Document:-
A/CN.4/SR.2704

Summary record of the 2704th meeting

Topic:
State responsibility

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

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

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 V. Circumstances precluding wrongfulness

Commentary to chapter V (A/CN.4/L.608/Add.3)

Paragraph (1)

1. Mr. KAMTO, supported by Mr. PAMBOU-TCHIVOUNDA, said that the second sentence should be amended, at least in the French text. The expression *permet à un État de se protéger contre une accusation* ("enables the State to protect itself against a claim"; in the English version: "provides a shield against . . . claim") was not felicitous, since it was not possible to protect oneself against a claim. Rather, the point was for the State to exonerate itself from responsibility.

2. Mr. SIMMA said that, in his opinion, the English version was entirely satisfactory and a formulation closer to the English should therefore be found for the French version.

3. Mr. PELLET pointed out that it was not a translation problem but one of perspective. He proposed that it should be translated as *permet à l'État de répondre à une accusation*.

4. Mr. TOMKA (Chairman of the Drafting Committee) proposed the formulation *offre à l'État un bouclier contre une accusation*.

Paragraph (1), as amended in the French text, was adopted.

Paragraph (2)

5. Mr. KAMTO proposed that in the first sentence the words "the articles" should be replaced by "the present articles". One wondered whether the current formulation meant all of the draft articles on State responsibility or only the articles in chapter V.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

6. Mr. PELLET said that a footnote should be inserted at the end of the second sentence, referring to article 73 of the 1969 Vienna Convention.

Paragraph (6), as amended, was adopted.

Paragraph (7)

7. Mr. PAMBOU-TCHIVOUNDA proposed that the word *arguments*, in the first sentence of the French text, should be replaced by *moyens*.

Paragraph (7), as amended in the French text, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

8. Mr. PELLET said he failed to understand the meaning of the word "interpretation", as used in the third sentence.

9. Mr. CRAWFORD (Special Rapporteur) said he had started by classing the exception of non-performance among the circumstances precluding wrongfulness, but the Commission had decided that it was not a rule of law and had to be excluded from chapter V. Accordingly, the sources cited in the footnote tended to make it a question of interpretation.

10. Mr. PELLET said that he was convinced that the exception of non-performance did not indeed have any place in chapter V, but it was not, for all that, a rule of interpretation. Rather, it was a rule under the law of treaties.

11. Mr. SIMMA proposed, as a compromise, that "interpretation" be replaced by "structure".

12. Mr. CRAWFORD (Special Rapporteur) said that the solution proposed by Mr. Pellet caused a problem inasmuch as the exception of non-performance was not provided for in the 1969 and 1986 Vienna Conventions. The decision by the Commission to exclude it from chapter V would indicate that it was not an autonomous rule but a principle of interpretation or a specific rule that related only to certain treaties.

13. Mr. ECONOMIDES proposed the following wording: ". . . is a rule which concerns mutual and synallagmatic obligations and does not in itself constitute a circumstance precluding wrongfulness".

14. Mr. TOMKA (Chairman of the Drafting Committee) proposed a formulation reading: ". . . is a particular characteristic of certain mutual or synallagmatic obligations and not an autonomous rule of international law".

15. Mr. CRAWFORD (Special Rapporteur) said that he would prefer a formulation combining the proposals by Mr. Economides and Mr. Tomka, namely, ". . . as a

specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness".

16. Mr. CANDIOTI proposed that the words "person or" should be inserted between "other" and "entity", in the first footnote.

Paragraph (9), as amended, was adopted.

The commentary to chapter V, as amended, was adopted.

Commentary to article 20 (Consent)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

17. Mr. PELLET proposed that the words "more properly treated as", in the second sentence, should be deleted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

18. Mr. PELLET proposed that the text should be simplified by omitting the phrase "at least to some extent" in the first sentence.

19. Mr. ECONOMIDES said that the word "guidance", in the last sentence, was too weak. The principles concerning the validity of consent to treaties offered much more than guidance.

20. Mr. CRAWFORD (Special Rapporteur) proposed that the words "provide guidance" should be replaced by "are relevant by analogy".

21. Mr. ECONOMIDES said he was ready to accept "provide relevant guidelines by analogy".

22. Mr. ROSENSTOCK said that, in his opinion, the expression "provide relevant guidance" was preferable.

23. Mr. CRAWFORD (Special Rapporteur) and Mr. ECONOMIDES endorsed the solution proposed by Mr. Rosenstock.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (10)

Paragraphs (7) to (10) were adopted.

The commentary to article 20, as amended, was adopted.

Commentary to article 21 (Self-defence)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

24. Mr. PELLET said the affirmation in the first sentence was far too categorical. The sentence was redundant and should be deleted. In his opinion, cases in which self-defence was authorized were confined to aggression.

25. Mr. CRAWFORD (Special Rapporteur) said he had no objection to deleting the first sentence.

26. Mr. ROSENSTOCK said that he was not in favour of deleting the sentence, as it would make for imbalance with the last sentence of paragraph (1).

27. Mr. CRAWFORD (Special Rapporteur) pointed out that self-defence could justify, for example, blockading a port, in breach of a treaty guaranteeing freedom of navigation. He proposed that the scope of the sentence should be restricted by replacing "conduct" by "certain conduct".

28. Mr. PELLET said he strongly objected to the example given by the Special Rapporteur. Self-defence could not justify a port blockade in the absence of aggression. As for Mr. Rosenstock's arguments, they were not convincing because they related to form, whereas it was a matter of substance. It would have been possible to avoid mentioning Article 2, paragraph 4, of the Charter of the United Nations and simply refer to Article 51.

29. Mr. ECONOMIDES, endorsing Mr. Pellet's comments, said that the sentence should be formulated more clearly. He could accept the solution proposed by the Special Rapporteur if there was a link-up with the next sentence.

30. Mr. KAMTO said he shared Mr. Pellet's position and considered that the sentence should be deleted. It did not make for a better understanding and simply opened the door to undesirable situations.

31. Mr. TOMKA (Chairman of the Drafting Committee) proposed the following wording: "Self-defence may justify conduct in relation to certain obligations other than those under Article 2, paragraph 4, of the Charter of the United Nations, which is related to a breach of that provision."

32. Mr. PELLET, reiterating that he would prefer to have the sentence deleted, said that he could accept the following wording: "Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision."

33. Mr. CRAWFORD (Special Rapporteur) said that, unquestionably, self-defence did not concern only Article 2, paragraph 4, of the Charter of the United Nations. For example, a State that was a victim of aggression could freeze the aggressor State's assets on its territory, some-

thing that did not constitute resort to force and did not concern Article 2, paragraph 4, of the Charter. It was lawful conduct in self-defence. Accordingly, he was ready to endorse the text proposed in the formulation suggested by Mr. Pellet.

Paragraph (2), as amended by Mr. Pellet, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

34. Mr. PELLET proposed that the words "referred to in the Charter" should be added at the end of the last sentence.

35. Mr. HAFNER proposed that the word "even", in the third sentence, should be deleted.

Paragraph (6), as amended, was adopted.

The commentary to article 21, as amended, was adopted.

Commentary to article 22 (Countermeasures in respect of an internationally wrongful act)

Paragraph (1)

36. Mr. PELLET proposed that the following sentence should be added at the end of the paragraph: "Chapter II of Part Three regulates countermeasures in further detail".

Paragraph (1), as amended, was adopted.

Paragraph (2)

37. Mr. KAMTO proposed that the term "countermeasures", in the last sentence, should be replaced by "measures of this kind", so as to ensure consistency between that sentence and the last sentence of paragraph (3), which stated that, since the *Air Service Agreement* case, the term "countermeasure" had been preferred.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

38. Mr. GAJA proposed that the expression "parties to the obligation", in the fourth sentence, should be replaced by "owed the obligation".

Paragraph (6), as amended, was adopted.

The commentary to article 22, as amended, was adopted.

Commentary to article 23 (*Force majeure*)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

Paragraph (8)

39. Mr. LUKASHUK proposed that the paragraph, which related to private law and hence had no place in the commentary, should be deleted.

40. Mr. ROSENSTOCK said that, in any event, the first sentence and the relevant footnote, which were useful, should be kept.

41. Mr. CRAWFORD (Special Rapporteur) said he endorsed Mr. Rosenstock's proposal, provided the footnote also mentioned the two texts quoted in the paragraph.

42. Mr. ECONOMIDES also proposed that the word *probablement*, in the first sentence of the French version, should be replaced by a stronger word, such as *vraisemblablement*.

Paragraph (8), as amended, was adopted.

Paragraph (9)

43. Mr. SIMMA pointed to an apparent contradiction between the first sentence, according to which a situation which had been caused or induced by the invoking State was not one of *force majeure*, and paragraph 2 of article 23, which stated that paragraph 1 did not apply if the situation of *force majeure* was due to the conduct of the State invoking it, in other words, that the situation of *force majeure* did exist, but could not be invoked.

44. Mr. CRAWFORD (Special Rapporteur) said that the point was well taken. He proposed that the wording of the first sentence should be changed to read: "A State may not invoke force majeure if it has caused or induced the situation in question."

Paragraph (9), as amended, was adopted.

Paragraph (10)

Paragraph (10) was adopted.

The commentary to article 23, as amended, was adopted.

Commentary to article 24 (Distress)

Paragraphs (1) to (10)

Paragraphs (1) to (10) were adopted.

The commentary to article 24 was adopted.

Commentary to article 25 (Necessity)

Paragraph (1)

45. Mr. AL-BAHARNA proposed that in the second sentence the word "tightly" should be replaced by "narrowly".

Paragraph (1), as amended, was adopted.

Paragraph (2)

46. Mr. HAFNER said that the statement in the fourth sentence, "the essential interests of the State itself" excessively restricted the notion of "essential" in relation to paragraph 1 (*a*) of article 25 itself. He therefore proposed that the formulation "the essential interests of the State itself", in the fourth sentence, should be replaced by the "the essential interest of a State" and, in addition, that the expression "as a whole" should be added at the end of the sentence.

47. Mr. CRAWFORD (Special Rapporteur) said he could agree with the second part of the proposal, but not the first part, for a State could not tell another what its essential interests were. It would be remembered that, when the Commission had revised the first-reading text, it had done so on the understanding that it would be possible to allow what had happened in, for example, the context of conservation in the "Russian Fur Seals" case,[1] namely, that where the essential interests involved a natural resource which was not owned by the State concerned, one could nonetheless deem it appropriate, at least in principle and in extreme cases, to invoke a state of necessity to prevent extermination of the stock.

48. Mr. TOMKA (Chairman of the Drafting Committee) said that, like the Special Rapporteur, he was in favour of maintaining the definite article in front of "State". As to the case mentioned by the Special Rapporteur, which dated back about 100 years, it had involved acts which had occurred beyond a State's border but in space that did not belong to another State. The decision had not been intended to authorize a State to protect, by a unilateral decision, the interests of another State, without regard to the latter's decision.

49. Mr. GOCO asked whether the notion expressed by the formulation "for the time being irreconcilable", in the penultimate sentence, was important for the existence of a state of necessity.

50. Mr. CRAWFORD (Special Rapporteur) confirmed the importance of that notion. However, since a conflict was definitively insoluble only in theory, he could agree to deleting the words "for the time being".

It was so agreed.

51. Mr. CANDIOTI, referring to the footnote, which quoted the speech by German Chancellor von Bethmann-Hollweg as a classic case of abuse of a state of necessity, asked Mr. Simma whether the term *Notwehr* meant "state of necessity" or "self-defence".

52. Mr. SIMMA said that the word *Notwehr* meant self-defence, but the German term to translate "state of necessity" also included the prefix *Not*, which explained why the phrase, *wir sind jetzt in der Notwehr; und Not kennt kein Gebot* could be translated as "we are in a state of necessity and necessity knows no law". He therefore suggested that the footnote should remain unchanged.

53. Mr. CRAWFORD (Special Rapporteur) proposed that the quotation should be kept in German but not translated, for any English translation would be inaccurate or miss the point.

54. Mr. PELLET, supported by Mr. TOMKA, said that a translation was essential and proposed that only the second part of the phrase should be retained, which might be translated as "necessity is the law".

55. Mr. CANDIOTI pointed out that the German word *Notwehr* meant self-defence and not state of necessity. The quotation did not have a rightful place and should therefore be deleted.

56. Mr. SIMMA said that in 1914, Germany could not justify invading a neutral country as self-defence. In fact, it was a state of necessity that had been invoked and it seemed that Bethmann-Hollweg had not used the word *Notwehr* properly. To avoid any confusion, he therefore proposed that only the second part of the quotation should be kept.

57. Mr. GAJA proposed that the whole of the quotation should be retained and translated as: "We are in a state of self-defence and necessity knows no law."

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

It was so agreed.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (12)

Paragraphs (3) to (12) were adopted.

Paragraph (13)

59. Mr. PELLET proposed that, in the last sentence, the word "opinion", which seemed imprecise, should be replaced by the word "doctrine"; that the footnote should specify what the pages mentioned in the *Yearbook* of the Commission for 1980 were about; and to add a few references after 1980 in the same footnote.

Paragraph (13), as amended, was adopted.

Paragraphs (14) to (19)

Paragraphs (14) to (19) were adopted.

[1] *British and Foreign State Papers, 1893-1894*, vol. 86 (London, H.M. Stationery Office, 1899), p. 220.

Paragraph (20)

60. Mr. ECONOMIDES proposed that the fourth sentence should be deleted, as it could imply that Article 2, paragraph 4, of the Charter of the United Nations could authorize humanitarian intervention. The Commission should be prudent and confine itself to citing the two problems that did exist and were presented in the first two paragraphs, indicating quite simply that those issues did not fall within the scope of article 25.

61. Mr. CRAWFORD (Special Rapporteur) said he could agree to delete the sentence, since the basic idea was expressed in the next sentence, namely, that the question of the lawfulness of humanitarian intervention was not covered by article 25.

Paragraph (20), as amended, was adopted.

The commentary to article 25, as amended, was adopted.

Commentary to article 26 (Compliance with peremptory norms)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

62. Mr. GALICKI recalled that the Commission had decided not to speak of "peremptory obligations" but of "peremptory norms". He therefore proposed that the first sentence should be amended to read: "Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

63. Mr. CRAWFORD (Special Rapporteur), in response to a question by Mr. Sreenivasa RAO about the footnote concerning a judgment of ICJ on East Timor, said that the Court's judgment had said it was undisputable that self-determination was an obligation *erga omnes*.

Paragraph (5) was adopted.

Paragraph (6)

64. Mr. GAJA said that the words "international obligations", in the second sentence, should be replaced by "norms" and, in addition, the paragraph should be placed after paragraph (17) of the commentary to article 25, in other words, after the paragraph that spoke for the first time of the "international community as a whole".

65. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to that proposal.

It was so agreed.

Paragraph (6), as amended, was adopted.

Paragraph (7)

66. Mr. ECONOMIDES proposed that a new sentence should be inserted after the fourth sentence, reading: "Similarly, if such an act is perpetrated, a State cannot unilaterally waive the right to invoke responsibility before final settlement of the case in accordance with international law."

67. Mr. CRAWFORD (Special Rapporteur) said that to take up such an issue in paragraph (7) would unnecessarily complicate matters. A cross-reference could nonetheless be made to the commentary to article 45.

68. Mr. PELLET said he wholeheartedly endorsed Mr. Economides's proposal. He would, however, be content with a cross-reference to the commentary to article 45. Nevertheless, he would point out that, for the time being, that article did not reflect Mr. Economides's comment, which should not be forgotten, either in the commentary to article 45 or, better still, in the commentary to article 41. It was a very important point.

Paragraph (7), as amended by the Special Rapporteur, was adopted.

The commentary to article 26, as amended, was adopted.

Commentary to article 27 (Consequences of invoking a circumstance precluding wrongfulness)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

69. Mr. GAJA said that the long quotation in the paragraph was already contained earlier in the document, in paragraph (3) of the commentary to chapter V. He therefore proposed that only the last sentence should be kept.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

70. Mr. PELLET proposed that the last sentence, which could be misleading, should be deleted. Even if the question of compensation were examined, it would not be taken up from the standpoint of state of necessity.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

The commentary to article 27, as amended, was adopted.

PART TWO. CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Commentary to Part Two

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to Part Two was adopted.

CHAPTER I. GENERAL PRINCIPLES

Commentary to chapter I

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

71. Mr. PELLET proposed that the phrase *parce qu'elles découlent directement au profit d'entités* should be replaced by *parce qu'elles profitent directement à des entités.*

72. Mr. CRAWFORD (Special Rapporteur) said he could agree to that change in the French version but thought that it was unnecessary to alter the English version.

73. Mr. CANDIOTI proposed that the word "secondary", in the last sentence, should be deleted and the words "person or" inserted before "entities", in order to bring it into line with the wording of article 33.

Paragraph (2), as amended, was adopted.

The commentary to chapter I, as amended, was adopted.

Commentary to article 28 (Legal consequences of an internationally wrongful act)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

74. Mr. CANDIOTI proposed that in the penultimate sentence the words "an entity" should be replaced by "a person or an entity".

75. Mr. LUKASHUK proposed that the second and third sentences, which were redundant, should be deleted.

76. Mr. CRAWFORD (Special Rapporteur) said that, indeed, those sentences played an essential explanatory role.

77. Mr. MELESCANU said that the paragraph was essential, since it clarified the definition of an internationally wrongful act as given in article 1, a definition which applied to all wrongful acts without specifying to whom the act was directed. It could be a State, but also another entity. It was a very important idea for understanding the philosophy underlying the draft article.

Paragraph (3), as amended by Mr. Candioti, was adopted.

The commentary to article 28, as amended, was adopted.

Commentary to article 29 (Continued duty of performance)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to article 29 was adopted.

Commentary to article 30 (Cessation and non-repetition)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

Paragraph (8)

78. Mr. GAJA said that it would be appropriate, in the antepenultimate sentence, to use the words "no longer exists" instead of "does not remain in force".

Paragraph (8), as amended, was adopted.

Paragraph (9)

79. Mr. LUKASHUK said that the analogy drawn in the second sentence between cessation and assurances and guarantees of non-repetition was artificial. Accordingly, the words "Like cessation" should be deleted.

80. Mr. PELLET said that the expression "they involve much more flexibility than cessation", in the second sentence, was clumsy. The character of such assurances and guarantees of non-repetition was, moreover, explained later on in the commentary. He therefore proposed that the phrase in question should be replaced by, "although, unlike cessation, they are not demanded in all cases".

Paragraph (9), as amended by Mr. Lukashuk, was adopted.

Paragraph (10)

81. Mr. CANDIOTI said that it would be better to alter the first sentence: assurances and guarantees of non-repetition were the legal consequences not of an internation-

ally wrongful act but of the obligation to compensate that flowed from the act.

82. Mr. ROSENSTOCK said that, logically, the last sentence should become the second sentence of the paragraph, as it was not normal to have to read such a long paragraph in order to find out what ICJ had done, or rather what it had not done, in the case mentioned in the first sentence, with regard to guarantees of non-repetition.

83. Mr. CRAWFORD (Special Rapporteur) said that the recasting of the paragraph proposed by Mr. Rosenstock would without doubt be better for the logic of the paragraph and he would produce a text to submit to the Commission.

84. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to that proposal.

It was so agreed.

Paragraph (10) was adopted on that understanding.

Paragraph (11)

85. Mr. PELLET said that, in his opinion, the paragraph was not complete in that a reference to article 48 was essential, as the Commission had adopted very clear positions on that point that should be reflected in the commentary. He therefore proposed that a sentence should be added, reading: "In addition, assurances and guarantees of non-repetition may be sought by a State other than an injured State in accordance with article 48."

Paragraph (11), as amended, was adopted.

Paragraph (12)

Paragraph (12) was adopted.

Paragraph (13)

86. Mr. ECONOMIDES, supported by Mr. SIMMA, said that it was not logical to say in the penultimate sentence that the exceptional character of the measures was indicated by the words "if the circumstances so require", as by definition one did not know what the circumstances would be. He therefore proposed that the words "more or less" should be inserted before "exceptional".

87. Mr. LUKASHUK said that the sixth sentence was repetitive and added nothing to the analysis of the question. It should therefore be deleted.

Paragraph (13), as amended, was adopted.

The commentary to article 30, as amended, was adopted.

Commentary to article 31 (Reparation)

Paragraph (1)

88. Mr. PELLET pointed out that paragraph 48 of the judgment of ICJ in the *LaGrand* case mentioned in a footnote had nothing to do with assurances and guarantees of non-repetition.

89. Mr. CRAWFORD (Special Rapporteur) said that the footnote in question could be kept and the words "in the context of assurances and guarantees against repetition" could be deleted.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

90. Mr. PELLET, supported by Mr. KAMTO and Mr. LUKASHUK, said that the definition of moral damage, in the sixth sentence, was not satisfactory in that it omitted the moral damage that could potentially be caused to the State in the form of an affront to its honour, dignity or prestige, as in the decision in the *"Rainbow Warrior"* case. In addition, the seventh and eighth sentences should be deleted, for that was not how he understood article 31. The whole of the end of paragraph (5) should therefore be reviewed.

91. Mr. CRAWFORD (Special Rapporteur) proposed that he should revise paragraph (5) in the light of the comments made on the question of the definition of moral damage and submit a new text at the next meeting.

92. The CHAIRMAN said that, if he heard no objection, he would take it that members agreed to that proposal.

It was so agreed.

The meeting rose at 1.05 p.m.

2705th MEETING

Tuesday, 7 August 2001, at 3 p.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. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.