3) to which case reference was being made.

98. Mr. CRAWFORD (Special Rapporteur), taking note of Mr. Kamto’s comment, said that he would add the necessary reference.

Paragraph (3) was adopted on that understanding.

Paragraphs (4) to (9)

Paragraphs (4) to (9) were adopted.

The commentary to article 13, as amended, was adopted.

Commentary to article 14 (Extension in time of the breach of an international obligation)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

99. Mr. PELLET said that he did not understand what was meant by a “complete” act. He did not know whether that was a matter of substance or of form, but, in any event, “complete” was not the right term.

100. Mr. CRAWFORD (Special Rapporteur) said that a distinction was being made between an act that was “completed” and one that was continuing.

101. Mr. KAMTO proposed that the word achevé should be used in French.

102. Mr. PELLET said that he could accept the term achevé. In that case, however, it was the term “continuing” which seemed to be a problem, since all acts, whether continuing or not, were bound to be achevé at some time or another.

103. Mr. RODRÍGUEZ CEDEÑO said that the Spanish term consumado and continuo were satisfactory.

104. Mr. PAMBOU-TCHIVOUNDA asked whether the continuing or complete nature of an act depended on the act itself or on its effects.

The meeting rose at 1.10 p.m.

2703rd MEETING

Monday, 6 August 2001, at 3.05 p.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, 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)


E. Text of the draft articles on responsibility of States for internationally wrongful acts (continued) (A/CN.4/L.608/Add.1 and Corr.1 and Add.2–10)

2. Text of the draft articles with commentaries thereto (continued)

PART ONE. The internationally wrongful act of a State (continued)

CHAPTER III. Breach of an international obligation (continued)

Commentary to article 14 (Extension in time of the breach of an international obligation) (continued) (A/CN.4/L.608/Add.7)

Paragraph (4) (continued)

1. Mr. PELLET said that it should be made clear that an act that had a continuing character but that was complete did not fall within the scope of article 14, paragraph 1. Also, in the interests of clarity, in the French text accompli should be replaced by consommé.

2. Mr. CRAWFORD (Special Rapporteur) agreed to draft a new sentence in line with Mr. Pellet’s suggestion.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

Paragraph (8)

3. Mr. PAMBOU-TCHIVOUNDA asked whether the first sentence should not refer to the duration of the breach of the obligation rather than the duration of the obligation breached.

4. Mr. CRAWFORD (Special Rapporteur) explained that obligations, as well as breaches of obligations, could have a limited duration. The “Rainbow Warrior” case illustrated that there could be no continuing breach once the obligation came to an end.

Paragraph (8) was adopted.

Paragraphs (9) to (13)

Paragraphs (9) to (13) were adopted.

Paragraph (14)

5. Mr. GAJA said that the phrase “if the obligation is in force”, in the third sentence, should be replaced by “if the State is bound by the obligation”.

6. Mr. LUKASHUK, referring to the same sentence, said that as an “event” could not be the object of international law and obligations, an alternative such as an “act of State” should be used.

7. Mr. GAJA pointed out that the phrase “during which the event continues and remains not in conformity with what is required by that obligation” was taken from paragraph 3 of the article and therefore should not be changed.

8. Mr. CRAWFORD (Special Rapporteur) agreed to the amendment proposed by Mr. Gaja.

Paragraph (14), as amended, was adopted.

Commentary to article 15 (Breach consisting of a composite act)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

9. Mr. PELLET said he failed to see what was meant by a “systematic” obligation. Why use “systematic” if “complex” or, simply, “composite” was meant? There was also a contradiction between the fifth sentence, “The isolated killing of a person . . . is not genocide”, and the last sentence, “. . . any individual responsible for any of them [the acts] with the relevant intent will have committed genocide”. The killing of a single person on the basis of a genocidal ideology was indeed a genocidal act, and he suggested that the sentence beginning “The isolated killing . . . ” should be deleted.

10. Mr. ECONOMIDES said that the footnote was incomplete; the reference to other concepts of complex acts not included in the articles was unexplained and should be deleted.

11. Mr. CRAWFORD (Special Rapporteur) said that the footnote could end after “p. 709” to avoid confusion. With regard to the sentence Mr. Pellet wished to have deleted, it emphasized killings which were carried out in isolation and could not therefore be classed as genocide, but he would not object to deleting it as the last sentence in the paragraph made the point quite clearly. He had introduced the word “systematic” in an attempt to elaborate on the concept of an international obligation that defined certain conduct in aggregate as wrongful, but he would be glad to produce some alternative wording for approval by the Commission.

Paragraph (4)

12. Mr. PELLET said that the paragraph would be greatly improved if the Special Rapporteur could give an example of a simple act that caused continuing breaches.
13. Mr. CRAWFORD (Special Rapporteur) gave the example of the detention of a person over a period of time or a prohibition involving a series of different acts by the responsible State. He would look for an example from a specific case and submit it later for the approval by the Commission. He would also remove the words “or systematic” from the first sentence.

Paragraphs (5) and (6) were adopted.

Paragraph (7)

14. Mr. GALICKI questioned the need for quotation marks around “systematic” and “inaugurated”.

15. Mr. CRAWFORD (Special Rapporteur) said he would remove the quotation marks and also find an alternative for “systematic”.

Paragraph (7), as amended, was adopted.

Paragraph (8)

16. Mr. PELLET proposed that the first sentence should be amended to read: “. . . the time at which the last action or omission occurs which . . . is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series.”

Paragraph (8), as amended, was adopted.

Paragraph (9)

17. Mr. GAJA said that the reference to individual responsibility in the penultimate sentence was confusing and should be omitted, leaving the last two sentences to be merged so that they read: “If this were not so, the effectiveness of the prohibition would thereby be undermined.”

Paragraph (9), as amended, was adopted.

Paragraph (10)

18. Mr. GALICKI said that the article should be correctly quoted in the third sentence and the quotation marks used properly so that it read: “. . . the ‘first of the actions or omissions of the series’ for the purposes of . . .”.

Paragraph (10), as amended, was adopted.

Paragraph (11)

19. Mr. GAJA suggested some rewording to avoid the overuse of the word “force”. In the second sentence, “the international obligation must be in force” should be replaced by “the State must be bound by the international obligation”. In the third sentence, “was not in force” should be replaced by “did not exist”, “came into force” by “came into being”, and “the obligation came into force” by “the obligation came into existence”.

Paragraph (11), as amended by Mr. Gaja, was adopted.

CHAPTER I. GENERAL PRINCIPLES (continued)

Commentary to article 2 (Elements of an internationally wrongful act of a State) (concluded) (A/CN.4/L.608/Add.2)

New paragraph (9 bis)

20. The CHAIRMAN drew attention to the following proposed text for a new paragraph (9 bis):

“A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by ‘fault’ one understands the existence, for example, of an intention to harm. The international responsibility of a State in this regard presents an ‘objective’ character in the sense that in the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.”

21. Mr. Sreenivasa RAO said that the last sentence was unclear. It appeared to be a roundabout way of saying that fault was unrelated to intent and therefore that fault was not necessary for defining obligations.

22. Mr. PELLET said he had drafted the text and that Mr. Sreenivasa Rao’s interpretation was correct. The third sentence described an exception to the general rule that fault was not an element of international responsibility. In certain circumstances, such as cases of genocide, a subjective mental element could be an important part of an obligation, and some primary obligations could only be breached when there was intention.

23. Mr. ECONOMIDES said that, as he understood it, the paragraph was a complicated way of saying that fault was not a necessary element of the internationally wrongful act of a State except when it was provided for in a primary rule.

24. Mr. GAJA suggested that the meaning would be clearer if the first part of the last sentence was omitted, so that it began with: “In the absence of . . .”.

25. Mr. KAMTO suggested that connexe would be better than proche as a translation into French of “related”.

Paragraph (9 bis), as amended, was adopted.

The commentary to article 2, as amended, was adopted.

CHAPTER IV. RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

Commentary to chapter IV (A/CN.4/L.608/Add.1)

26. Mr. PELLET said that the French version of the entire commentary should be amended to conform to the wording decided on for the final version of article 17, where the word direction had been replaced by directive.
Paragraph (1)

27. Mr. PELLET said it was not clear precisely what was meant by the recurring phrase “independent responsibility”. Did it mean “the author’s own responsibility”?

28. Mr. ROSENSTOCK said that he found the phrase useful, and assumed the Special Rapporteur had coined it to contrast with the idea of “joint and several”.

29. Mr. CRAWFORD (Special Rapporteur) said that both Mr. Pellet and Mr. Rosenstock had correctly understood his intentions, but he would draft an explanation of the phrase to be included on its first occurrence.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

30. Mr. HAFNER proposed the inclusion of the words “the organ of” between the words “conduct of” and “one State”.

Paragraph (5), as amended, was adopted.

Paragraph (6)

31. Mr. LUKASHUK proposed that, in order to bring the wording of the third sentence into line with that of article 16, the words “the commission of an internationally wrongful act by” should be inserted between “control over” and “the latter”.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

32. Mr. LUKASHUK suggested that the word “lawful”, in the fourth sentence, should be replaced by “not wrongful”.

33. Mr. CRAWFORD (Special Rapporteur) proposed that the word “lawful” should simply be replaced by the word “not”.

It was so agreed.

Paragraph (8), as amended, was adopted.

Paragraph (9)

34. Mr. PELLET said the second and third sentences implied that support was a form of incitement, which was certainly not the case. He proposed that the third sentence should be deleted. In the sixth sentence, he queried the phrase “accessory after the fact” and suggested that that sentence, too, might be deleted. In the French text of the twelfth sentence, the words *peut naître* should be replaced by *nait*.

35. Mr. CRAWFORD (Special Rapporteur) said that, as a consequence of Mr. Pellet’s final amendment, in the English version of the twelfth sentence, the word “can” should be deleted.

It was so agreed.

36. Mr. CRAWFORD (Special Rapporteur), responding to Mr. Pellet’s comment on the sixth sentence, said that the sentence did not suggest that being an accessory after the fact was a form of incitement, which it obviously was not: it was a form of complicity. He drew attention to the word “Another”, which made it clear that incitement was being contrasted, not equated, with being an accessory after the fact. He would prefer to retain the sixth sentence.

37. Mr. PELLET said that after hearing Mr. Crawford’s remarks, he thought that the sixth sentence could be retained, but the French version of the first words *Il y a aussi le* should be replaced by the words *Un autre*.

It was so agreed.

38. Mr. CRAWFORD (Special Rapporteur) said he endorsed Mr. Pellet’s proposal to delete the third sentence, because it was quite true that expressing support and incitement were two entirely different things.

It was so agreed.

39. Mr. GAJA proposed that the words “concrete support and” should be replaced by “concrete support or” in the fourth sentence of the English version and that the words “peremptory obligations” should be replaced by “obligations under peremptory norms” in the twelfth sentence.

It was so agreed.

40. Mr. LUKASHUK proposed that the word “exceptionally”, in the penultimate sentence, should be deleted.

It was so agreed.

41. In response to a question on the first footnote to the paragraph from Mr. KAMTO, Mr. CRAWFORD (Special Rapporteur) said that the phrase “dissenting opinion” had been incorrectly translated into French.

Paragraph (9), as amended, was adopted.

The commentary to chapter IV, as amended, was adopted.
Commentary to article 16 (Aid or assistance in the commission of an internationally wrongful act)

Paragraph (1)

42. Mr. LUKASHUK said that the last sentence added an entirely new element to State responsibility, implying that assistance in the commission of a wrongful act could constitute a major component of a wrongful act. Either the text of article 16 should be amended to include that new element or the sentence should be deleted.

43. Mr. CRAWFORD (Special Rapporteur) said he would greatly prefer to retain the sentence and thought Mr. Lukashuk’s objections were based on a misunderstanding. The sentence indicated that in a situation when there was no causal relationship between the assistance and the act, the assisting State did not assume responsibility for the act, although it could still be responsible for its own assistance. In some situations, the assistance was so central to the conduct that the State was deemed to have produced the conduct, but in other cases that was not so. The point was controversial, however, and there was no question of inserting anything in article 16.

44. Mr. PELLET said he was in favour of retaining the last sentence. Referring to the fourth sentence, he queried the term “fautif” as a translation for the word “wrongdoer” and suggested that it should be replaced by the word “responsible” in French.

45. Mr. CRAWFORD (Special Rapporteur) said that in English, too, the word “wrongdoer” was incorrect. He proposed that the phrase “The primary wrongdoer” should be replaced by “The State primarily responsible”.

It was so agreed.

Paragraph (1), as amended, was adopted.

Paragraph (2) (A/CN.4/L.608/Add.1/Corr.1)

46. Mr. CRAWFORD (Special Rapporteur) said the paragraph made the point that there were a number of substantive rules prohibiting assistance and even requiring States to repress conduct. The footnote contained examples of cases when one State had assisted another in carrying out an attack on a third State. Such rules, as the paragraph indicated, did not rely on the general principle stated in article 16, but neither did they deny its existence. One could not infer from the existence of the principle the non-existence of the general rule formulated in article 16. Reference was made to Article 2, paragraph 5, of the Charter of the United Nations. He thought the paragraph made a useful point.

Paragraph (2) was adopted.

Paragraphs (3) and (4) (A/CN.4/L.608/Add.1)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

47. Mr. ECONOMIDES, referring to the second sentence, said that the phrase “clearly and unequivocally” was unduly strong and that one of the two words should be deleted. The last sentence served no purpose and should be deleted.

48. Mr. CRAWFORD (Special Rapporteur) said he could agree to deleting both the words “and unequivocally” and the last sentence.

Paragraph (5), as amended, was adopted.

Paragraph (6)

49. Mr. LUKASHUK, referring to the penultimate sentence, said that the phrase “Thus, it is also free to assist another State in doing so” seemed to legalize actions that went against the principles of international law. He therefore proposed that the sentence should be deleted.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

50. Mr. ECONOMIDES proposed that the last sentence should be placed between the sixth and seventh sentences.

51. Mr. CRAWFORD (Special Rapporteur) said he could go along with that proposal and suggested that the first words in the transposed sentence, “For its part”, should be deleted.

Paragraph (8), as amended, was adopted.

Paragraphs (9) to (11)

Paragraphs (9) to (11) were adopted.

The commentary to article 16, as amended, was adopted.

Commentary to article 17 (Direction and control exercised over the commission of an internationally wrongful act)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

52. Mr. PELLET proposed that the words “fini par confirmer”, in the fifth sentence, should be replaced by the words “a confirmé” in the French.

53. Mr. CRAWFORD (Special Rapporteur) said he endorsed that proposal, which in English would result in the deletion of the word “eventually”.

Paragraph (2), as amended, was adopted.
Paragraph (3)

54. Mr. PELLET said that the end of the first sentence, “or reformulated so as to eliminate areas of uncertainty or dependency”, was not clear. He proposed that it should be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

55. Mr. LUKASHUK drew attention to the third sentence: “Even in cases where a component unit of a federal State enters into treaties or other international legal relations in its own right, and not by delegation from the federal State, the component unit is not itself a State in international law.” The draft on the law of treaties originally considered by the Commission had contained a provision indicating that subjects of a federation could participate in international treaties to the extent permitted by the federal constitution. The provision had not gone into the 1969 Vienna Convention owing to the sharp protests of the Canadian delegation. Cases when one of the German Länder or a canton of Switzerland concluded its own treaty had to be taken into account, for those entities had international legal responsibility within their fields of competence.

56. Mr. HAFNER said he agreed to some extent with the concerns expressed by Mr. Lukashuk but could accept the text as it stood. On the other hand, he would propose deleting the phrase “or component units of federal States” from the first sentence, because the examples given thereafter related only to dependent territories.

It was so agreed.

57. Mr. GALICKI said that in the first sentence, the quotation marks around the word “dependency” should be deleted.

It was so agreed.

58. Mr. CRAWFORD (Special Rapporteur) said the proposition in the third sentence was not inconsistent with Mr. Lukashuk’s concerns. There might well be cases of treaty-making by component units of federal States in which the responsibility for a breach was that of the component unit, not of the federal State. That situation of responsibility fell outside the scope of the articles, however, because the component unit was not a State.

Paragraph (4), as amended, was adopted.

Paragraph (5)

59. Further to a comment by Mr. ECONOMIDES, Mr. CRAWFORD (Special Rapporteur), supported by Mr. CANDIOTI, suggested that “St. Paul’s” should be replaced by the phrase “the Basilica of St. Paul”.

It was so agreed.

60. Mr. CRAWFORD (Special Rapporteur), responding to a comment by Mr. KAMTO, suggested that the word “has”, in the first sentence, should be replaced by “exercises”.

It was so agreed.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

61. Mr. PELLET drew attention to the difficulties posed by the word direction in French, which could imply the exercise of total power. He therefore suggested that the following sentence should be added to the paragraph: “The choice of the expression, common in English, ‘direction and control’ raised some problems in other languages, owing in particular to the ambiguity of the term ‘direction’, which may imply, as is the case in French [and, perhaps, in the other official languages], complete power; whereas it does not have this implication in English.” If no such explanation were given, there could be awkward ramifications.

62. Mr. CANDIOTI said that the same problem did not exist in Spanish: the word dirección could carry the English connotation of “instruction” or “guideline”.

63. Mr. CRAWFORD (Special Rapporteur) said that he would willingly support the insertion of the sentence suggested by Mr. Pellet, although it might be preferable to refer simply to “other languages” without mentioning “other official languages”.

It was so agreed.

Paragraph (7) as amended, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

The commentary to article 17, as amended, was adopted.

Commentary to article 18 (Coercion of another State)

Paragraph (1)

64. Mr. LUKASHUK said that, although he understood the idea behind the third sentence, the current wording suggested that the coercing State had some general responsibility. He therefore suggested that the words “coercing State” should be followed by the phrase “with respect to third States”.

65. Mr. ROSENSTOCK, while concurring with the suggestion, pointed out that the reference to “third States” would be confusing when seen in conjunction with the reference at the end of the second sentence to “another State”.

It was so agreed.
66. Mr. CRAWFORD (Special Rapporteur) suggested that in the second sentence the words “another State” should be amended to read “a third State”. Mr. Lukashuk’s suggestion, which he supported, could then read: “with respect to the third State”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

67. Mr. HAFNER said that the first sentence was ambiguous: it was not clear whether it meant that force majeure was comparable to coercion, insofar as it was irresistible, or whether it meant that coercion could be seen as force majeure in relation to the coerced State, enabling the latter to resort to force majeure. He assumed that the first meaning was intended; but clarification was required.

68. Mr. CRAWFORD (Special Rapporteur) said the intention was to emphasize that what was involved was indeed coercion, not some lesser action like persuasion or inducement. The force majeure did indeed qualify as irresistible force, so far as the acting State was concerned. He suggested, in view of the importance of the issue, that the sentence should be placed in square brackets and he would attempt to improve the wording.

69. Mr. PELLET suggested that the words “is to be equated with” could be replaced by the phrase “has the same essential character as”, which gave less of a hostage to fortune than the categorical wording currently used. Secondly, he was unhappy with the second sentence, which was too tortuous. It should be reworded along the following lines: “The will of the coerced State will not suffice. It is essential that it should have no effective choice but to . . . ”.

70. Mr. CRAWFORD (Special Rapporteur) said Mr. Pellet’s comment persuaded him that the second sentence should also be placed in square brackets, since there was a clear relation between the first and second sentence. He would attempt to reword the sentences, aiming to emphasize that the point at issue was coercion, not merely strong measures or arm-twisting.

It was so agreed.

Paragraph (2), as amended, was adopted.

Paragraph (3)

71. Mr. ECONOMIDES said that the reference to article 19, in the fourth sentence, was wrong: the article in question was 49.

Paragraph (3), as amended, was adopted.

Paragraph (4)

72. Mr. PELLET said, in relation to the last two sentences, that he greatly doubted that there could be situations in which coercion did not amount to force majeure and was therefore covered by article 18. Examples should be provided. Moreover, the penultimate sentence did not tally with the statement at the beginning of paragraph (2).

73. Mr. CRAWFORD (Special Rapporteur) said that, although examples existed, unfortunately they related mostly to the coercion of Governments in the context of war crimes, crimes against humanity and even genocide during the Second World War and were thus difficult to deal with succinctly. It was possible to envisage cases in which the acting State could not rely on article 23, because of one of the exclusions, for example; but he acknowledged that that was not quite the meaning of the penultimate sentence. He was in any case reluctant, for other reasons, to add more examples. He therefore suggested that the last two sentences should be deleted altogether.

Paragraph (4), as amended, was deleted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

The commentary to article 18, as amended, was adopted.

Commentary to article 19 (Effect of this Chapter)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 19 was adopted.

Cooperation with other bodies (concluded)*

[Agenda item 8]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

74. The CHAIRMAN invited Mr. Wafik Kamil, Secretary-General of the Asian-African Legal Consultative Organization (AALCO) to address the Commission.

75. Mr. KAMIL (Observer for the Asian-African Legal Consultative Organization) informed the Commission that, at its fortieth annual session, held in New Delhi from 20 to 24 June 2001, the organization had decided to change its name from the Asian-African Legal Consultative Committee in order to reflect the status of its functions and permanent structure.

76. AALCO, which attached great significance to its traditional, long-standing ties with the Commission, made it a primary objective to examine questions under consideration by the Commission and to place before it the views of member States. Over the years, that practice had helped forge closer bonds between both bodies and it had become customary for each to be represented at the other’s annual sessions. Thus the Commission had been represented at the meeting of the Legal Advisers of

* Resumed from the 2700th meeting.
member States of AALCO during the fifty-fifth session of the General Assembly. Mr. Brownlie, Mr. Momtaz, Mr. Sreenivas Rao and Mr. Yamada had attended and Mr. Hafner had addressed the meeting in his capacity as Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, on which AALCO had convened an open-ended working group of its own.

77. The fortieth session—the President of which had been Mr. Sreenivas Rao and the Vice-President the Minister of Justice and Attorney-General of Nigeria—had considered no fewer than 13 substantive items, one of which was the work of the Commission at its fifty-second session. Everything discussed by the Commission was of interest to the Governments of the region and to AALCO as a whole, but the main topic taken up for in-depth consideration was State responsibility.

78. On that topic, he had been mandated to bring to the attention of the Commission the views expressed by member States. At a general level, delegates had welcomed the deletion of article 19, which had embodied the controversial notion of “international crimes”. On the other hand, the reference to a “serious breach by a State of an obligation owed to the international community as a whole” had been considered a reasonable formulation that could gain consensus among States. Some delegates, however, had been concerned that the term “serious breaches” was ambiguous and open-ended, thus running the risk of multiple interpretations. It had therefore been suggested that the term should be clarified and its content and legal consequences set out more explicitly.

79. As for the definition of the “injured State”, delegates had noted the improvement in the formulation of article 42. In particular, the distinction between categories of injured States had been deemed to have practical utility. Given the implications that the definition might have in determining which State could invoke responsibility and also the nature of the remedy that could be sought, other delegates had cautioned against expanding the definition of the term “injured State”. While the distinction between “directly affected States” and “States interested in the performance of an obligation” had its relevance and value, it should not lead to the creation of new rights not accepted under international law.

80. The reference to collective interests in article 48, entitled “Invocation of responsibility by States other than the injured State”, had been seen by some as being ambiguous and therefore requiring further elaboration. Many delegates had also been opposed to the concept of “collective countermeasures”, since it could be abused by powerful States. As for the need to regulate the resort to countermeasures, delegates had emphasized the usefulness of including provisions for recourse to dispute settlement procedures.

81. Many delegates considered that the draft articles should be embodied in a convention, while others favoured their adoption by the General Assembly in the form of a declaration. Some were open to either option. The AALCO secretariat was currently studying the draft articles, as adopted on second reading, and he would therefore refrain from making any observations on the final text for the time being. The secretariat would prepare comments for the benefit of member States by the time they met in the Sixth Committee of the General Assembly at its fifty-sixth session.

82. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), a majority of delegates had supported the draft and urged that no substantive changes should be made. While the articles were seen as adopting a pragmatic approach to risk management and potentially playing an important role in addressing environment-related issues, it had also been pointed out that many of the principles contained in the articles had already gained acceptance in international law. Among the points raised by delegates were the following: the “duty to cooperate” should be explicitly spelt out; the “prevention” dimension should be retained; environmental impact assessment should be made compulsory and serve as a basic reference for consultations, notification and dispute settlement; and, lastly, the Commission should decide whether to retain or delete the reference to the expression “not prohibited by international law”. The view had been expressed that the articles should be formulated as a model law, so as to offer guidance to States in their bilateral and regional arrangements. AALCO member States also trusted that the Commission would shortly make a decision to examine the question of liability.

83. On the topic of reservation to treaties, it had been held that the Vienna Convention regime on treaties provided a flexible and pragmatic balance between the unity and integrity of treaties, on the one hand, and the need for universality of adherence, on the other. Delegates had therefore urged that the work on the topic should not deviate from the Vienna regime. The outcome of the work of the Commission could take the form either of a guide to practice or a model law, at the same time addressing the need for universality of adherence, on the other. Delegates had therefore urged that the Commission should take into account the views expressed by States also trusted that the Commission would shortly make a decision to examine the question of liability.

84. As for the topic of unilateral acts of States, it had been observed that it was crucial for the Commission to provide a precise delineation of the scope of unilateral acts. It had been suggested that the Commission should first seek to identify all the conceivable categories of unilateral acts, including recognition, acquiescence, estoppel and protest. Once that was accomplished, the work could move towards defining unilateral acts and their practical application. Another delegate had urged that the Commission should undertake in-depth studies while proceeding with the consideration of the topic.

85. On the topic of diplomatic protection, delegates had stated that it was a discretionary right vested in the State. They had opposed the proposal to authorize the use of force in securing diplomatic protection. Even if force were used, as an exceptional measure, it must have the authorization of the Security Council or other competent bodies. One delegate had commented that the treatment

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1 See 2665th meeting, footnote 5.
2 See 2701st meeting, para. 75.
by the Commission of the topic seemed to focus too much on the procedural issue of the determination of nationality and too little on elements of substantive law involving the protection of nationals by States, such as denial of justice or national treatment of aliens. AALCO member States had been urged to reply to the questions by the Commission on the topic.

86. Other items considered at the fortieth session of AALCO had included international terrorism; status and treatment of refugees; deportation of Palestinians and other Israeli practices, including the massive immigration and settlement of Jews in the occupied territories in violation of international law, particularly the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; extraterritorial application of national legislation in connection with sanctions imposed against third parties; follow-up of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court; follow-up of the United Nations Conference on Environment and Development; legislative activities of United Nations agencies and other international organizations concerned with international trade law; WTO as a framework agreement and code of conduct for world trade; and establishing cooperation against trafficking in women and children.

87. At the same session, AALCO had organized, in cooperation with the International Organization for Migration, a one-day special meeting entitled “Some legal aspects of migration”.

88. AALCO, as an intergovernmental body whose membership comprised 45 States from the continents of Asia and Africa, was uniquely placed to serve the States of the region in examining and formulating their responses to newly emerging challenges of international law. He had presented a proposal on rationalization of the work programme, which had aimed at identifying core legal issues of practical interest to member States. AALCO was also proud of its cooperative relationship with the Commission and he hoped that, during his term of office, the relationship would be intensified. In that context, he noted that in-depth consideration of important legal topics was often impossible on formal occasions, owing to the shortage of time. He therefore suggested that the two bodies could jointly organize a seminar or workshop, perhaps in collaboration with the United Nations Office of Legal Affairs. Despite the tight financial constraints and other limitations under which both bodies operated, the benefits of such an exercise would outweigh the drawbacks. The seminar could focus on one of the topics currently at a formative stage within the Commission, such as unilateral acts of States or diplomatic protection. Other possibilities would be to discuss the topics proposed under the long-term programme of work of the Commission or to undertake an exploratory study on possible approaches to the future work of the Commission on the question of liability. He was, however, open to any other suggestions. He added that an item entitled “Report on the work of the International Law Commission at its fifty-third session” would be considered at the forty-first session of AALCO to be held at Abuja, in July 2002, to which he invited all members of the Commission.

89. Mr. CRAWFORD said it was gratifying that the Asian-African Legal Consultative Committee, with whose impressive work he had, as a representative of Australia, had a modest involvement some years previously, was currently a fully-fledged organization. That change of status was entirely appropriate, given the need for a distinctively legal approach to the problems of the States of Asia and Africa.

90. In deciding to refer the draft articles on State responsibility to the General Assembly with a request that it initially take note thereof, the Commission had anticipated the views of many members of AALCO, attempting to respond to the concerns expressed by AALCO member States on issues such as collective countermeasures. Many of those concerns had been embodied in statements made by individual States in the Sixth Committee or in written communications. It was his personal hope that the textual outcome would be regarded as a balanced one, taking careful account of all those comments and dealing with secondary obligations in the field of responsibility in a way that responded both to classical international law and to modern developments.

91. Mr. ECONOMIDES said he had been agreeably surprised by a number of the proposals made by the Observer for AALCO regarding the activities of the Commission. In particular, he had noted the views expressed about the need to regulate resort to countermeasures and to make provision for recourse to dispute settlement procedures. The Planning Group should consider ways of making cooperation between the two bodies closer and more effective, inter alia, by having advance notice of the views of AALCO on particular issues. He was also receptive to the idea of holding a joint seminar on a topic of common concern. One particularly promising topic was the international responsibility of international organizations.

92. Mr. MELESCANU said he wished to assure the Observer for AALCO that cooperation between the two bodies was much wider than the current somewhat limited exchange of views might lead one to suppose. Evidence of that assertion was the distinguished and active participation of Mr. Sreenivasa Rao and others in the work of both bodies. If the important views zealously promoted by country representatives in negotiations were not always fully reflected in the textual outcome of the work of the Commission, that was attributable, not to any lack of expertise or tenacity on the part of those representatives, but simply to the need to reach consensus formulations covering the interests of all to the fullest possible extent.

93. In their discussions on the topic of unilateral acts of States at the current session, all members of the Commission had agreed on the need for much fuller information regarding State practice, as an indispensable starting point for a solidly grounded codification exercise. He thus appealed to member States to do their utmost to make their views known to the Commission, either individually, or jointly under the aegis of AALCO—for instance, by responding to any questionnaires transmitted.

94. Mr. DUGARD endorsed Mr. Melescanu’s remarks concerning the need for fuller information on the practice of States. On the topic for which he had responsibility as Special Rapporteur, that of diplomatic protection, there
was a wealth of judicial precedent and State practice, most of which, however, derived from Europe and Latin America. It would be of considerable assistance to him, in his task as Special Rapporteur, if more evidence could be made available on State practice in the countries of Asia and Africa.

95. On the issue of denial of justice, to which the Observer for AALCO had alluded, there was a division of opinion in the Commission as to whether that subject should or should not be included in the draft articles, with a number of Latin American members strongly favouring inclusion, whereas a majority of members took the view that its inclusion would introduce a primary rule into the draft articles. He would therefore be interested to know whether there was a strong body of opinion in AALCO in favour of including the concept of denial of justice in the draft on diplomatic protection.

96. Mr. GOCO welcomed the recent change of name to AALCO, as a reflection of its importance as an organization comprising no fewer than 45 member States, as well as the fruitful cooperation that existed between the two bodies pursuant to chapter III of the statute of the Commission—cooperation epitomized by the participation in various capacities of a number of members of the Commission in the work of AALCO. He wished to draw attention to the question of corruption and related practices as a possible topic for consideration by AALCO at its forty-first session. Recent events on the world stage clearly showed that corruption and organized crime had ceased to be narrowly national issues and had currently become an endemic universal problem.

97. Mr. HE congratulated the Observer for AALCO on his report on the work of the organization and welcomed its renaming, as an indication of its new-found status. The long-standing cooperation between the two bodies was an extremely useful exercise, and one that was beneficial to both. The decision by AALCO to extend its agenda was an appropriate reflection of its status as a body with a crucial role to play in the field of legal cooperation.

98. Mr. GALICKI said that the Commission should request the Observer for AALCO to congratulate AALCO on the decision it had taken to upgrade its status—a decision that had substantive as well as formal implications, reflecting as it did an intensification of legal cooperation between the States of Asia and Africa. AALCO was, in his view, the regional body that had reacted most comprehensively and directly to the work of the Commission, whether finalized or ongoing, and its views would be of great value to the Commission in its future work. As had already been stressed, the Commission would be grateful to AALCO for any efforts it could make to encourage its member States to provide the Commission with fuller information regarding State practice. The proposals regarding joint activities such as seminars would also doubtless be welcomed by members of the incoming Commission.

99. Mr. RODRÍGUEZ CEDENO thanked the Observer for AALCO for his report on the activities of the organization, with the useful proposals concerning, inter alia, the topic of unilateral acts of States. The forty-first session of AALCO would provide an ideal opportunity for holding a joint seminar on a topic of common interest, and also for an exchange of information regarding State practice in the countries of Asia and Africa.

100. Mr. KATEKA commended AALCO on its acquisition of a new status and its expanded membership. The rationalization of its work, to which the Observer had alluded, should also extend to coordinating the work of the various Asian and African forums, and to selecting priority issues from a potentially very extensive agenda. Although the work of the Commission on State responsibility was nearing completion, it was not too late for AALCO member States to exert further influence on the topic in the General Assembly, and also, perhaps, at a future diplomatic conference.

101. Mr. KAMIL (Observer for the Asian-African Legal Consultative Organization) said he was extremely touched by members’ comments, and also pleased at the emphasis placed on the need to improve cooperation between the two bodies. Welcoming the positive response to his proposal to hold a joint seminar, he said that, in accordance with customary practice of AALCO, one day during its forty-first session could be devoted to such a seminar, on a topic to be selected jointly by the bureaux and secretariats of the two bodies. Given the limited time available during sessions for each body to consider the other’s work, there was a strong case for holding inter-sessional meetings, at which the input requested by the Commission could be provided. He would convey to the organization Mr. Galicki’s and others’ congratulations concerning its change of status, and also Mr. Goco’s remarks concerning the inclusion of the topic of corruption on the agenda of AALCO.

102. The CHAIRMAN thanked the Observer for AALCO for the information he had provided on the activities of his organization. The Commission had particularly noted the suggestions made for future joint cooperative activities between the two bodies.

The meeting rose at 6.10 p.m.

2704th MEETING

Tuesday, 7 August 2001, at 10.05 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. Sreenivasara Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.