

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
  
1998

*Volume I*

*Summary records  
of the meetings  
of the fiftieth session  
20 April-12 June 1998  
27 July-14 August 1998*

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UNITED NATIONS





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References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook . . .*, followed by the year (for example, *Yearbook . . . 1997*).

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Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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\* \*

This volume contains the summary records of the meetings of the fiftieth session of the Commission (A/CN.4/SR.2519-A/CN.4/SR.2564), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

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## MEMBERS OF THE COMMISSION

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| Mr. Mohamed BENNOUNA               | Morocco  | Mr. Mochtar KUSUMA-ATMADJA      | Indonesia                         |
| Mr. Ian BROWNLIE                   | United Kingdom<br>of Great<br>Britain and<br>Northern<br>Ireland | Mr. Igor Ivanovich LUKASHUK     | Russian<br>Federation             |
| Mr. Enrique CANDIOTI               | Argentina  | Mr. Teodor Viorel MELESCANU     | Romania                           |
| Mr. James CRAWFORD                 | Australia  | Mr. Václav MIKULKA              | Czech Republic                    |
| Mr. Christopher John Robert DUGARD | South Africa   | Mr. Didier OPERTTI BADAN        | Uruguay                           |
| Mr. Constantin ECONOMIDES          | Greece   | Mr. Guillaume PAMBOU-TCHIVOUNDA | Gabon                             |
| Mr. Nabil ELARABY                  | Egypt  | Mr. Alain PELLET                | France                            |
| Mr. Luigi FERRARI BRAVO            | Italy  | Mr. Pemmaraju Sreenivasa RAO    | India                             |
| Mr. Zdzislaw GALICKI               | Poland   | Mr. Víctor RODRÍGUEZ CEDEÑO     | Venezuela                         |
| Mr. Raul Ilustre GOCO              | Philippines  | Mr. Robert ROSENSTOCK           | United States<br>of America       |
| Mr. Gerhard HAFNER                 | Austria  | Mr. Bernardo SEPÚLVEDA          | Mexico                            |
| Mr. Qizhi HE                       | China  | Mr. Bruno SIMMA                 | Germany                           |
|                                    |  | Mr. Doudou THIAM                | Senegal                           |
|                                    |  | Mr. Chusei YAMADA               | Japan                             |

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## OFFICERS

*Chairman:* Mr. João BAENA SOARES  
*First Vice-Chairman:* Mr. Igor Ivanovich LUKASHUK  
*Second Vice-Chairman:* Mr. Raul Ilustre GOCO  
*Chairman of the Drafting Committee:* Mr. Bruno SIMMA  
*Rapporteur:* Mr. Christopher John Robert DUGARD

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*Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, represented the Secretary-General and Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General.*

## AGENDA

The Commission adopted the following agenda at its 2519th meeting, held on 20 April 1998:

1. Organization of work of the session.
2. State responsibility.
3. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities).
4. Reservations to treaties.
5. Nationality in relation to the succession of States.
6. Diplomatic protection.
7. Unilateral acts of States.
8. Programme, procedures and working methods of the Commission, and its documentation.
9. Cooperation with other bodies.
10. Date and place of the fifty-first session.
11. Other business.

## ABBREVIATIONS

|         |  |
|---------|--|
| ACABQ   | Advisory Committee on Administrative and Budgetary Questions |
| ECE     | Economic Commission for Europe                               |
| Euratom | European Atomic Energy Community                             |
| IAEA    | International Atomic Energy Agency                           |
| ICJ     | International Court of Justice                               |
| ICRC    | International Committee of the Red Cross                     |
| ICSID   | International Centre for Settlement of Investment Disputes   |
| ILA     | International Law Association                                |
| ILO     | International Labour Organization                            |
| OAS     | Organization of American States                              |
| OECD    | Organisation for Economic Cooperation and Development        |
| OSCE    | Organization for Security and Co-operation in Europe         |
| PCIJ    | Permanent Court of International Justice                     |
| UNCTAD  | United Nations Conference on Trade and Development           |
| UNDP    | United Nations Development Programme                         |
| UNEP    | United Nations Environment Programme                         |

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| <i>I.C.J. Reports</i>       | ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>                       |
| ILM                         | <i>International Legal Materials</i> (Washington, D. C.)                             |
| Moore, <i>Digest</i>        | J. B. Moore, <i>A Digest of International Law</i> (Washington, D. C.)                |
| <i>P.C.I.J., Series A</i>   | PCIJ, <i>Collection of Judgments</i> (Nos. 1-24: up to and including 1930)           |
| <i>P.C.I.J., Series A/B</i> | PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (Nos. 40-80: beginning in 1931) |
| RGDIP                       | <i>Revue générale de droit international public</i>                                  |
| “Chronique”                 | “Chronique des faits internationaux”, edited since 1958 by C. Rousseau (Paris)       |
| UNRIAA                      | United Nations, <i>Report of International Arbitral Awards</i>                       |

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In the present volume, the “International Tribunal for Rwanda” refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994; and the “International Tribunal for the Former Yugoslavia” refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

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## NOTE CONCERNING QUOTATIONS

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

**JUDGMENTS, ADVISORY OPINIONS AND ORDERS  
CITED IN THE PRESENT VOLUME**

| SHORT TITLE OF THE CASE  | NATURE OF THE DECISION   |
|--|--|
| <i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide</i> | <i>(Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 595.</i>  |
| <i>Barcelona Traction</i>  | <i>Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 3.</i>  |
| <i>Chorzów Factory</i>   | <i>Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17.</i>  |
| <i>Corfu Channel</i>   | <i>Merits, Judgment, I.C.J. Reports 1949, p. 4.</i>  |
| <i>Frontier Dispute</i>  | <i>(Burkina Faso v. Republic of Mali), Judgment, I.C.J. Reports 1986, p. 554.</i>  |
| <i>Gabčíkovo-Nagymaros Project</i>   | <i>(Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 7.</i>  |
| <i>International Status of South West Africa</i>   | <i>Advisory Opinion, I.C.J. Reports 1950, p. 128.</i>  |
| <i>Legal Status of Eastern Greenland</i>   | <i>Judgment, 1933, P.C.I.J., Series A/B, No. 53, p. 22.</i>  |
| <i>Legality of the Threat or Use of Nuclear Weapons</i>  | <i>Advisory Opinion, I.C.J. Reports 1996, p. 226.</i>  |
| <i>Loizidou v. Turkey</i>  | <i>European Court of Human Rights, judgment of 18 December 1996 (merits), Reports of Judgments and Decisions 1996-VI.</i>  |
| <i>Mavrommatis Palestine Concessions</i>   | <i>Judgment No. 2, 1924, P.C.I.J., Series A, No. 2.</i>  |
| <i>Military and Paramilitary Activities in and against Nicaragua</i>                           | <i>(Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14.</i>  |
| <i>Namibia</i>   | <i>Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16.</i>                              |
| <i>North American Dredging Company</i>   | <i>See A. H. Feller, The Mexican Claims Commissions, 1923-1934 (New York, The Macmillan Company, 1935).</i>  |
| <i>Nottebohm</i>   | <i>Second Phase, Judgment, I.C.J. Reports 1955, p. 4.</i>  |
| <i>Nuclear Tests</i>   | <i>(Australia v. France), Judgment, I.C.J. Reports 1974, p. 253. (New Zealand v. France), ibid., p. 457.</i>   |
| <i>Panevezys-Saldutiskis Railway</i>   | <i>Judgment, 1939, P.C.I.J., Series A/B, No. 76, p. 4.</i>   |
| <i>Reparation for Injuries Suffered in the Service of the United Nations</i>                   | <i>Advisory Opinion, I.C.J. Reports 1949, p. 174.</i>  |
| <i>Rainbow Warrior</i>   | <i>UNRIAA, vol. XIX, pp. 197 et seq.</i>   |
| <i>South West Africa</i>   | <i>(Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 319.</i><br><br><i>(Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966, p. 6.</i> |

SHORT TITLE OF THE CASE

NATURE OF THE DECISION

*Trail Smelter*

UNRIAA, vol. III (Sales No. 1949.V.2), pp. 1905 et seq.

*United States Diplomatic and  
Consular Staff in Tehran*

*Judgment, I.C.J. Reports 1980*, p. 3.

*Vienna Convention on Consular  
Relations (Paraguay v. United  
States of America)*

*Order of 9 April 1998, I.C.J. Reports 1998*, p. 266.

## MULTILATERAL INSTRUMENTS CITED IN THE PRESENT VOLUME

Source

### HUMAN RIGHTS

- Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948) United Nations, *Treaty Series*, vol. 78, p. 277.
- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950) Ibid., vol. 213, p. 221.
- Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20 March 1952) Ibid., p. 262.
- Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (Strasbourg, 11 May 1994) Council of Europe, *European Treaty Series*, No. 155.
- International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965) United Nations, *Treaty Series*, vol. 660, p. 195.
- International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) Ibid., vol. 993, p. 3.
- International Covenant on Civil and Political Rights (New York, 16 December 1966) Ibid., vol. 999, p. 171.
- American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, Costa Rica, 22 November 1969) Ibid., vol. 1144, p. 123.
- African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981) Ibid., vol. 1520, p. 243.
- Inter-American Convention on the Forced Disappearance of Persons (Belen, 9 June 1994) *International Legal Materials* (Washington, D.C.), vol. XXXIII, No. 6 (November 1994), p. 1530.

### ENVIRONMENT AND NATURAL RESOURCES

- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989) UNEP, *Selected Multilateral Treaties in the Field of the Environment* (Cambridge, England, 1991), vol. 2, p. 449.
- Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako, 30 January 1991) *International Legal Materials* (Washington, D.C.), vol. XXX, No. 3 (May 1991), p. 775.

- Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991) ECE, *Environmental Conventions*, United Nations publication, 1992, p. 95.
- United Nations Framework Convention on Climate Change (New York, 9 May 1992) United Nations, *Juridical Yearbook 1992* (Sales No. E.97.V.8), p. 340.
- Convention on Biological Diversity (Rio de Janeiro, 5 June 1992) *Ibid.*, p. 359.
- 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (London, 7 November 1996) *International Legal Materials* (Washington, D.C.), vol. XXXVI, No. 1 (January 1997), p. 7.
- Convention on the Law of the Non-Navigational Uses of International Watercourses (New York, 21 May 1997) *Official Records of the General Assembly, Fifty-first Session, Supplement No. 49, resolution 51/229, annex.*
- Convention on Supplementary Compensation for Nuclear Damage (Vienna, 12 September 1997) *International Legal Materials* (Washington, D.C.), vol. XXXVI, No. 6 (November 1997), p. 1473.
- NATIONALITY AND STATELESSNESS
- Convention on Certain Questions relating to the Conflict of Nationality Laws (The Hague, 12 April 1930) League of Nations, *Treaty Series*, vol. CLXXIX, p. 89.
- European Convention on Nationality (Strasbourg, 6 November 1997) Council of Europe, *European Treaty Series*, No. 166.
- PRIVILEGES AND IMMUNITIES, DIPLOMATIC RELATIONS
- Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) United Nations, *Treaty Series*, vol. 500, p. 95.
- Vienna Convention on Consular Relations (Vienna, 24 April 1963) *Ibid.*, vol. 596, p. 261.
- LAW OF THE SEA
- Convention respecting the Free Navigation of the Suez Maritime Canal (Constantinople, 29 October 1888) N. Singh, *International Maritime Law Conventions*, vol. 4 (London, Stevens, 1983), p. 2834.
- Geneva Conventions on the Law of the Sea (Geneva, April 1958)
- Convention on the Continental Shelf (Geneva, 29 April 1958) United Nations, *Treaty Series*, vol. 499, p. 311.
- Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958) *Ibid.*, vol. 516, p. 205.

- Convention on the High Seas (Geneva, 29 April 1958) Ibid., vol. 450, p. 11.
- Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958) Ibid., vol. 559, p. 285.
- United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122.
- Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks (New York, 4 December 1995) *Law of the Sea Bulletin No. 29* (United Nations publication, 1995), p. 25, document A/CONF.164/37.
- LAW APPLICABLE IN ARMED CONFLICT**
- Convention for the adaptation to maritime warfare of the principles of the Geneva Convention (The Hague, 18 October 1907) J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915), p. 163.
- Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919) *British and Foreign State Papers, 1919*, vol. CXII (London, H. M. Stationery Office, 1922), p. 1.
- Geneva Conventions for the protection of war victims (Geneva, 12 August 1949) United Nations, *Treaty Series*, vol. 75, pp. 31 et seq.
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Ibid., p. 31.
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea Ibid., p. 85.
- Geneva Convention relative to the Treatment of Prisoners of War Ibid., p. 135.
- Geneva Convention relative to the Protection of Civilian Persons in Time of War Ibid., p. 287.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977) Ibid., vol. 1125, pp. 3 and 609.

## LAW OF TREATIES

- Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) Ibid., vol. 1155, p. 331.
- Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978) *Official Records of the United Nations Conference on Succession of States in Respect of Treaties, Vienna, 4 April-6 May 1977 and 31 July-23 August 1978*, vol. III (United Nations publication, Sales No. E.79.V.10).
- Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (Vienna, 8 April 1983) United Nations, *Juridical Yearbook 1983* (Sales No. E.90.V.1), p.139.
- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986) Document A/CONF.129/15.

## INTERNATIONAL TRADE AND DEVELOPMENT

- General Agreement on Tariffs and Trade (Geneva, 30 October 1947) United Nations, *Treaty Series*, vol. 55, p. 187.
- Protocol modifying certain provisions of the General Agreement on Tariffs and Trade (Havana, 24 March 1948) Ibid., vol. 62, p. 30.
- Agreement establishing the International Fund for Agricultural Development (with schedules) (Rome, 13 June 1976) Ibid., vol. 1059, p. 191.

## DISARMAMENT

- Treaty for the Prohibition of Nuclear Weapons in Latin America (with annexed Additional Protocols I and II) (Mexico, Federal District, 14 February 1967) Ibid., vol. 634, p. 281.
- Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, D.C., 1 July 1968) Ibid., vol. 729, p. 161.
- Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques (New York, 10 December 1976) Ibid., vol. 1108, p. 151.
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Paris, 13 January 1993) *Status of Multilateral Arms Regulation and Disarmament Agreements*, 4th ed. (1992), vol. 2 (United Nations publication, Sales No. E.93.IX.11 (Vol. 2)), p. 113.

OUTER SPACE

- Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (Moscow, London and Washington, 27 January 1967) United Nations, *Treaty Series*, vol. 610, p. 205.

GENERAL INTERNATIONAL LAW

- Antarctic Treaty (Washington, D.C., 1 December 1959) Ibid., vol. 402, p. 71.
- Food Aid Convention, 1971 (opened for signature at Washington from 29 March 1971 until 3 May 1971) Ibid., vol. 800, p. 161.
- Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Vienna, 26 September 1986) Ibid., vol. 1457, p. 133.
- Treaty on European Union (Maastricht Treaty) (Maastricht, 7 February 1992) Ibid., vol. 1757, p. 3.
- Inter-American Convention against Corruption (Caracas, 29 March 1996) Document E/1996/99.
- Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Paris, 17 December 1997) OECD, document DAF/IME/BR(97)20.

## CHECKLIST OF DOCUMENTS OF THE FIFTIETH SESSION

| <i>Documents</i>   | <i>Title</i>   | <i>Observations and references</i>  |
|--|--|---|
| A/CN.4/483   | Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-second session of the General Assembly   | Mimeographed.   |
| A/CN.4/484   | Preliminary report on diplomatic protection, by Mr. Mohamed Bennouna, Special Rapporteur   | Reproduced in <i>Yearbook...1998</i> , vol. II (Part One).  |
| A/CN.4/485 [and Corr.1]  | Provisional agenda   | Mimeographed. For agenda as adopted, see p. viii above.   |
| A/CN.4/486   | First report on unilateral acts of States, by Víctor Rodríguez Cedeño, Special Rapporteur  | Reproduced in <i>Yearbook...1998</i> , vol. II (Part One).  |
| A/CN.4/487 and Add.1   | First report on prevention of transboundary damage from hazardous activities, by Pemmaraju Sreenivasa Rao, Special Rapporteur  | <i>Idem.</i>  |
| A/CN.4/488 and Add.1-3   | State responsibility: Comments and observations received from Governments  | <i>Idem.</i>  |
| A/CN.4/489   | Fourth report on nationality in relation to the succession of States, by Mr. Václav Mikulka, Special Rapporteur  | <i>Idem.</i>  |
| A/CN.4/490 and Add.1-2 [and Add.2/Corr.1], Add.3-4 [and Add.4/Corr.1] and Add.5-7 [and Add.7/Corr.1]           | First report on State responsibility, by Mr. James Crawford, Special Rapporteur  | <i>Idem.</i>  |
| A/CN.4/491 [and Corr.1] and Add.1-2 [and Add.2/Corr.1], Add.3-4 [and Add.4/Corr.1], Add.5-6 [and Add.6/Corr.1] | Third report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur  | <i>Idem.</i>  |
| A/CN.4/L.552 and Add.1   | Draft report of the International Law Commission on the work of its fiftieth session: chapter IV (Diplomatic protection)   | Mimeographed. For the adopted text see <i>Official Records of the General Assembly, Fifty-third session, Supplement No. 10 (A/53/10)</i> . The final text appears in <i>Yearbook...1998</i> , vol. II (Part Two). |
| A/CN.4/L.553   | Report of the Working Group on diplomatic protection   | Mimeographed.   |
| A/CN.4/L.554 [and Corr.1 and 2] and Add.1 [and Add.1/Corr.1 and 2] and Add.2 [and Add.2/Corr.1]                | Draft report of the International Law Commission on the work of its fiftieth session: chapter VI (International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)) | <i>Idem.</i> For the adopted text see <i>Official Records of the General Assembly, Fifty-third session, Supplement No. 10 (A/53/10)</i> . The final text appears in <i>Yearbook...1998</i> , vol. II (Part Two).  |
| A/CN.4/L.555 and Add.1   | <i>Idem.</i> : chapter V (Unilateral acts of States)   | <i>Idem.</i>  |

|                                       |  |  |
|---------------------------------------|--|--|
| A/CN.4/L.556                          | International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities): Proposal by the Special Rapporteur  | Mimeographed.  |
| A/CN.4/L.557 [and Corr.1]             | Report of the Working Group on nationality in relation to the succession of States   | <i>Idem.</i>   |
| A/CN.4/L.558                          | Report of the Working Group on unilateral acts of States   | <i>Idem.</i>   |
| A/CN.4/L.559 [and Corr.1]             | Draft report of the International Law Commission on the work of its fiftieth session: chapter VIII (Nationality in relation to the succession of States)   | <i>Idem.</i> For the adopted text see <i>Official Records of the General Assembly, Fifty-third session, Supplement No. 10 (A/53/10)</i> . The final text appears in <i>Yearbook...1998</i> , vol. II (Part Two). |
| A/CN.4/L.560                          | Recommendations of the Planning Group to the Commission  | Mimeographed.  |
| A/CN.4/L.561 and Add.1-6              | Draft report of the International Law Commission on the work of its fiftieth session: chapter VII (State responsibility)   | <i>Idem.</i> For the adopted text see <i>Official Records of the General Assembly, Fifty-third session, Supplement No. 10 (A/53/10)</i> . The final text appears in <i>Yearbook...1998</i> , vol. II (Part Two). |
| A/CN.4/L.562 [and Corr.1] and Add.1-2 | <i>Idem.</i> : chapter IX (Reservations to treaties)   | <i>Idem.</i>   |
| A/CN.4/L.563 [and Corr.1]             | Reservations to treaties. Titles and texts of draft guidelines of the Guide to Practice proposed by the Drafting Committee at the fiftieth session of the Commission   | Mimeographed.  |
| A/CN.4/L.564                          | Draft report of the International Law Commission on the work of its fiftieth session: chapter IX (Reservations to treaties). Texts of the draft guidelines of the Guide to Practice in respect of reservations to treaties, with accompanying commentary | <i>Idem.</i> For the adopted text see <i>Official Records of the General Assembly, Fifty-third session, Supplement No. 10 (A/53/10)</i> . The final text appears in <i>Yearbook...1998</i> , vol. II (Part Two). |
| A/CN.4/L.565                          | State responsibility. Draft articles provisionally adopted by the Drafting Committee: arts. 1, 2 [3] and 3 [4] (Part One, Chapter I)   | Mimeographed.  |
| A/CN.4/L.566                          | Draft report of the International Law Commission on the work of its fiftieth session: chapter I (Organization of the session)  | <i>Idem.</i> For the adopted text see <i>Official Records of the General Assembly, Fifty-third session, Supplement No. 10 (A/53/10)</i> . The final text appears in <i>Yearbook...1998</i> , vol. II (Part Two). |
| A/CN.4/L.567                          | <i>Idem.</i> : chapter X (Other decisions and conclusions of the Commission)   | <i>Idem.</i>   |
| A/CN.4/L.568                          | International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities). Titles and texts proposed by the Drafting Committee: draft articles 1 to 17   | Mimeographed.  |
| A/CN.4/L.569                          | State responsibility. Draft articles provisionally adopted by the Drafting Committee: articles 1, 3, 4 (Part One, Chapter I), 5, 7, 8, 8 <i>bis</i> , 9, 10, 15, 15 <i>bis</i> and A (Chapter II)  | See summary record of the 2562nd meeting.  |

| Documents                     | Title   | Observations and references   |
|-------------------------------|---|---|
| A/CN.4/L.570                  | Draft report of the International Law Commission on the work of its fiftieth session: chapter III (Specific issues on which comments would be of particular interest to the Commission) | Mimeographed. For the adopted text see <i>Official Records of the General Assembly, Fifty-third session, Supplement No. 10</i> (A/53/10). The final text appears in <i>Yearbook... 1998</i> , vol. II (Part Two). |
| A/CN.4/L.571                  | <i>Idem</i> : chapter II (Summary of the work of the Commission at its fiftieth session)  | <i>Idem</i> .   |
| A/CN.4/SR.2519-A/CN.4/SR.2564 | Provisional summary records of the 2519th to 2564th meetings  | Mimeographed. The final text appears in the present volume.   |

# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE FIFTIETH SESSION

*Summary records of the 2519th to 2548th meetings  
held at Geneva from 20 April to 12 June 1998*

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### 2519th MEETING

*Monday, 20 April 1998, at 3.05 p.m.*

*Outgoing Chairman:* Mr. Alain PELLET

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam.

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### Opening of the session

1. The OUTGOING CHAIRMAN declared open the fiftieth session of the International Law Commission and welcomed the members of the Commission. The session would be exceptional in three respects: first, because the fiftieth anniversary would be marked, fittingly, by a two-day seminar, on 21 and 22 April; secondly, because, for the first time in a long time, the Commission would be trying out a session split into two parts, the first in Geneva and the second in New York; and, lastly, because the Commission would have a heavy agenda, but a very interesting one, since it would be taking up two new topics and resuming consideration of two old ones.

### Statement by the outgoing Chairman

2. The OUTGOING CHAIRMAN said that, as customary, he had introduced to the Sixth Committee the report of the Commission on the work of its forty-ninth session.<sup>1</sup> In so doing, he had concentrated on making a few comments on the working of the Commission and its relations with the Sixth Committee and had pointed out in particular that it was the Commission's wish to have the benefit of detailed instructions from States and to obtain clearer, more precise and less stereotyped reactions from the Sixth Committee. He had underlined the need for an improved dialogue between the two parties to the codification process and had noted that, as the Commission had for its part undertaken an in-depth reform of its methods of work, it was at the current time incumbent upon the Sixth Committee also to take steps to that end. Those comments had been received favourably and with understanding and the Sixth Committee had also accepted two innovations in respect of which he had taken the initiative and which, in his view, had had a positive effect. First of all, half a day had been devoted to informal exchanges of view between the representatives of States in the Sixth Committee and members of the Commission who had been present in New York; that had allowed them all to express themselves more freely than in a public meeting and to institute a genuine dialogue. In his view, that profitable exercise was worth repeating. Secondly, and contrary to custom, he had requested the Special Rapporteur for the topic of nationality in relation to succession of States, who in that capacity had been present on the podium of the Sixth Committee, to react to the comments made by the representatives of States on chapter IV of the report of the Commission on the work of its forty-ninth session. That exercise should also be repeated and developed in two directions. On the one hand, it seemed only right and proper for the Special Rapporteur himself, who had been appointed by the Commission, rather than the Chairman, to introduce the part of the report that dealt with his topic.

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<sup>1</sup> *Yearbook . . . 1997*, vol. II (Part Two).

On the other, even though it might be vain to hope that the United Nations would agree to finance the travel and accommodation of all the Special Rapporteurs, those who were in New York at the time when the report of the Commission was under consideration in the Sixth Committee should be invited to do the same.

3. As to the actual consideration of the report of the Commission on the work of its forty-ninth session in the Sixth Committee, he would refer mainly to the excellent topical summary prepared by the Secretariat (A/CN.4/483). The report had been well received on the whole, in particular on account of its brevity and relative concision—a lesson that could be followed in the future.

4. The draft articles on nationality in relation to the succession of States and the Special Rapporteur for the topic had, justifiably, received fulsome praise. Apart from some reservations, the Commission's general approach had been approved and, in particular, the "angle of attack" taken—protection of human rights and the need to avoid statelessness—had been approved. The General Assembly, in its resolution 52/156, had requested States to express their views on the draft articles and, even if the final resolution was silent on the matter, it could be inferred from the debates that the Commission was required to pursue its work on the item, including the effects of a succession of States on the legal status of legal persons.

5. With regard to the topic of reservations to treaties, the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties adopted by the Commission<sup>2</sup> had not given rise to the opposition that might have been expected, although some provisions had been criticized. A majority had taken the view that the Commission had achieved a satisfactory balance and the idea of addressing the preliminary conclusions to the competent treaty bodies in the field of human rights had been approved, it being understood, however, that paragraph 4 of General Assembly resolution 52/156 called for such consultation to be extended to other bodies set up by normative multilateral treaties. With but a few slight differences, the delegations who had spoken on the topic had approved the Commission's general approach of taking the "Vienna regime" and trying to clarify and complete it where necessary (A/CN.4/483, sect. B).<sup>3</sup> As a logical consequence of that consensus, a very large majority of delegations had come out in favour of the unity of the regime of reservations and the preparation of a guide to practice, which the Commission had in principle, decided on at its forty-ninth session.<sup>4</sup>

6. In the case of the topic of State responsibility, there was apparently broad agreement in the Sixth Committee that the Commission should "put an end to" the topic and that the second reading of the draft should be completed by the end of the current quinquennium at the latest (A/CN.4/483, sect. C), which was also the intent of the Commission. Like the Commission, the delegations which had spoken on the topic had then noted that the three most

"problematic" aspects were crime, countermeasures and dispute settlement. Some delegations had made detailed comments on several aspects of the draft, which had been deemed to be both too specific on some points and too superficial on others.

7. As far as the topic of international liability for injurious consequences arising out of acts not prohibited by international law was concerned, passions still ran high 20 years after its inclusion on the Commission's agenda, but no delegation had objected to the Commission's decision to deal first with the issue of prevention. He had nevertheless drawn the Sixth Committee's attention to the fact that precise guidance from States and the Committee on the remainder of the topic was essential and should be provided within two years, failing which the Commission would be unable to get out of the deadlock it had been in for 20 years.

8. No State that had spoken in the Sixth Committee, with one exception, had questioned the usefulness of discussing the new topics of unilateral acts and diplomatic protection.

9. Referring to the other activities with which he had been concerned at the end of his term as Chairman of the Commission at its forty-ninth session, he said that, on 6 October 1997, he had addressed a letter to the Secretary-General after the members of the Commission had reacted with consternation to the Secretary-General's "discretion" about the Organization's legal affairs in his report entitled "Renewing the United Nations: a programme for reform".<sup>5</sup> The Secretary-General's reply, dated 9 December 1997, had been cordial, but dismissive. He regretted that the Secretary-General had not seen fit to meet with him when he had been in New York, as he had requested. The Secretary-General undoubtedly had a very busy schedule, but he could not help thinking that his refusal showed a lack of consideration for the Commission.

10. Concerning cooperation with other bodies, he had heard virtually nothing from the Inter-American Juridical Committee, but, in January 1998, the Asian-African Legal Consultative Committee (AALCC) had organized the Seminar on the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties, held at Tehran, from 24 to 25 January 1998, in which Mr. Crawford had taken part. Mr. Yamada had agreed to represent the Commission at the thirty-seventh session of AALCC, held in New Delhi, from 13 to 18 April 1998, of which Mr. Sreenivasa Rao had been elected Chairman. With regard to the Council of Europe, Mr. Ferrari Bravo had represented the Commission at a meeting of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) in February 1998, during which a number of matters connected with the report of the Commission on the work of its forty-ninth session had been considered. In his capacity as Special Rapporteur on the topic of reservations to treaties, he himself had been invited to participate on the subject in the first meeting of the Group of Specialists on Reservations to International Treaties in Paris, on 26 and 27 February 1998.

<sup>2</sup> Ibid., pp. 56-57, para. 157.

<sup>3</sup> For an explanation of the "Vienna regime", see *Yearbook* . . . 1996, vol. I, 2460th meeting, para. 9.

<sup>4</sup> *Yearbook* . . . 1997, vol. II (Part Two), p. 46, para. 63.

<sup>5</sup> A/51/950 and Add.1-7.

11. In conclusion, he thanked the Secretariat for having organized two meetings to commemorate the Commission's fiftieth anniversary. He hoped that the seminar to be held on 21 and 22 April 1998 would be as much of a success as the United Nations Colloquium on Progressive Development and Codification of International Law, held in New York on 28 and 29 October 1997.<sup>6</sup> That Colloquium had opened up many avenues for future reflection that should be explored by the Planning Group at the fiftieth session.

12. Mr. CORELL (Under-Secretary-General for Legal Affairs, the Legal Counsel) said that the Secretary-General had not been able to open the Colloquium in New York or to meet with the Chairman of the Commission because of his very busy schedule and certainly not because of a lack of interest in international law. The Secretary-General had attended one of the Commission's meetings during its forty-ninth session<sup>7</sup> and the importance of international law had been stressed in two parts of his report on renewing the United Nations, particularly in connection with the establishment of an international criminal court, a project which had originated with the Commission. As the Secretary-General had pointed out in his letter to the Chairman of the Commission, dated 9 December 1997, the report dealt with reforms urgently required within the Secretariat to enable the Organization better to fulfil its functions. The machinery of international law, which was constantly adapting to the needs of the international community, did not, in comparison with other areas, seem to require immediate restructuring. The development of international law was a continuous dialectical process being carried out in a number of forums, including the Commission itself, which had an important role to play in any plans for future reform in that field. The diligence with which the Commission had examined its methods of work and work programme augured well for the future.

#### Election of officers

*Mr. Baena Soares was elected Chairman by acclamation.*

*Mr. Baena Soares took the Chair.*

13. The CHAIRMAN thanked the members of the Commission for the honour they had done him in electing him Chairman and said he hoped that he would prove worthy of the confidence placed in him. He would try to fulfil his functions in a spirit of openness and to continue with the innovations which had been introduced by the outgoing Chairman and that had improved the Commission's working methods and promoted an open exchange of views.

14. He suggested that the meeting should be suspended in order to give members more time for consultations on the membership of the Bureau.

<sup>6</sup> See *Proceedings of the United Nations Colloquium on Progressive Development and Codification of International Law, Making Better International Law: the International Law Commission at 50* (United Nations publication, Sales No. E/F.98.V.5).

<sup>7</sup> See *Yearbook . . . 1997*, vol. I, 2506th meeting, pp. 233-234.

*The meeting was suspended at 3.45 p.m. and resumed at 4 p.m.*

*Mr. Lukashuk was elected first Vice-Chairman by acclamation.*

*Mr. Goco was elected second Vice-Chairman by acclamation.*

*Mr. Simma was elected Chairman of the Drafting Committee by acclamation.*

*Mr. Dugard was elected Rapporteur by acclamation.*

#### Adoption of the agenda (A/CN.4/485)

15. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/485), on the understanding that that decision in no way prejudged the order in which the various items would be considered.

16. Mr. MIKULKA pointed out that the wording of agenda item 5 corresponded to the initial wording of the topic for which he was Special Rapporteur. That wording should be replaced by the title adopted at the forty-eighth session, namely, "Nationality in relation to the succession of States".<sup>8</sup>

*The agenda, as amended, was adopted.*

#### Organization of work of the session

[Agenda item 1]

17. The CHAIRMAN suggested that, in conformity with established practice, the Enlarged Bureau should meet immediately to discuss the organization of work of the session.

*The meeting rose at 4.15 p.m.*

<sup>8</sup> See *Yearbook . . . 1996*, vol. II (Part Two), p. 76, document A/51/10, para. 88.

## 2520th MEETING

*Tuesday, 28 April 1998, at 10.05 a.m.*

*Chairman: Mr. João BAENA SOARES*

*Present: Mr. Addo, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan, Mr. Pambou-*

Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam.

**Diplomatic protection (A/CN.4/483, sect. E, A/CN.4/484,<sup>1</sup> A/CN.4/L.553)**

[Agenda item 6]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN said that, as mentioned in paragraph 233 of the report of the Commission to the General Assembly on the work of its forty-ninth session,<sup>2</sup> the first part of the current session was to be devoted to discussion of the various reports, whereas the second part, to be held in New York, was to be used for the adoption of draft articles with commentaries and of the report of the Commission to the General Assembly on the work of its fiftieth session. Accordingly, he invited the Commission to begin its consideration of the topic of diplomatic protection and suggested that the preliminary report on the topic (A/CN.4/484) should be discussed on an issue-by-issue basis, the procedure that had been used to good effect at the previous session. Members should also consider what follow-up actions the Commission could take on the topic.

2. The Commission might wish to consider the advisability of reconvening the Working Group on diplomatic protection established at its forty-ninth session<sup>3</sup> after the general discussion, for the purpose of assisting the Special Rapporteur in focusing on the elements to be covered in his second report.

3. Mr. BENNOUNA (Special Rapporteur) said that, in appointing him Special Rapporteur, the Commission had recommended that he submit a preliminary report at the current session and decided that it would endeavour to complete consideration of the topic of diplomatic protection on first reading by the end of the quinquennium. The latter objective could well be rediscussed. The preliminaries were essential for the successful outcome of any human endeavour. Hence a preliminary report was a stepping stone to the in-depth consideration of the topic and the possible incorporation in a treaty or other instrument of what had emerged as established practice. From the very outset of the Working Group's consideration of the topic,<sup>4</sup> members had argued that preliminary analysis was indispensable to any comprehensive study of diplomatic protection. Mr. Lukashuk, for example, had taken the view that the Special Rapporteur would have to consider the very notion of diplomatic protection, which was increasingly geared in modern law to the rights of the individual; because a right to diplomatic protection did

exist, Mr. Lukashuk did not believe that diplomatic protection was based on jurisdiction *ratione personae* over the individual. Those views had been supported by a number of other members of the Commission.

4. Mr. Pellet had drawn attention to the complete lack of symmetry in diplomatic protection. A State whose national had been injured could exercise its diplomatic protection against the State causing the harm, but the reverse was not true: a State that had suffered harm as a result of an individual could not complain to the State of which that person was a national. Mr. Pellet had further suggested that positions of political and economic strength explained why diplomatic protection was a one-way institution. Mr. Thiam had added that multinational corporations were often more powerful than States.

5. Mr. Pellet had also said that the fact that individuals were nowadays increasingly recognized as subjects of international law was a dimension that would necessarily have to be taken into account in the Special Rapporteur's preliminary report. Taking the idea still further, Mr. Ferrari Bravo had opined that the judgment of PCIJ in the *Mavrommatis Palestine Concessions* case had been based on what was at the current time an outdated theory under which the State had been regarded as "master" of its citizens. He himself had pointed out that major developments in recent years meant that the topic had to be viewed from a new and "fresher" angle.

6. He had thought that, in a preliminary report, he should lay out the various options available, rather than indicate his own concept of the topic. He remained entirely open-minded, but it did seem clear that the traditional view of diplomatic protection was no longer satisfactory, unless one was to cling to the iron-clad conservatism of which the Commission had sometimes been accused.

7. The traditional view could be adapted to modern-day reality in a variety of ways, and a single legal construct was not necessarily the only solution. The Commission had already wrestled with the distinction between primary and secondary rules, and the Working Group had suggested in its report that the topic be confined to secondary rules of international law, that is to say, the consequences of an internationally wrongful act (by commission or omission) which had caused an indirect injury to the State usually because of injury to its nationals.<sup>5</sup> The Working Group had likewise indicated that the topic would not address the specific content of the international legal obligation that had been violated.

8. Mr. Pambou-Tchivounda and Mr. Simma had warned, however, that the "clean hands" rule and exhaustion of local remedies would mean venturing into the field of primary rules. It might also be necessary to consider general categories of obligations; since the topic of State responsibility would require a similar effort, the work on the two topics should perhaps be coordinated.

9. In 1996, ILA had set up a Committee on Diplomatic Protection of Persons and Property that was grappling with the same questions as the Commission was about to

<sup>1</sup> Reproduced in *Yearbook* . . . 1998, vol. II (Part One).

<sup>2</sup> *Yearbook* . . . 1997, vol. II (Part Two), p. 71.

<sup>3</sup> *Ibid.*, p. 60, para. 169.

<sup>4</sup> For the report of the Working Group, *ibid.*, pp. 60-62, paras. 172-189.

<sup>5</sup> *Ibid.*, p. 61, para. 180.

consider. The Committee's Chairman had written to him in October 1997 to indicate that the work would focus on how the traditional principles of international law relating to diplomatic protection had changed in contemporary practice. Specifically, the Committee would look into what acts by a State constituted espousal, whether a State could exercise diplomatic protection even if its nationals had declined espousal, whether espousal deprived claimants of the right to pursue claims of their own accord and whether individual claimants should be able to opt out of group or lump sum claims. Indeed, the Committee had raised a number of questions that all came back to the basic one: what was the nature of diplomatic protection and how should it be defined?

10. It seemed inevitable that the Commission would have to come up with a response, and two approaches could be envisaged. The first, a Latin or Cartesian one, would be to work out a definition and only then determine the course of future work on the topic. The second approach, which might be called Anglo-Saxon or empirical, would be to leave the definition wide open at the outset and to develop it out of a study of actual practice with a view to codification of the topic. Both approaches had their merits and their drawbacks, but what seemed essential under any circumstances was to make a critical analysis of the traditional view of diplomatic protection in order to furnish criteria for evaluating contemporary practice. He himself thought there was a constant dialectical relationship between theory and practice and that there was nothing to prevent experts in the practice of international law from playing with theories occasionally.

11. In submitting the report of the Commission on the work of its forty-ninth session to the General Assembly, the then Chairman had emphasized the need for preliminary evaluation of the nature of diplomatic protection, including whether it was a right of an individual or might be exercised only at the discretion of a State, and had added that "the question might even be raised as to whether the legal fiction on which diplomatic protection was based was still valid at the end of the twentieth century".<sup>6</sup> He had thereby issued a challenge: to dust off and renovate the traditional conception of diplomatic protection as it had been taught in law schools for generations.

12. Some might say it was a waste of time to question the existence of diplomatic protection: the principle that any harm done to a member of a group or tribe was an attack on the tribal chieftain or head was immutable. The law was full of fictions and would make an excellent novel if redrafted as one. Like the novel, the law transformed an aspect of reality into a different element. The legal or juridical person, for example, was one of the most celebrated of legal fictions. ICJ, in its judgment in the *Barcelona Traction* case (see page 39), said that the law had recognized that the independent existence of the legal entity could not be treated as an absolute and that "lifting the corporate veil" or "disregarding the legal entity" had been found justified and equitable in certain circumstances. The Court had thus exploded the fiction sur-

rounding the concept of the corporate entity (*société anonyme*), showing that it was possible, and acceptable to get back to the underlying reality and that legal fictions did not have to be deemed immutable. They were invented to correspond to certain needs, but reality got its revenge when they were readapted to take better account of contemporary situations.

13. That was certainly true of the legal fiction of diplomatic protection. International law had progressed considerably since the mid-nineteenth century. The dualist approach to international law that had underpinned the notion of diplomatic protection was no longer in vogue. International norms were increasingly being aimed directly at individuals, and that was a positive development, as it gave individuals increasingly direct access to the courts to defend their rights at the international level. States and international as well as domestic courts were increasingly obliged to take account of the situation of individuals in elaborating or implementing rules of international law. Hence there was greater continuity between the international and domestic legal arenas, even though each retained its own specific character.

14. The reasons for inventing diplomatic protection as a legal fiction—to justify the intervention of a State on behalf of its nationals—had gradually disappeared. When the veil of legal fiction was lifted, the rights of the individual were increasingly seen to be replacing the rights of the State. The Convention on Certain Questions relating to the Conflict of Nationality Laws (hereinafter referred to as the "1930 Hague Convention") had compounded the fiction of diplomatic protection by propounding the theory that the State did not bear responsibility for any individual who held dual nationality. Today, however, the fact that States were responsible at the international level for their treatment of their nationals was generally acknowledged. That was true even if an individual held dual nationality, as long as the criterion of effective nationality was met. In the decision in case A/18,<sup>7</sup> the Iran-United States Claims Tribunal had indicated that the trend towards modification of the 1930 Hague Convention rule was scarcely surprising as it was consistent with the contemporaneous development of international law to accord legal protection to individuals even against the State of which they were nationals.

15. Why accept that foreigners could claim respect for the rules of international law and obtain the protection of their own State yet deny such protection to nationals affected by the same violations of international law? ICJ had taken a first step in that direction by recognizing the possibility for all States to act on behalf of an individual whose fundamental rights had been violated (*Barcelona Traction* case). And it was at the current time acknowledged that a State could act internationally to protect certain universal rights of the individual without having to prove any link of nationality.

16. The respect for the sovereignty of the host State which had inspired the 1930 Hague Convention also jus-

<sup>6</sup> *Official Records of the General Assembly, Fifty-second Session, Sixth Committee, 22nd meeting, para. 60.*

<sup>7</sup> Iran-United States, Case No. A/18, decision of 6 April 1984, *Iran-United States Claims Tribunal Reports* (Grotius, Cambridge, U.K., 1985), vol. 5, p. 251.

tified the rule of exhaustion of local remedies. In its draft on State responsibility<sup>8</sup> the Commission had included article 22 (Exhaustion of local remedies), proceeding on the basis that the rule was a substantive and not a procedural one and that the violation of the international obligation and the State's international responsibility came into play only on completion of the available internal procedures. The Commission might also note the effects of the dualism which sought to substantiate the idea that the application of domestic law was a matter for internal procedures and that the application of international law was a matter for international ones. At the Seminar on International Law, held at Geneva on 21 and 22 April 1998, to celebrate the fiftieth anniversary of the Commission, Mr. Dominicé had drawn attention to the fact that the initial act could of itself constitute a violation of the international obligation when, in proceedings before a national court, an individual invoked international rules, asserting his own rights under international law from the outset. It was only on completion of the internal procedures that the case was taken over by the State of nationality. At that stage the question arose of whether the complainant State was acting to secure respect for a right of its own or as the representative or agent of its national when it invoked the international responsibility of the host State. That was the main question to be discussed: it was not a philosophical but a legal and practical question. There was in principle no obstacle to arguing that, in espousing the case of its national, a State was enforcing his right under the rules of international law addressed to him.

17. Taken to its extreme, the legal fiction of diplomatic protection led to the conclusion that the reparation was due to the State even if it was the damage suffered by the individual which provided the reparation measure (*Chorzów Factory* case (see page 28)). Increasing recognition was being given to the right of an individual to claim compensation from his national State before the domestic courts and of his right to contest the conditions of the distribution of the compensation if it was shared between several parties. Domestic case law tended to give precedence to the reality of the harm suffered by the individual over the fiction of the damage to the State. There was always that interaction.

18. The Commission could therefore start out from the assumption that diplomatic protection was a discretionary power of the State to bring international proceedings, not necessarily to assert its own right but to secure observance of the international rules operating in favour of its nationals, and to invoke the international responsibility of the host State. That assumption should be debated by the Commission with a view to advancing its understanding of the legal nature of diplomatic protection; in the light of that discussion he would then prepare his report on the substance of the topic for next year. The Commission might be reluctant to rid itself of the traditional concept of diplomatic protection, but it must acknowledge that that concept had been largely overtaken by recent developments in international law on the rights of the human per-

son and that it was the Special Rapporteur's duty to take due account of that point in his further work on the topic.

19. The fiction of diplomatic protection as the application of a right of the State had certainly played a positive role at a time when it had represented the only means of advancing the case of an individual in the international sphere and invoking the international responsibility of the host State in its relations with that individual. Clearly, that situation no longer applied, and rigid maintenance of the fiction might be perceived as retrograde or even reactionary in the light of all the implications of the notion of globalization.

20. In his preliminary report he had raised the question of the relationship between the topic of diplomatic protection and the topic of international responsibility, seeking clarification of the restriction of the Commission's investigations to secondary rules of international law. He had not meant that the Commission must choose between primary and secondary rules. Diplomatic protection certainly fell in the category of secondary rules but it thus prompted the question of the significance of secondary rules in relation to primary rules. When analysing the underlying law (questions of nationality and the "clean hands" rule) the Commission would necessarily come to rely on the categories of primary rules in order to draw some conclusions on the question of diplomatic protection.

21. Mr. BROWNLIE said that he wished to make it clear that he was not unfriendly to human rights concepts and institutions. His problem was that he was burdened by the experience of working for Governments and for individuals, and even tribes, seeking to use human rights principles and institutions in practice. The polarity was not between the conservative and the liberal view; the problem was simply one of how things worked.

22. The Special Rapporteur was clearly attached to the trends of thought exhibited by the Chairman of the ILA Committee on Diplomatic Protection of Persons and Property and others which sought to assimilate the institution of diplomatic protection and principles of human rights. However, assimilation was not a partnership but a one-way street, and the Commission might end up on that street if it marginalized the system of diplomatic protection.

23. The human rights system worked in a similar way to the principles of diplomatic protection: it was a condition of admissibility that the claimant should exhaust any available local remedies, and States had the discretionary power of espousing a claim on behalf of an individual or corporation. The practice of the European Commission of Human Rights was very similar: there had been important cases of principle in which an individual had decided to withdraw his claim but the European Commission had declined to treat the claim as withdrawn because there was an objective interest in maintaining the standards of the public order of Europe. The Commission should therefore be careful not to adopt false polarities between human rights and diplomatic protection. It should also be noted that, even in Europe, the protection of human rights was very patchy. There was no point in marginalizing the system of diplomatic protection when no effective substi-

<sup>8</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

tute was yet available. The practical way forward was to keep the various vehicles in play.

24. His main concern in commenting on the Special Rapporteur's views related to the working method. Theories and concepts such as the distinction between primary and secondary rules could of course be discussed, but it would not be helpful, before addressing the institutions and rules of diplomatic protection, to insist on a prior phase of theoretical debate as to whether, for example, diplomatic protection involved a legal fiction. Such points could be debated as they came up in specific contexts. The Commission was not an academy: its task was a practical one. He therefore favoured going along with the report of the Working Group on diplomatic protection at the forty-ninth session. The broad meaning of diplomatic protection was clear: the important issues were the admissibility of claims and the law relating to the prior conditions which had to be satisfied before claims were made. The claims themselves were part of the substantive law of State responsibility, treaties, unilateral acts, and so on.

25. He could agree that the Commission was dealing with secondary rules. It would certainly cause confusion if it pretended otherwise, but the distinction between primary and secondary rules should not be used as an absolute test. Classification of a rule as primary or secondary would depend on the nature of the issue on a particular occasion. Problems of classification did exist. However, the question was not of overlap but of a double function of admissibility and merit with respect, for example, to the "clean hands" rule, certain issues of nationality, and the whole area of acquiescence and delay.

26. He could not understand why a legal interest on the part of a State in the fate of its nationals involved a legal fiction. And there was nothing eccentric in the notion that a tribe might have such an interest. The Commission should avoid trying to sound too fashionable.

27. Diplomatic protection was of course a construction in the same sense as the concepts of possession, ownership and marriage were constructions. The basis for the prior exhaustion of local remedies was empirical, and it was arguable that there was an implied risk principle which meant that there was no need to exhaust local remedies in the absence of any prior voluntary connection with the jurisdiction concerned. That had been the argument advanced by Israel in its case against Bulgaria following the shooting down of an Israeli civil airliner: the individual victims did not have a duty to exhaust local remedies when no prior voluntary connection with the jurisdiction of Bulgaria existed.<sup>9</sup> It was not a legal fiction but a perfectly good piece of policy reasoning.

28. Mr. AL-KHASAWNEH said that he was not persuaded by Mr. Brownlie's point regarding legal fiction. Most of the examples cited in the preliminary report were part and parcel of legal, and indeed human, reasoning; there was nothing retrograde or eccentric about them. Nor were they confined to the nineteenth century, if he had understood correctly. As Ulpian, the Roman jurist, had stated: for the purposes of the law, certain cities and municipalities had to be treated as minors. The whole idea

of trust, and of the relationship of the king to his kingdom, was based on that analogy. Similarly, in medieval times, King Henry VIII of England had declared: *Rex in regnum sui est imperator*—a statement that had had many implications for the development of the law. Thus, it seemed to him that there was far more reality to the matter than had been suggested.

29. Mr. ECONOMIDES said it was apparent from paragraphs 33 to 44 of the preliminary report that the institution of diplomatic protection had been losing ground for some time; that was because of the impressive development of human rights, particularly in Europe. In many cases, an individual could at the current time himself defend those rights at the international level without having to seek the intervention of his own State. The codification of diplomatic protection should, however, probably have taken place in the context of State responsibility and not in an autonomous manner. No doubt the Commission would revert to the point later.

30. The Commission should not concern itself with the question of the fiction on which, according to the Special Rapporteur, the institution of diplomatic protection rested. Regardless of how it was called—fiction, novation, substitution, what was involved was a theoretical approach which was not relevant to the normative development of the subject. The main question, as the Special Rapporteur had rightly emphasized, was who held the right exercised by way of diplomatic protection—the State of nationality or the injured victims of that State? Clearly, the answer must always be the State; and in principle its powers in that regard were discretionary. Diplomatic protection had always been a sovereign prerogative of the State as a subject of international law. Had it been otherwise, no agreement would have been concluded after the Second World War to indemnify for property that had been nationalized, in particular by the former Communist States. Nowadays, of course, the individual could be a subject of international law and so could submit an international claim himself. In such cases, diplomatic protection no longer had any *raison d'être*. But when an individual could not be a subject of international law—still a frequent occurrence in contemporary practice—diplomatic protection could be very useful. Every effort should, therefore, be made not to marginalize the institution.

31. He agreed that the distinction between primary and secondary rules should be dealt with in a flexible way. The Commission should concern itself more with the substance of the matter and less with certain artificial distinctions. The rule of the exhaustion of local remedies, with its traditional exceptions, along with the other conditions for the exercise of diplomatic protection, in particular concerning the nationality of the claimant, were fundamental to diplomatic protection. He asked whether the Special Rapporteur therefore planned to deal with those questions in his second report. Undoubtedly, there was room for progressively developing and significantly modernizing the law governing diplomatic protection. Even if the law of the State was taken as the starting point, it should be possible, with a view to progressive development of the law, to enhance the place of the individual in the context of diplomatic protection, particularly where indemnification was concerned.

<sup>9</sup> *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, at pp. 531-532.

32. The title of the draft could perhaps be made more precise, but that could be done later in the light of the draft to be prepared.

33. The time had come to extend diplomatic protection to the nationals of a State who suffered damage, not while they were abroad but while they were in their own State, as a result of an internationally wrongful act caused by a foreign diplomatic mission or the officials of such a mission who enjoyed jurisdictional immunity and, consequently, could not be brought before the local courts. There was no reason why a State which protected its nationals when they were injured abroad as a result of a violation of international law in those circumstances should not do likewise if they were injured when resident on the national territory. That was a new and important point the Commission would do well to consider.

34. Mr. LUKASHUK said that the preliminary report dealt with an issue that was at once complex and of great practical significance for the protection of human rights. While he agreed that the institution of diplomatic protection would play an important role for years to come in ensuring respect for those rights, certain points in the report raised doubts in his mind.

35. Given the complexity of the issue, it would be inappropriate to burden the subject with theoretical concepts. For instance, the question of recognizing that the individual had the status of a subject of international law was highly contentious. Hence there was little point in raising it in that particular context. It would be better to adhere to the practice—particularly the judicial practice—whereby the individual was treated as a beneficiary of international law. A statement by Scelle,<sup>10</sup> to which the Special Rapporteur made reference in his preliminary report, was not altogether convincing for, as was well known, Scelle had gone against the general trend in rejecting the idea that the State could have the status of a subject of international law and in opining that only an individual could enjoy that status. He therefore agreed that there was no justification at the current time for completely rejecting the traditional points of view as reflected in the decision in the *Mavrommatis Palestine Concessions* case, much of which remained valid.

36. The Special Rapporteur was right, however, to draw attention to certain inadequacies in the traditional views, mainly that the State regarded its right to diplomatic protection as a matter of a discretionary power, the individual not having any right to diplomatic protection as such. The Commission might wish to give further consideration to that problem.

37. He was somewhat concerned about the Special Rapporteur's proposal that the individual should renounce the right to protect his own property. It was hard to imagine how such an idea could work in practice, particularly when it came to foreign investment. The tendency was, rather, to increase the safeguards for foreign investment, as attested by the creation of ICSID, which the Special Rapporteur saw as justification for considering that for-

ign investors had international legal personality. But investment disputes had long been settled by international commercial arbitration, and no one had ever suggested that an individual who submitted a dispute to such arbitration thereby acquired international legal personality.

38. Further, in paragraph 50 of his preliminary report, the Special Rapporteur asked whether in taking such an approach the State was enforcing its own right or whether it was simply the agent or representative of its national who has a legally protected interest at the national level and thus a right. That posed a dilemma which should, however, be resolved not by contraposition but rather by harmonization of the rights of the State and of the individual. Needless to say, one of the main rights of States was the right to protect the rights of its citizens, but it was a right that should not be exercised in an arbitrary manner, and it should be regulated by both domestic and international law.

39. The right to diplomatic protection was enshrined in many of the new constitutions as a right of the individual. At the international level, it should be deemed to be a fundamental human right and appropriate mechanisms should be created to ensure its implementation.

40. Positing a link between diplomatic protection and international responsibility, the Special Rapporteur justified his position by saying that the Commission's first discussions on the topic of international responsibility had focused on the responsibility of States for damage to the person and property of aliens. But international responsibility was still only a subject for discussion; it was not yet an established branch of international law. Only at the turn of the century had people in France and Italy started to write about responsibility for damage caused to foreign persons and foreign property. The codification efforts of the League of Nations had considered the question in the same narrow context. The same had been true of the Commission's first efforts: only later had it decided to examine international responsibility in general.

41. He agreed entirely on the need to envisage both primary and secondary rules. On the whole the preliminary report paved the way for the successful continuation of the Special Rapporteur's work in accordance with the established timetable.

42. Mr. HAFNER said that Mr. Economides' last point was open to many interpretations. It would assist the Commission in its further work if the matter could be further clarified with reference to specific cases.

43. Mr. ECONOMIDES said that he had wished to raise the issue of victims of violations of international law which took place on the territory of their State of nationality, since diplomatic protection applied to damage suffered by nationals of a State who lived abroad. Where such violations were committed on the territory of one State by another State or its agents, which enjoyed jurisdictional immunity, the nationals of the former State had no legal redress in their own courts. That position might arise, for instance, if a diplomatic mission or its diplomatic or consular agents caused harm to a national of the host State. The State should not remain indifferent to the lawful claims of its own nationals for damage arising out of violations of international law. Rather, it should seek to

<sup>10</sup> G. Scelle, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international de La Haye, 1933-IV* (Paris, Sirey, 1934), vol. 46, at p. 661.

satisfy such claims by exercising diplomatic protection. In his view, there was a perfect symmetry between diplomatic protection in the classical sense and damage caused on the territory of the State of nationality. That point merited the Commission's consideration.

44. Mr. PAMBOU-TCHIVOUNDA said the main point, as he saw it, was to decide whether the question raised by Mr. Economides fell within the context of diplomatic protection proper or within the law of international responsibility for wrongful acts. At first sight, the former might appear to be the case but, on reflection, the question arose whether an act committed by a diplomatic agent on the territory of another State in violation of international law, but in the course of that agent's official duties, might not be attributable to the State he represented.

45. Mr. SIMMA said there was hardly any other topic that was as ripe for codification as diplomatic protection and on which there was such a comparatively sound body of hard law. Theoretical debate was all well and good at the outset of consideration of a topic, but the time had come to forget the preliminaries and get down to business.

46. While the concept of "a fiction of law" was referred to only occasionally in the preliminary report, everything in the Special Rapporteur's oral presentation of the report had turned on that concept. In line with the definition of fiction to be found in the *Dictionnaire Robert*, a legal fiction would consist in positing a fact or situation that differed from legal reality. However, to judge from the Special Rapporteur's claim that that definition of fiction was precisely applicable to the *Mavrommatis* construct, it would seem that his perception of legal reality differed from that of other members of the Commission.

47. On the contrary, there was nothing artificial in seeing the home State as having a right to ensure that its nationals were treated in conformity with an international standard or with human rights. In his view, the Commission was emphatically not dealing with a fiction. In the context of diplomatic protection, to call the *Mavrommatis* construct a fiction was to depict international law in a pejorative manner, for the Special Rapporteur contrasted "a fiction" with human rights, thereby implying that the "old" law was merely fictitious, whereas the "new" human-rights-based law occupied a higher moral ground.

48. As to terminology, he was in any case not in favour of describing the two approaches as the "old" and "new" approaches. While it was true that the law of diplomatic protection had existed for decades or even centuries before the emergence of human rights as a term of art in international legal circles, the two approaches existed in parallel, and their respective potentials overlapped only partially, as Mr. Brownlie, among others, had already made clear. To jettison diplomatic protection in favour of human rights would be, in some instances, to deprive individuals of a protection which they had previously enjoyed. Of course, human rights could at the current time serve to buttress the diplomatic protection exercised by home States: the Federal Republic of Germany, for example, relied wherever possible on a human rights argument in exercising diplomatic protection, as a claim based on human rights was clearly more appealing to many States

than one based on an international minimum standard that had been a bone of contention throughout the nineteenth century and the first half of the twentieth century.

49. The traditional "*Mavrommatis* approach" to diplomatic protection thus had its strong points and should not be discarded without careful consideration of what was required in order to render the individual rights approach effective. He had no objection to the human rights approach being allowed to permeate the Commission's further debate on the topic on a case-by-case basis, but the Commission must not continue to question the very underpinning of diplomatic protection in adopting such a focus.

50. Mr. BENNOUNA (Special Rapporteur) said that as the debate progressed he was becoming increasingly convinced that, despite views expressed to the contrary, that debate was indeed necessary. He, too, would have liked to have been able to discard the concept of a fiction, which was basically a legal construction. However, in the case of diplomatic protection, the damage was suffered directly by the individual, and only indirectly by the State of which he or she was a national. It had thus been necessary to resort to a somewhat artificial construction in order to link the damage suffered by the individual with that suffered by the State. However, Mr. Brownlie and Mr. Simma were quite wrong in supposing that he used the term "fiction" in a pejorative sense. Law was an intellectual construct made up of fictions, and there was thus nothing pejorative in his use of the term. The problem was basically one of language and of differing cultural perceptions.

51. Like Mr. Brownlie and Mr. Simma, he regarded it as entirely natural that a State should ensure that its nationals were treated in conformity with international law and he wished to see that practice continue. The Commission was in agreement that the State had discretionary power at the procedural level to defend its nationals. However, matters could not be left at that. Should the Commission adopt the *Mavrommatis* conception, whereby in defending a national's rights a State was asserting its own rights; or should it adopt the approach of discretionary power, whereby in acting on behalf of one of its nationals a State could exercise one of that national's own rights? The Commission must give careful thought to that question, which was not merely a matter of theory. True, hard law did exist in that area, but the hard law had become outdated and he personally would resist any attempt by the Commission to show itself unduly conservative in that regard.

52. In conclusion, he wished to stress that, *pace* Mr. Simma, he had never sought to contrast diplomatic protection and human rights. He certainly had no wish to, as it were, saw off the branch on which he hoped to sit, by demolishing the very topic on which he had been appointed Special Rapporteur. He had simply asserted that the concept of diplomatic protection, which predated the concept of human rights, could no longer be studied without taking careful account of the evolution of human rights in recent years. It was countries undergoing a transition to democracy—including his own—that had the greatest interest in strengthening human rights, and thus

in ensuring that account was taken of individuals in action by the State.

53. Mr. FERRARI BRAVO said that the approach suggested by the Special Rapporteur was indeed an attractive one, always supposing it would prove possible to strike a balance between diplomatic protection and the exigencies of human rights. It was his impression that everything would depend on the question of legal persons—a grey area which neither the Commission nor other bodies had explored in depth, instead contenting themselves with citing the somewhat obscure *obiter dictum* of ICJ in the *Barcelona Traction* case. It was no coincidence that, at the level of the European system for protection of human rights, the rights closest to those of legal persons, namely, property rights, were dealt with not in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the “European Convention on Human Rights”), but in a Protocol thereto. A new approach seemed to be gaining ground, and that would be the crucial aspect of the study to be conducted by the Special Rapporteur.

54. Mr. ROSENSTOCK said that both in his preliminary report and in his oral presentation the Special Rapporteur had seemed to suggest that there was a potential conflict between the traditional view of diplomatic protection and the human-rights-based approach, whereas subsequently he seemed to have denied that such was his view. Perhaps the Special Rapporteur should clarify his position in that regard. In his own view, there need be no incompatibility between the two approaches.

55. Mr. BENNOUNA (Special Rapporteur) said it was gratifying that doubts were beginning to creep into the debate, as doubt was the beginning of wisdom. As to Mr. Rosenstock’s question, it had not been his intention to contrast diplomatic protection and human rights. The two approaches were not mutually exclusive, and were indeed complementary. Instead, he had sought to contrast a certain traditional view of diplomatic protection with human rights. The evolution of those rights had brought about a need to review the legal nature of diplomatic protection. Under the *Mavrommatis* conception, the individual was ignored and account was taken only of the harm to the State. Such an approach was at the current time no longer tenable. Alongside the State, which had the procedural right to bring a claim, account must also be taken of the right of private individuals, who no longer “disappeared” behind the State.

56. Mr. Ferrari Bravo’s interesting comment also provided food for thought. The preliminary report could be criticized for having dealt only with individuals, and it was true to say that many more grey areas would be encountered in the case of legal persons, which some States had no interest whatever in defending, and to which the *Barcelona Traction* case law was not applicable.

57. Mr. GOCO said that the Special Rapporteur’s preliminary report dwelt on the distinction between primary and secondary rules. In his view, however, the Commission would be unable to consider secondary rules in isolation. It must also touch substantially on primary rules, as secondary rules, being procedural, were the means to enforce rights conferred. The Special Rapporteur himself

seemed to concede that the two types of rule were so closely interwoven that it might prove impractical to compartmentalize them. Personally, he thought that the topic of diplomatic protection could not be understood without direct reference to principles and rules of a substantive nature.

58. The preliminary report seemed to cast doubt on the traditional view of diplomatic protection, whereby, in resorting to diplomatic protection or international judicial proceedings on behalf of its nationals, a State was in reality asserting its own rights. Despite the new possibilities for individuals to have access to international bodies or tribunals, that surely remained the very essence of diplomatic protection. He did not give much credence to the view that in the exercise of diplomatic protection the real subject of the law, namely, the individual, was completely eliminated. Although it was the State that asserted the claim of the injured individual, the latter remained the principal actor in the judicial process. This was tantamount to the rule on subrogation wherein a party steps into the shoes of another with all the rights and claims of the latter, without denying the subrogee of his right to participate in the process. Speaking of fiction, he said he had no quarrel with that. The reason he said he thought it was so was because of the discretionary character given to the State, whether or not to give diplomatic protection. In comparison, there existed in corporate law the doctrine of “piercing the veil” of corporate fiction when the shell of the corporation, having a personality separate and distinct from its members or shareholders, is pierced in case of fraud.

59. It appeared from paragraph 18 of the preliminary report that the responsibility of the host State arose only after local remedies had been exhausted by individuals. Would that still be the case if the State of nationality had asserted the claim of the individual from the outset, following the traditional view that anyone who mistreated a citizen directly offended the State? When a State invoked diplomatic protection for its citizen and chose the means of exercising it, why was there still a need to determine on which right the State action was based (para. 13 of the preliminary report)? The ruling by PCIJ in the *Mavrommatis Palestine Concessions* case highlighted the point that the injury to a private interest became irrelevant once the State brought a case before an international tribunal on behalf of its subjects, the State then being regarded as the sole claimant.

60. As to the standard minimum treatment accorded to aliens under international law dealt with in paragraph 21 of the preliminary report, the question arose whether that should be the sole standard. Should the standard of treatment not be defined by reference to domestic law, so as to avoid conferring privileged status on aliens? He asked whether it was not as a matter of international law that the standard of treatment should be defined in terms of equality under domestic law. To be sure, application of either standard would give rise to controversy, given the cultural, social, economic and legal differences between the host State and the foreign State. The matter was further complicated by the emergence of human rights and the principles governing the treatment of aliens. The Special Rapporteur should explore that delicate issue in greater depth.

61. According to paragraph 40 of the preliminary report, in consenting to arbitration the parties to a dispute waived all other remedies. Did that also prevent the foreign State which was not a party to the arbitration process from asserting diplomatic protection? If the right of the individual was recognized at the international level, did that bar the State from extending diplomatic protection to him?

62. As to paragraph 24 of the preliminary report, the bases for diplomatic protection were presumably the ties of citizenship, allegiance, and so forth. Why, then, would the right of action which the State acquired subsist if there was a subsequent change in the nationality of the injured individual? It might be appropriate to establish guidelines or rules—such as nationality, meritorious claim, denial of justice or violation of fundamental human rights—with a view to preventing abuses of the foreign State's discretionary power to provide diplomatic protection.

*The meeting rose at 1.05 p.m.*

## 2521st MEETING

*Wednesday, 29 April 1998, at 10.05 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam.

### Diplomatic protection (*continued*) (A/CN.4/483, sect. E, A/CN.4/484,<sup>1</sup> A/CN.4/L.553)

[Agenda item 6]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

1. Mr. ADDO said that the questions the Special Rapporteur had raised in his preliminary report (A/CN.4/484) were legitimate and pertinent and the Commission must endeavour to find answers to them in a bid to move forward with the progressive development of international

law and its codification. If it was not to lose time debating the theoretical foundations of the law regarding diplomatic protection, it must first ascertain the *lex lata*, and proceed from there to the areas of the law that were controversial and try to see some of the lines along which needed changes in the law can best be made, with a view to achieving their universal acceptance or application.

2. Traditionally, the topic under consideration applied only to a State's treatment of aliens within its territory, not to its treatment of its own nationals. Public law specialists, such as Brierly,<sup>2</sup> and PCIJ in its milestone decision in the *Panevezys-Saldutiskis Railway* case (see page 16), had indicated that in taking up the case of one of its nationals by resorting to diplomatic action, a State was in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. That was the *lex lata*.

3. His only quarrel was with the artificiality in that way of looking at the question. Surely a State had in general an interest in seeing that its nationals were fairly treated in a foreign country, but it was a bit of an exaggeration, as Brierly had pointed out, to say that, whenever a national was injured in a foreign State, the State of origin was injured also. In practical terms, the theory was not adhered to in any consistent manner. For example, it would demand that damages should be measured in relation to the injury which had been suffered by the State and was obviously not the same as that suffered by the individual. In fact, however, the law permitted the injury to be assessed on the basis of loss to the individual, as if the injury to the individual was in fact the cause of action.

4. Aside from the artificiality of the theory, the right to diplomatic protection was not satisfactory from the procedural standpoint. The individual had no remedy of his own and the State of which he was a national might be unwilling to take up his cause for reasons which had nothing to do with its merits. Was there no way to find a solution by allowing individuals access in their own right to some form of international tribunal? The prospect of States accepting such a procedure was perhaps slim, but a discussion of the idea might be worthwhile, even if it was ultimately rejected.

5. The customary rules regarding diplomatic protection—their discretionary espousal by States, the requirement of continuing nationality, the need for a violation of rights as a basis for a valid claim and others—did not necessarily offer perfect protection for the rights and interests of aliens. Account had to be taken of the fact that diplomatic protection dealt with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronted the rights of the territorial sovereign, as ICJ had said in the *Barcelona Traction* case.

6. That brought him to the question asked by the Special Rapporteur in paragraph 54 of his preliminary report: when bringing an international claim, was the State enforcing its own right or the right of its injured national? He was not impressed with the argument that time-worn

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>2</sup> J. L. Brierly, *The Law of Nations*, 6th ed., rev. by H. Waldock (Oxford, Clarendon Press, 1963).

procedures must be respected or that modernization was obligatory. Stability and change were twin concepts affecting the law in any dynamic society. According to *lex lata*, a State that brought an international claim was enforcing its own right in that the injury caused to its national had been transposed, by the legal artifice already mentioned, into an injury to the State itself.

7. Brierly explained that “such a view does not, as is sometimes suggested, introduce any fiction of law; nor does it rest . . . on anything so intangible as the ‘wounding of national honour’”.<sup>3</sup> It was significant to note that Brierly appeared shortly afterwards to have changed his position into virtually the negation of his earlier postulate, which he described as often an entirely unreasonable interpretation to put upon the facts. That changed attitude suggested that that branch of the law might have grown up in a haphazard manner. It was time to develop the theory on the basis of custom. However, custom was limited in its operation to the States that gave birth to it or adopted it. There was no denying the fact that most of *lex lata* in that area was a legacy from the international community of yesteryear, which had been smaller than it was at the current time. Fiction or no fiction, the law in that area had worked admirably well for the majority of States. In fact, there was nothing wrong with legal fiction. He cited several articles in English-language legal dictionaries that defined the meaning of the term and recalled that legal fictions abounded in common law. For example, it was well known that judges made the law, although they said they were only declaring it. The law they made was in no way impaired because of the legal fiction.

8. Taking a different point of view, he said that historically, much of international law regarding diplomatic protection had taken shape with the spread of economic, social and political ideas from Europe and North America to other parts of the world. In developing the law towards universal application, care must be taken to avoid undue reliance on outdated materials and, conversely, there was a constant need for modernization and for taking into account the attitudes of the newer States, those of the third world. It might also be appropriate to recall that concepts did not enjoy the status of immutable and universal postulates and that they should be subjected to rigorous reappraisal in the light of later developments. The semblance of universality of the law must not be mistaken for actual universality.

9. The institution of diplomatic protection had met with resistance from certain regions such as Latin America. Two Mexican jurists, Padilla Nervo and Castañeda, had criticized the rules as having been based on unequal relations between great Powers and small States. Much had been said about whether those rules had been based on the ideas of justice and fair dealing of the European States, but there was no doubt that the great Powers sometimes stretched substantive standards and abused the diplomatic protection process, as illustrated by “gunboat” diplomacy.

10. Whatever developments had taken place with regard to diplomatic protection in the past, there was at the current time a need for rules in that regard, since all States had nationals who travelled or maintained interests in other countries. As a whole, the customary law in that area had, despite all its defects, been reasonably satisfactory, balancing the interests of both alien and host State for the good of both. The Commission, no doubt, will have to use its imagination in selecting material from historical and contemporary law and in incorporating whatever changes had taken place.

11. Mr. HERDOCIA SACASA said that, having shaken the tree of an ancient institution, the Special Rapporteur had made it drop fruit from which the Commission could benefit. He had replaced the institution of diplomatic protection in the context of the development of international law and, by the same token, had struck down ancient myths, while perhaps building new fictions. His greatest achievement was, however, to have put the individual back into the context of diplomatic protection and to have given him a new role.

12. The main point of the discussion was whether diplomatic protection was still relevant, with some people going as far as to say that it was an outmoded institution. The Commission must, rather, reaffirm that it was as valid as ever, even if the emphasis had to be shifted to the individual and a great deal of modernizing had to be done, above all in respect of the procedure for defining and distributing the results of the claim.

13. The fact of having reaffirmed that human beings had the status of subjects of international law and of having made access to certain bodies of courts possible for individuals took nothing away from diplomatic protection and did not make it any less effective. There were still some gaps, of course, in the regime of the international protection of individuals, but various institutions were working together to safeguard the general protection machinery already in place.

14. The principle of diplomatic protection was part of customary international law, not of treaty law. The same, however, was not true of human rights, which were often based on treaty law.

15. He agreed that the exercise of diplomatic protection generally came within the discretionary power of the State, but it was also true that national legislators had gradually established peremptory rules of protection. It would probably be necessary to revise the comment in paragraph 48 of the preliminary report stating that even if such obligation (of protection) is referred to by some constitutional texts, it is actually much more a moral duty than a legal obligation. As, in principle, a person who had the constitutional right to protection from his State could demand it from that State.

16. In his view, the question raised in paragraph 54 (see paragraph 6 above) did not give rise to any problem for the Commission. The two rights were not contradictory, but complementary. While there was no doubt that, in practice, it was the State that had the discretionary right to exercise diplomatic protection, that protection could not be exercised where there had been no harm or no compen-

<sup>3</sup> J. L. Brierly, “The theory of implied State complicity in international claims”, *The Basis of Obligation in International Law and Other Papers*, H. Lauterpacht and C. H. M. Waldock, eds. (Oxford, Clarendon Press, 1958), p. 158.

sation and compensation could not be effective if diplomatic protection was not exercised.

17. Mr. PAMBOU-TCHIVOUNDA said that he welcomed the courage shown by the Special Rapporteur in the drafting of his preliminary report which, in its substance, its objective and even its form, had been intended to inform the persons to whom it was addressed. If that had indeed been the Special Rapporteur's intention, he had achieved it. With that first effect digested, all that mattered at the current time was how things would evolve, especially as the task was to produce a positive evaluation of a traditional concept, that is to say, to take account of the constant dialectic between theory and practice.

18. He would limit his statement to the question of the legal nature of diplomatic protection, dealt with in chapter I of the preliminary report, and wished at the outset to mention a number of obvious facts.

19. First, the material sphere of international law depended on the structure of international society. Secondly, that structure embraced a diversity of topics which were unequal in terms of their legal characteristics: in that connection, reference might be made to the advisory opinion by ICJ on *Reparation for Injuries Suffered in the Service of the United Nations*. Thirdly, the assignment of rights or the imposition of obligations by international law did not of themselves confer legal personality on the addressees: legal personality was not inherent in the quality of subject of law, in either domestic or international law. Fourthly, whether it was on the authority of the precedent either of the judgment of PCIJ in the *Mavrommatis Palestine Concessions* case or of the above-mentioned advisory opinion, the conferment of specific rights on individuals or on official agents was a manifestation of the will of States or of international organizations (by treaty or by customary means), but did not constitute recognition of international legal personality. Lastly, an individual's direct access to certain international institutions for enforcing a claim fell within the framework of the application of international treaty or customary law, in the creation of which the individual would not have taken part, since he was not authorized to do so by international law, that is to say, did not possess international legal personality.

20. That said, he wished to distance himself from the notion, very widespread in a certain doctrine and stated in paragraph 32 of the preliminary report, that a certain share of legal personality was conferred on the individual. On the contrary, he perceived legal personality, either domestic or international, as a uniform whole which could not be broken up into parts. Neither did he accept the implications of such a notion, namely, that individuals would be the ones who determined the framework of the claims which they could enforce at the international level. In fact, individuals used the existing procedures within the limits of those procedures and in an attempt to satisfy very limited interests. It would be fanciful to believe that individuals had become the competitors of States or international organizations in that regard and it would be a mistake to give human rights an excessive role and influence in relation to the established institutions or mechanisms such as diplomatic protection, which was undergoing the dialectic

between stability and change, but surviving it. On the other hand, no one knew the fate which the force of the development of international law would hold for human rights, since States, on which the institution of diplomatic protection had been established, might logically prefer not to be caught up in the flux of the great advance of human rights and there was nothing to prohibit them from withdrawing from any instrument of which they were the authors. Mr. Brownlie was quite right to assert (2520th meeting), on the basis of the chronological precedence of diplomatic protection over human rights and of both judicial and arbitral precedents, that human rights had borrowed from the resources of diplomatic protection.

21. In shaping the law on the exercise of diplomatic protection, account should certainly be taken, to the advantage of that law and with a view to its modernization, of the progress which the human rights record would show. However, he could not entirely embrace the argument of Lavieć,<sup>4</sup> which the Special Rapporteur endorsed in paragraph 38 of his preliminary report, that the recent means of protection also reflected the decline of diplomatic protection. To maintain the relevance of that argument would in fact be tantamount to supporting the Special Rapporteur's appeal for a rewriting of the judgment of PCIJ in the *Mavrommatis Palestine Concessions* case to say, in the language of paragraph 53 of the report that when the State espouses its nationals' cause, it is enforcing their right to fulfilment of international obligations. Thus, in an effort to reply to the question put in paragraph 54 of the report, the Special Rapporteur was trying to correct what he described, rightly or wrongly, as a "fiction", that is to say, the State's own right in relation to international law, asserting that the State would be mandated by its nationals, whose interests it would represent at the international level.

22. First, apart from the very few and limited cases listed in paragraphs 33 to 44 of the preliminary report, the essence of diplomatic protection remained intact in its three components—it was a means of protecting rights and interests used within the framework of an international dispute between States. Therefore, as long as States existed and unless they were regarded as fictions, diplomatic protection would remain a widely used procedure, regardless of the conditions of its application. It was a right of the State, but primarily a procedural right and only incidentally a substantive right.

23. Secondly, there was a contradiction in the notion that the international law made by States conferred a certain share of legal personality on the individual, but limited the full expression of that personality in the sphere of international law. That contradiction undermined any attempt to transpose the mandate theory from domestic to international law by divesting the substitution of the State for the individual and representation of any foundation.

24. Thirdly, he proposed that the justification of the right of substitution and of the separate right of the State to enforce diplomatic protection should be inferred from the inherent nature of the relationship between the indi-

<sup>4</sup> J. P. Lavieć, *Protection et promotion des investissements: Étude de droit international économique* (Paris, Presses universitaires de France, 1985), p. 5.

vidual, as an element of the population, and the State. From a legal standpoint, in fact, relations between the individual and the State were ontological, for the individual existed as an element of the population, without which there was no State, and the State existed as a creation of law. The inherent nature of the relationship between the individual and the State was established and embodied in the condition of nationality. From that standpoint, nationality was a rule of international law whose application fell within the exclusive competence of the State with respect to the modalities of its conferment and loss; since it was a rule of international law, its availability against third parties was authorized by international law. That was the meaning of the decision in the *Nottebohm* case, which had given a new lease of life, without any modification, to the customary institution of diplomatic protection. The requirement of the nationality link contained the implicit and somewhat laconic premise of the *Mavrommatis Palestine Concessions* case proclamation, which, if it was taken into account, eliminated the contrivances of the legal construction mentioned by the Special Rapporteur in paragraph 27 of his preliminary report. In that connection, the respective case law of the *Mavrommatis Palestine Concessions* and *Panevezys-Saldutiskis Railway* cases clarified each other.

25. He concluded, on the basis of the nationality of the State, that diplomatic protection was clearly a right of the State.

26. Mr. BENNOUNA (Special Rapporteur) said that, since the traditional doctrine was an established fact, the Commission must ask itself whether it would be wise to take recent developments into account, being well aware that, by so doing, it would necessarily add material to the draft articles on international responsibility. That text had in fact dealt with only two situations, one arising from unlawful acts and the other from activities which were not prohibited, both relating to State-to-State responsibility. The existence of State responsibility with regard to private persons was at the current time a fact accepted by international case law: either the individual invoked that responsibility directly by means of the procedures open to him or the State intervened to invoke the responsibility of the other State with regard to the private persons concerned.

27. It was, moreover, incompatible with the state of contemporary international law to assert that legal personality was a uniform whole. Of course, the first personality was the State and it was States that determined the share of legal personality conferred either on international organizations or on individuals, but there was no uniform model. For example, by consenting to arbitration under the auspices of ICSID, a State concluded an international agreement and bound itself to a private investor in the same way as it would bind itself to another State.

28. The strict position taken by Mr. Pambou-Tchivounda showed that the Commission was divided and that the discussion was necessary. With regard to the question put in paragraph 54 of the report, the situation was not perhaps as clear-cut as it had been in the 1920s and the solution should perhaps be sought in the area of complementarity: there probably existed a procedural right of the State in legal terms which was characterized

by diplomatic protection, but, when it took action, the State was sometimes enforcing its own right and sometimes a right of private persons.

29. Mr. ECONOMIDES said he agreed that, in addition to the State-State relationship created by diplomatic protection and international responsibility, there was also in recent law a relationship, of international law as well, between the State and the individual. When that very specific relationship of the State to the individual did not exist, there could be no other solution than the traditional concept, according to which the State enforced the right of the individual on his behalf. The creation of the possibility for the individual himself to exercise his diplomatic protection would require the drafting of a universal convention which would overturn not only the institution of diplomatic protection, but also international law as a whole.

30. Mr. BENNOUNA (Special Rapporteur) said that he had never argued that diplomatic protection should be exercised by the individual. It was always the State which exercised diplomatic protection, but, nowadays, when the State intervened, it was sometimes exercising its own right and sometimes a right which was recognized as belonging to individuals. The Commission was dealing with the topic during a phase of transition and change and it must therefore tell the General Assembly that it was going to treat diplomatic protection as part of *lex lata* and take account of those recent developments in codifying the topic, work which should constitute an adaptation and not a revolution.

31. Mr. MELESCANU said that there was really no disagreement within the Commission about the fact that the Commission should codify the institution of diplomatic protection while also taking account of recent developments. Starting from that common ground, the task would therefore be to work out precisely what those developments were and what importance should be attached to them.

32. Mr. BROWNLIE said that he doubted whether the theoretical discussions taking place were of great value if the main focus of the Commission's work was to determine how to assist individuals who had been harmed by actions of foreign States. For reasons that were both economic and political, the Chernobyl disaster had not given rise to any claims against the former Union of Soviet Socialist Republics, but, from the classical point of view, the local remedies rule would have applied and associations of foreign claimants would have appeared in Ukrainian courts. If the local remedies rule was still being applied by both developed and developing countries, then the point at issue was not a matter for theoretical or historical debate, but a matter of establishing what could be done by way of progressive development of the law to assist, not multinationals which had the necessary means, but individuals who found themselves obliged to litigate abroad.

33. Mr. DUGARD said that he was prepared to accept that the topic rested on a legal fiction whereby the claim of an individual was transformed into a claim of the State. Developments in international law, particularly in respect of human rights, and the Declaration on the Human

Rights of Individuals Who are not Nationals of the Country in which They Live<sup>5</sup> tended to blur the dividing line between human rights and diplomatic protection even further. The question that arose was whether, in a particular case, the legal fiction was useful and what its consequences were. As the Special Rapporteur had explained, it was not suggested that, because the claim was that of the individual rather than that of the State, the individual should assert his own rights in international law. Such an idea could, however, follow by implication from the suggestion that the whole subject of diplomatic protection ought to be reconsidered in the light of its fictitious basis. It was important to recognize that where there was no treaty or similar mechanism that conferred on the individual the right to institute international claims, the individual had no remedy. The Commission could, by way of progressive development, recommend that such a remedy should be conferred on the individual under international law, but he doubted whether such a recommendation would have any impact on States. In most instances, the traditional rules of diplomatic protection, in which the State viewed the claim as that of the State itself and not that of the individual, would give the greatest protection to the individual.

34. The purpose of the *dictum* of ICJ on obligations *erga omnes* in the *Barcelona Traction* case had been to make it clear that, in certain cases, States could protect non-nationals in the wider interest of humanity. However, there had to be some conventional basis for allowing the State to initiate proceedings on behalf of a non-national. In any event, whatever the purport of the *dictum* of the Court, there was every reason to think that, in the majority of cases, States would not be prepared to institute international proceedings on behalf of non-nationals. Even within the European human rights system, inter-State claims on behalf of non-nationals were rare and, where they did exist, they always contained an element of a linguistic or ethnic link. The doctrine of *erga omnes* obligations in the *Barcelona Traction* case could be examined within the framework of article 40 of the draft articles on State responsibility,<sup>6</sup> but not within that of diplomatic protection. The international community had changed, as also had international law, but not sufficiently to warrant a complete revision of the subject at the risk of leaving the individual worse off than before. The order of ICJ in the *case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)* showed that States were still prepared to protect their nationals and to view an injury to a national as an injury to the State.

35. The traditional rules relating to the study of the topic of diplomatic protection appeared in the report of the Commission to the General Assembly on the work of its forty-ninth session.<sup>7</sup> He trusted that the Special Rapporteur would turn to those rules and would seek to amend them where necessary in the light of new developments of the kind to which he had drawn the Commission's attention. The best way to advance the interests of the individual in the modern world was by codifying the traditional rules of international law on the subject and perhaps by

recommending to States that the right to diplomatic protection should be seen as a human right and that they should consider including them in their domestic legal systems.

36. Mr. GOCO said that, in paragraph 48 of the preliminary report, the Special Rapporteur stressed the discretionary nature of the exercise of diplomatic protection by the State; on the other hand, however, he also mentioned certain factors that could make such exercise an obligation. He wondered, for example, whether, in the event of a denial of justice, arbitrary conduct on the part of the courts or some other violation of the fundamental rights of the human person, there could not be some basic rules that would make it incumbent on the State to grant diplomatic protection where it might be tempted not to do so for political reasons.

37. Mr. DUGARD said that the exercise of diplomatic protection could not be made obligatory in international law. All the Commission could do was to recommend that States should amend their domestic law.

38. Mr. BENNOUNA said he also thought that an individual could in no case oblige a State to take action against another State.

39. Mr. SIMMA said that, if the right to diplomatic protection became a human right, such a development would of necessity affect the discretionary power of the State at the international level. It would become far more difficult for a State to advance political or diplomatic arguments in favour of not making a claim.

40. Mr. HAFNER said that the more theoretical and deductive approach adopted by the Special Rapporteur and the more pragmatic or inductive approach which some members might have preferred would in any case have led to the same results, since the questions arising on the subject of diplomatic protection, one of the few classical items of State-to-State relations still left for codification, would have to be answered at some time or another.

41. Although the Commission had almost unanimously reached the conclusion that the topic related only to secondary rules; nevertheless, it had been asked whether a particular rule was a matter of primary or secondary law. The status of a rule really depended on the function it exercised in a particular situation. A norm of the law of treaties could belong to the category of secondary rules in one case and to that of primary rules in another. Continuing the debate on that point at the risk of further blurring the categorization was therefore not very useful. However, it should be clear that the Commission did not under any circumstances intend to codify the rights of the individual that had to be infringed in order to give rise to diplomatic protection. Finding a formulation that regulated the matter in a general way could, of course, become difficult in some instances, but, as the comments by States clearly showed, the Commission did not have to feel obliged to undertake a study of the substantive rules of international responsibility.

42. The only points to consider were therefore the rights of the State to exercise diplomatic protection and the conditions of such exercise. That it was a right and not a duty

<sup>5</sup> General Assembly resolution 40/144, annex.

<sup>6</sup> See 2520th meeting, footnote 8.

<sup>7</sup> *Yearbook . . . 1997*, vol. II (Part Two), p. 62, para. 189.

could clearly be derived from actual practice. He would have great difficulty with recognizing that right to be a part of human rights for, in that case, the State would have a duty to grant diplomatic protection; yet such a duty did not exist. To cite only one example, when the Third United Nations Conference on the Law of the Sea had rejected the suggestion that States could be sued by private companies, it had been proposed that the sponsoring State of the claimant company should be obliged to appear before the Law of the Sea Tribunal and to represent the claim against the other State, a solution that would have amounted to obligatory protection. That proposal had been almost unanimously rejected for that very reason and the solution finally adopted in article 190 of the United Nations Convention on the Law of the Sea went in the opposite direction.

43. That led on to the question of the role of individuals in international relations. It was obvious that today they had more access to international institutions in order to assert their rights against States. The individual enjoyed a certain emancipation from the State of which he was a national and the significance of sovereignty was somewhat reduced as a result. That necessarily again gave rise to the question of human rights and diplomatic protection and of their mutual relevance. It should not be forgotten that there existed fundamental differences insofar as human rights were primarily directed against States, whereas diplomatic protection made use of States. Human rights were independent of nationality insofar as States were required to grant fundamental human rights to all persons under their jurisdiction. If an obligation of diplomatic protection were based on human rights, it could then be asked why it did not have to be extended to all persons under the jurisdiction of the State in question. Yet, for instance, neither article 6 of the European Convention on Human Rights nor article 1 of the Protocol thereto could be interpreted as giving rise to such an obligation. Of course, it could be conceived as a political right accorded only to nationals as citizens, but international law did not provide any indication that would justify such a rule even as *lex ferenda*. The expansion of the individual's access to international institutions thus affected diplomatic protection insofar as the latter was no longer the only means by which the individual's rights against other States could be upheld. But since such direct access existed not universally or generally, but only in few cases, individuals still needed the institution of diplomatic protection in order to enjoy a certain protection against foreign States.

44. Within that perspective, it could, of course, be asked whether an obligation to exercise diplomatic protection would not be beneficial to the individual; however, apart from the absence of any evidence to that effect, such an obligation would not seem justified in all cases, since the State had to represent the interests not only of one, but of all of its nationals and a case might easily arise where the interests of one individual ran counter to those of the nation as a whole. Furthermore, when the question had arisen in Austria in connection with a lump-sum agreement with the former Czechoslovakia, the decision reached had been that a State which did not exercise diplomatic protection could not be sued by its national on the grounds of its failure to act or of expropriation. A differ-

ent solution could be reached only if the State accepted such an obligation by its own legislation.

45. Hence it must be concluded, as was confirmed by jurisprudence, that diplomatic protection was a right of States and not of the individual. That had various consequences: first, there was indeed a certain element of fiction in that right, in the sense that something was assumed to be true although it might be untrue. The damage was caused to the individual and not to the State, but it was assumed that it had been caused to the State as if the property of the nationals or perhaps the nationals themselves had been the property of the State. In order to avoid such a conclusion, it was better to accept the existence of a certain element of fiction. But the Commission should not concern itself with those questions, as other matters had to be resolved and doctrine on that point was very divided.

46. Another conclusion was that, as long as the conditions of nationality or of exhaustion of local remedies were not fulfilled, no impairment of any right under international law had occurred and no diplomatic protection could be exercised. Only a right of the individual under national law had been violated. That could be demonstrated *a contrario* by assuming, for example, that a bilateral treaty gave the nationals of both parties the right to a certain treatment, but that that treatment was spelled out in a provision of a non-self-executing nature that had not been incorporated into internal legislation. In such a situation, the individual had not yet been granted an enforceable subjective right, as he could not invoke the provision in question before a national tribunal. If the national State requested compliance with that provision of the treaty, it did not exercise diplomatic protection but its own right to require observance of the treaty by the other State party. However, that situation must be separated from the one in which the individual could invoke a self-executing provision, but in which the exhaustion of local remedies rule could not apply because of lack of remedies or because of the well-known exceptions. It was thus necessary to determine very clearly from what moment the international law of diplomatic protection was involved. In that regard, there was no need to consider whether the individual was a subject of international law. That status was merely a consequence of the existence of certain rights and obligations and not a condition for the granting of certain rights and obligations.

47. Hence, that general rule entailed a further consequence regarding the nature of the rule of exhaustion of local remedies. It could mean only that the failure to comply with the international obligation or the responsibility of the wrongdoing State existed only if those remedies had been exhausted, subject to the various exceptions. There might be a variety of reasons for that, but it was in that sense that article 22 of the draft articles on State responsibility, must be understood. It could not be construed as only preventing an international claim. That also indicated the importance of the conception of that rule.

48. That conception also meant that the model of subrogation could not be applied to diplomatic protection, as there was a fundamental change in the character of the right. However, a different solution could be envisaged as far as *erga omnes* obligations with regard to individuals were concerned, as in the decision by the European Com-

mission of Human Rights referred to in the first footnote to paragraph 37 of the preliminary report.<sup>8</sup> In his view, however, such cases, in which a State intended to ensure respect for human rights by bringing a claim, were not necessarily part of diplomatic protection and must be distinguished from it.

49. Mr. Economides' idea of examining whether the exhaustion of local remedies rule was applicable in the case of a violation by a foreign State of the rights of individuals in the territory of their national State called for several comments. In certain cases, that rule did not work, as Mr. Brownlie had pointed out (2520th meeting) when referring to the *Aerial Incident of 27 July 1955*,<sup>9</sup> when there was no link with the relevant jurisdiction. That would be particularly true, for example, in the case of someone owning land near a border, the use of which land was impaired as a consequence of transboundary damage caused by the neighbouring State as in the *Trail Smelter* case. In such a situation, it would certainly be unfair to require the exhaustion of local remedies within the neighbouring State and diplomatic protection could be granted even without resort to those remedies. A different situation was the one in which a diplomat did not honour his obligations vis-à-vis citizens of the receiving State, for example, by not paying his debts. In such a situation, the duty under article 6 of the European Convention on Human Rights came into conflict with diplomatic immunity. Irrespective of that, it could be asked whether the private person who had suffered damage would have to exhaust local remedies in the sending State, since that was theoretically possible. Nevertheless, he could imagine that that requirement was not regarded as a condition for the exercise of diplomatic protection. That solution could also be derived from the general conception developed in connection with the case of the *Aerial Incident of 27 July 1955*. The question remained whether in such a situation one of the traditional conditions for the exercise of diplomatic protection was in fact met, namely, that an internationally recognized standard had not been observed. For diplomatic protection was an instrument to be used against a foreign State, but, if a diplomat did not honour his debts, the responsibility of the sending State was not involved since no act was imputable to it. It would certainly be difficult to establish the existence of any direct involvement of the sending State which could give rise to a claim by the private individual. If, on the other hand, the act was directly imputable to the State, it was largely an act *jure gestionis* where the State did not enjoy immunity and for which it could thus be sued before the domestic courts.

50. Lastly, reference must also be made to one question which Zemanek posed in his general course, namely, whether the resort to an international body to protect human rights must be considered a "local remedy".<sup>10</sup> The

<sup>8</sup> Council of Europe, Decision of the Commission as to the admissibility of application No. 788/60 lodged by the Government of the Federal Republic of Austria against the Government of the Republic of Italy (11 January 1961), *Yearbook of the European Convention on Human Rights*, 1961, vol. 4 (The Hague, Martinus Nijhoff, 1962), pp. 116-183, at p. 140.

<sup>9</sup> See 2520th meeting, footnote 9.

<sup>10</sup> K. Zemanek, "The legal foundations of the international system", *Collected Courses of the Hague Academy of International Law*, 1997 (The Hague, Martinus Nijhoff, 1998), vol. 266, pp. 9-336, at p. 266.

simple textual interpretation did not enable one to answer in the affirmative, but the Commission must certainly deal with such questions.

51. There was still a long way to go and many questions as important as those addressed in the report would arise in the future and have to be discussed. One could for example envisage quite a substantive discussion on the question whether diplomatic protection could be exercised for non-nationals, particularly in view of the fact that, as was shown in the context of human rights, the link of nationality became less important, with the link of residence benefiting accordingly.

52. Hence, despite the understandable wish to reach a concrete solution from a general and abstract position, the Commission must spare no effort to reach a stage as soon as possible at which it could frame concrete rules, in order to assure States that its work was properly targeted. The work done in the Working Group on diplomatic protection<sup>11</sup> had already enabled States to gain a clear picture, one that they seemed to have appreciated, of the structure of the Commission's work. It should thus continue its work in accordance with that structure, taking into account the discussion generated by the report it had before it.

53. Mr. LUKASHUK, referring to the remarks by Mr. Brownlie, said that transboundary damage should not initially be considered in the study on diplomatic protection. It belonged to a different sphere and it would be better for the Commission to confine itself to the case in which damage had been caused in the jurisdiction of the foreign State. Moreover, it seemed certain that the existence of a right of the individual to diplomatic protection was bound to be more and more widely recognized, as was the responsibility of the State in that regard.

54. Mr. HAFNER said that he could accept the exclusion of transboundary damage from the scope of the subject, although it could in fact give rise to the exercise of diplomatic protection; in that case, however, the fact that it had been excluded must be clearly spelled out.

55. Mr. ROSENSTOCK said he agreed with Mr. Dugard and Mr. Hafner that the topic under consideration was eminently suitable for codification, although that did not mean there was no room for progressive development: the fact that the topic was not a new one had no bearing on that consideration.

56. In his preliminary report, the Special Rapporteur had provided a thumbnail sketch of the history of the institution of diplomatic protection and some editorial comment thereon and he recognized the utility of such an approach. As for the editorial comments, suffice it to say that silence should not be taken for assent. Reviving bilateral or North-South issues did not seem a profitable undertaking.

57. Nor was it useful to launch a debate as to whether diplomatic protection was a legal fiction. In the same spirit, he would refrain from explaining why he found paragraph 47 of the preliminary report surprising, redundant and potentially disturbing, for theoretical debates

<sup>11</sup> See 2520th meeting, footnote 4.

were unhelpful. Moreover, whether intentionally or otherwise, the Special Rapporteur seemed to oppose “traditional” approaches to progressive ones and the traditional view of diplomatic protection to one which recognized, applauded, fostered and enhanced the role of human rights. Such a dichotomy did not reflect the true state of affairs and, like Mr. Dugard and Mr. Brownlie, he thought that it served no useful purpose, and was contrary to the interests of individuals, to marginalize diplomatic protection. It was indeed for the State to exercise that protection, but the rights of the individual were not threatened in consequence. The remarks by Mr. Herdocia Sacasa and Mr. Addo had been particularly relevant in that regard.

58. Nor did it seem essential to resolve the other theoretical issues that might arise, before tackling aspects of the exhaustion of local remedies. As long ago as 1834, the then Secretary of State of the United States of America, Mr. McLane, speaking of the exhaustion of local remedies, had declared that

it would be an unreasonable and oppressive burden upon the intercourse between nations that they should be compelled to investigate every personal offence committed by the citizens of the one against those of the other.<sup>12</sup>

Approximately a century and a half later, Mr. Brownlie, a British scholar, practitioner and member of the Commission, not known as a conservative, had described the rule on exhaustion of local remedies as “justified by practical and political considerations and not by any logical necessity deriving from international law as a whole”.<sup>13</sup>

59. The decision taken the previous year by the Working Group, which had been approved by the Commission, accepted by the Special Rapporteur and supported by Governments in their comments, namely that the work must concentrate on secondary rules, had been the right one. He had heard nothing that caused him to think it should be reconsidered, much less modified. The results of the Commission’s straying from secondary rules in its study of State responsibility were not encouraging. That being said, it would be useful to set up a consultative group to work with the Special Rapporteur, as recommended in the report of the Planning Group at the forty-eighth session.<sup>14</sup>

60. Mr. BENNOUNA (Special Rapporteur) said it was not his intention to question the conclusions the Working Group had reached at the previous session. The fact remained that the Working Group had left some questions pending and it was precisely in order to study those questions in greater depth that the preliminary report had been drafted.

61. Mr. ROSENSTOCK said he was pleased that the debate on questions settled at the previous session was not to be reopened and read out a paragraph in which it was stated that “the topic will be limited to codification of secondary rules”.<sup>15</sup>

62. Mr. BENNOUNA (Special Rapporteur) said he had meant that it was important to bear in mind the relative nature of the distinction between secondary and primary rules, and the fact that there was no watertight division between the two categories.

63. Mr. ROSENSTOCK agreed that there was indeed no watertight division; nor, however, was there any doubt with regard to the decision that had been taken, the reasons that had inspired it or what it implied.

*The meeting rose at 1.05 p.m.*

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## 2522nd MEETING

*Thursday, 30 April 1998, at 10.05 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Khasawneh, Mr. Ben-nouna, Mr. Brownlie, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam.

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### Diplomatic protection (*continued*) (A/CN.4/483, sect. E, A/CN.4/484,<sup>1</sup> A/CN.4/L.553)

[Agenda item 6]

#### PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. SEPÚLVEDA said that the preliminary report of the Special Rapporteur on diplomatic protection (A/CN.4/484), albeit of a preliminary nature, provided valuable material for debate, as did the bibliography and list of cases relating to diplomatic protection distributed by the Secretariat. It could be seen from the latter document, however, that since 1981 only nine cases relating to diplomatic protection had been resolved, five of them at domestic level and four by international courts; and that only half a dozen books on the topic, together with a rather larger number of articles in specialized journals, had been published since 1980. An effective tool was thus needed to gather information on State practice in the field of diplomatic protection, and on related topics such as

<sup>12</sup> Moore, *Digest* (1906), vol. VI, p. 658.

<sup>13</sup> I. Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford, Clarendon Press, 1979), p. 496.

<sup>14</sup> *Yearbook . . . 1996*, vol. II (Part Two), pp. 84-85 and p. 91, document A/51/10, paras. 148 (g) and 191-195, respectively.

<sup>15</sup> *Yearbook . . . 1997*, vol. II (Part Two), p. 61, para. 181.

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

arrangements between States enabling individuals to have recourse to international arbitration, thereby obviating the need for diplomatic protection. The *World Investment Report* prepared by UNCTAD offered a valuable source of information in that connection.<sup>2</sup>

2. As to the preliminary report, it was essential to begin the study of the topic by establishing the basic legal hypothesis without which diplomatic protection could not arise. The necessary preconditions had been established in the passage from the judgment of PCIJ in the *Mavrommatis Palestine Concessions* case cited in paragraph 5. The first precondition for such exercise was that a State was entitled to protect its subjects, when they were injured by acts contrary to international law committed by another State. Consequently, it was important to establish that, in order for a diplomatic claim to arise, there must first be proof that an injury had been inflicted on a national; that the injury was a breach of international law; that it was imputable to the State against which the claim was brought; and, lastly, that a causal link existed between the injury inflicted and the imputation of the injury. There would thus be three main protagonists in an international claim for diplomatic protection: the subject whose person, property or rights had been injured; the State causing the injury; and the State espousing the claim. But, of course, the State causing the injury had an opportunity to make reparation before the diplomatic protection procedure was initiated.

3. The second precondition for the exercise of diplomatic protection referred to in the judgment of PCIJ in the *Mavrommatis Palestine Concessions* case was that the injured subjects must have been unable to obtain satisfaction through the ordinary channels. In other words, there must be recourse to local remedies in attempts to resolve disputes, so as to afford the State an opportunity to avoid a breach of its international obligations by making timely reparation.

4. In paragraph 11 of the preliminary report, the Special Rapporteur also rightly pointed out that the State defending its nationals could not, in the exercise of diplomatic protection, have recourse to the threat or use of force. Hence, an important contribution the Commission could make in its consideration of the topic was to identify what means were available to States in making their rights and the rights of their nationals effective in the context of diplomatic protection.

5. It was also important to determine who had the direct and immediate legal interest and who had the attributes and the powers to bring an international claim. In his view, the State had no such direct and immediate interest. If that were the case, the rights in question would be ineluctable and could not be exercised at the State's discretion. For example, agreements on the protection of foreign investments gave persons whether natural or legal, the possibility of claiming reparation directly, thereby according them a status similar to that conferred on the United Nations in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations* whereby they had international legal personality by virtue

of having the power to bring an international claim. The same was true in the case of the Calvo clause,<sup>3</sup> whereby the alien contractually declined diplomatic protection from his State of origin. In that case too, it was clear that only the individual had a direct and immediate interest in the claim. Consequently, the debate on the legal fiction regarding the holder of those rights led nowhere, and the Commission should instead focus on the rights and legal interests that were being protected. He had already given it as his view that the State exercised vicariously a right originally conferred on the individual.

6. It was to be noted that foreign investors thus found themselves in an extremely privileged position vis-à-vis nationals, as they had recourse to three procedures—domestic remedies, diplomatic protection and international arbitration—for the protection of their rights, whereas nationals could avail themselves only of domestic remedies.

7. He also wished to comment on the disturbing question of the alleged link between diplomatic protection and human rights. In his view, the two issues were entirely distinct, and more thorough consideration of the question would reveal that diplomatic protection had traditionally concerned strictly patrimonial rights, whereas human rights concerned the very essence of personal freedom. The rights traditionally covered by diplomatic protection included most-favoured-nation treatment and performance requirements imposed upon enterprises—a far cry from traditional human rights concerns.

8. Mr. BROWNLIE drew attention to the problem of dealing with questions of direct damage to States, which, while clearly forming no part of the Commission's mandate, were nonetheless often inextricably bound up with questions of diplomatic protection in the real world. Three examples would suffice in that connection.

9. The *Rainbow Warrior* affair, involving the destruction of a Greenpeace international vessel by a French naval sabotage unit in Auckland Harbour, had led to claims on behalf of the State of New Zealand regarding violations of its sovereignty, and on behalf of the Netherlands regarding a photographer who had lost his life in the incident, who had been treated as being of Netherlands nationality for the purposes of the settlement brokered by the Secretary-General of the United Nations. The case thus represented a palimpsest of direct State interest on the part of New Zealand and the interest of another State in one of the individuals involved in the episode.

10. A second example, that of Chernobyl, had involved direct economic losses by private individuals in a number of States, as well as the potential for the States themselves to bring claims for direct damage to their airspace, had they so wished. The third example concerned the *Cosmos 954* Soviet nuclear satellite that had disintegrated over Canadian airspace in 1978, an incident that had resulted in a diplomatic settlement between Canada and the Union of Soviet Socialist Republics.<sup>4</sup> The Canadian claim had related exclusively to the costs incurred by the State of

<sup>2</sup> For example, *World Investment Report 1997* (United Nations publication, Sales No. E.97.II.D.10).

<sup>3</sup> See *Yearbook . . . 1956*, vol. II, document A/CN.4/96, pp. 206-208.

<sup>4</sup> ILM, vol. XVIII (1979), p. 899.

Canada in cleaning up hazardous debris which had fallen on Canadian territory. However, there again, private interests might well have been damaged by the contamination. The inevitable conclusion was that it would be wrong to take the view that, because direct damage might be involved, the particular episode was therefore irrelevant for the Commission's purposes. All those examples involved actual or potential diplomatic protection in respect of private interests. The fact that they were not exclusively concerned with private interests should not place them outside the purview of the Commission's consideration.

11. Mr. BENNOUNA (Special Rapporteur) said he seemed to recollect that diplomatic protection was not applicable in cases involving space vehicles, in which the strict liability of the launching State vis-à-vis other States was invoked. As to the other cases referred to by Mr. Brownlie, it would certainly be valuable to bear in mind that the distinction between direct damage to States and damage suffered by nationals was not always clear-cut in practice.

12. He wished to thank Mr. Sepúlveda for highlighting the distinction—which as Special Rapporteur he himself had tried to bring out—between the discretionary power of the State to exercise diplomatic protection, a matter on which members of the Commission agreed, and the rights (and perhaps obligations) involved, which depended on the particular circumstances and required in-depth analysis. Thus, in the light of recent developments in fields such as patrimonial and human rights and investment, the right at issue would sometimes be the right of the individual, and the obligation of the host State would sometimes be an international obligation directly assumed vis-à-vis the individual. The Commission should highlight that distinction between the exercise of diplomatic protection—which remained a right of the State—and the rights and obligations at issue, which might be a right of the State or a right of the individual, with the possibility of some overlap between the two.

13. He was grateful for the reminder that the State did not invariably exercise its right, the proof being that that right was sometimes transmitted to the individual, who had access to international bodies. Mr. Sepúlveda had also rightly compared the protection conferred on the United Nations in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations* with the right to bring a claim conferred on individual investors. In both cases that power was conferred by States.

14. Such contributions were a welcome response to his requests for guidance and helped clear the ground at the conceptual and technical levels, thereby enabling the Commission to come to grips with the substance of the problem. In his view it was premature to say that diplomatic protection was unrelated to human rights and had dealt only with patrimonial rights. It was true that in the past it had dealt mainly with questions of property, nationalization and investment, but the proceedings brought before ICJ in the case concerning the *Vienna Convention on Consular Relations (Paraguay v. United States of America)* by a State in the wake of the recent execution of one of its nationals in the United States of America were a clear instance of a link with human rights.

15. Members had raised another problem that merited consideration: before coercion and the threat or use of force could be eliminated in the exercise of diplomatic protection, appropriate mechanisms would be required to ensure that the individual or the State could defend the individual's rights. He asked whether the range of those mechanisms should be as wide as possible, or should they comprise legal recourse alone and whether the mechanisms of diplomacy should be used in preference to claims before the courts. It had been agreed that diplomatic privileges and immunities, as defined in the Vienna Convention on Diplomatic Relations (hereinafter referred to as the "1961 Vienna Convention") and the Vienna Convention on Consular Relations (hereinafter referred to as the "1963 Vienna Convention"), would not be contemplated in the future draft articles. But diplomatic intervention and legal recourse shared many common elements, including reliance on negotiation, and he thought both approaches should be considered possible elements of diplomatic protection.

16. Mr. ECONOMIDES said Mr. Sepúlveda had been quite right to mention in the context of diplomatic protection the principle of the non-use or threat of force, a principle that had at the current time entered into the domain of *jus cogens*. Due consideration should be given to devoting an article on it in the future instrument.

17. He agreed with the Special Rapporteur's comments on diplomatic protection of property rights. True, diplomatic protection was most frequently invoked in cases where such rights were violated, but other cases could likewise call it into play. It would therefore be too restrictive to assume that diplomatic protection dealt exclusively with damage to property. He also believed that the distinction between human rights and diplomatic protection was less clear-cut than Mr. Sepúlveda had intimated; more consideration should be given to that issue.

18. As to international arbitration, mentioned by Mr. Sepúlveda, he would point out that, when a State submitted a complaint, one of two things generally happened: either the State that had committed the internationally wrongful act acknowledged its wrongdoing and there was an amicable settlement, or the State refused to admit to wrongdoing and an international dispute centring on a case of diplomatic protection ensued. Such disputes had to be settled by the procedures relevant to all international disputes, which included negotiation, arbitration and judicial settlement. In all such cases the State was exercising its diplomatic protection vis-à-vis its nationals.

19. Mr. ROSENSTOCK said he endorsed Mr. Brownlie's comment on the complexity of certain cases involving diplomatic protection and the difficulty in drawing a clear distinction between diplomatic protection and human rights. In the case concerning the *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Paraguay was essentially bringing an action for violation of the 1963 Vienna Convention. The case certainly involved an obligation directly owed to the State of Paraguay, but whether it also involved human rights was a subtle and complex question to which the answer would be provided only when ICJ handed down its decision. So far as the current topic was concerned, enhanced human rights sensitivity would be to apply the stress on avoiding

statelessness as the Commission did on the topic of nationality in relation to the succession of States following the result in the *Nottebohm* case. The reasoning in the *Nottebohm* case was not wrong *grosso modo* but the result was.

20. Mr. SIMMA said that, if injury to a foreign national involved a violation of a right recognized as a human right, nothing could prevent that foreign national's State of origin from espousing his claim. The practice of the Federal Republic of Germany, for example, had stressed that approach. If injury to aliens in the form of violations of human rights were excluded from the application of diplomatic protection, no effective remedy would be available in cases where an alien did not have access to procedures before an international human rights body. If ad hoc arbitration was provided for in a contract, then the alien would have to exhaust local and probably international remedies. In most cases of violations of human rights of foreigners, however—such as unfair imprisonment or mistreatment—such international procedures were not available, and it was accordingly vital to confirm the right of the State of origin to exercise diplomatic protection.

21. Mr. SEPÚLVEDA said he agreed with Mr. Simma that diplomatic protection and human rights protection could indeed coincide in cases where human rights were violated. It would be going too far, however, to suggest that the two coincided in every case. For example, chapter Eleven of the North American Free Trade Agreement (NAFTA)<sup>5</sup> indicated that no party could require that an enterprise of that party that was an investment of an investor of another party appoint to senior management positions individuals of any particular nationality. If one of the parties did make such a demand in violation of NAFTA, one could hardly say that a fundamental human right was being violated. He therefore believed that one of the first steps must be to define the nature of the right that was to be protected.

22. Mr. HERDOCIA SACASA said it was essential to draw a distinction between diplomatic protection and the protection of human rights, but there was absolutely no doubt that protection of human rights fell into the category of diplomatic protection, which must not be restricted to intervention in the event of damage to property. The American Convention on Human Rights: "Pact of San José, Costa Rica" (hereinafter referred to as the "Pact of San José") and other international instruments, for example, set out the principle that no one could be arbitrarily deprived of his property, but that principle was closely tied in with the human right of due process.

23. Mr. CANDIOTI said the preliminary report of the Special Rapporteur and his oral introduction had prompted a productive debate about the basic aspects of diplomatic protection that required elaboration as a way of laying a firm conceptual foundation for further consideration of the topic. Diplomatic protection, as the Special Rapporteur's historical analysis revealed, had at the out-

set been virtually the sole means available to States for protecting the rights and interests of their nationals abroad, but it currently existed alongside other mechanisms and institutions developed by the international community at both the regional and the international level, especially in regard to human rights. Diplomatic protection, however, was sometimes in fact the sole or the best option for dealing with a particular problem.

24. As to whether, in exercising diplomatic protection, a State was enforcing its own right or the right of an injured national—a question raised in paragraph 54 of the preliminary report—a person linked by nationality to a State was a part of its population and therefore one of the State's constituent elements. As Mr. Pambou-Tchivounda had pointed out (2521st meeting), the protection of its nationals was a State's fundamental right, on the same plane as the preservation of its territory or the safeguarding of its sovereignty. Diplomatic protection by a State of its nationals and their interests was equivalent to defence by the State of one of its constituent elements, in other words, of its own rights and juridical interests. At the same time, however, the State was defending the specific rights and interests of the national that had been "injured" by another State.

25. As Mr. Herdocia Sacasa had pointed out, no rigid distinction could be drawn between the rights of the State and the rights of its nationals; the two sets of rights were complementary and could be defended in concert. Hence there was no need, at the current stage of development of international law, when individual rights were broadly acknowledged, to describe the machinery for diplomatic protection as a fiction or any other artificial construct that might have been appropriate in other historical contexts.

26. He agreed with other speakers about the need to bring the institution of diplomatic protection up to date in view of the latest developments in the international protection of human rights. Interesting proposals had been made on innovations as a contribution to progressive development of the law, something that merited further analysis. But it was important to remember that diplomatic protection was just one part of the vast field of international responsibility. As a means of giving effect to State responsibility, it created a relationship between two States: the "protector" State and the State against which action was being taken, which was viewed as responsible for an internationally wrongful act that had caused injury to a national of the "protector" State. The contemporary emphasis on protection of human rights—an emphasis of which he wholly approved—should not obscure the fact that the State-to-State relationship was an essential element in determining the nature of diplomatic protection.

27. Respect for the independence and for the other rights, including the jurisdictional powers, of the State against which diplomatic protection was being exercised, and in particular, observance of the principle of exhaustion of local remedies, were essential to the regulation of diplomatic protection. Mr. Sepúlveda's comments were particularly pertinent in that connection.

28. In the matter of primary and secondary rules, a consensus had emerged in favour of leaving aside the primary rules which set out the material content of the obligations

<sup>5</sup> *The NAFTA*, vol. I. North American Free Trade Agreement between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States (Washington, D.C., U.S. Government Printing Office, 1993).

of States in the treatment of foreigners and foreign investments and of concentrating on secondary rules that defined the basis, terms, modalities and consequences of diplomatic protection, although some primary rules of a general nature could be taken into account. In that regard he endorsed the Special Rapporteur's proposals in paragraphs 59 to 62 and 64 of the preliminary report. As had been pointed out in the debate, the study of diplomatic protection must include study of the means for exercising it. Certainly, the threat or use of force was to be excluded: the traditional machinery for peaceful settlement of disputes, particularly negotiation but also mediation, good offices and arbitration, were much more appropriate and productive. The question of countermeasures in the context of diplomatic protection should also be given due consideration.

29. In his opinion, the debate had clarified the starting point for future work and it provided sufficient material to formulate conclusions on which later efforts could build.

30. Mr. BENNOUNA (Special Rapporteur) recalled that, in the Commission's work on State responsibility, it had been agreed that the use of countermeasures must not entail any violation of human rights. Established international practice confirmed that position. The threat or use of force was likewise deemed to be unacceptable in the exercise of diplomatic protection. He nonetheless thought it should be made clear that peremptory norms—*jus cogens*—had to be respected in the exercise of diplomatic protection.

31. Members of the Commission had stated that diplomatic protection entailed protection of one of the constituent elements of the State: the population. That was true, in keeping with the principle of the State's jurisdiction by virtue of a link with persons, not with territory. Thanks to the progress made in the field of human rights, however, the interpretation of the State's jurisdiction *ratione personae* was much more restrictive today, and fortunately, States no longer had the right to do whatever they wished with their population.

32. Mr. HAFNER said that in any attempt to compare human rights protection with diplomatic protection, specific aspects of both must be distinguished. For example, the content of human rights must not be confused with the means of enforcement of human rights. If that distinction was kept clear, the following questions could be answered. Was diplomatic protection a human right? No. Could a human rights violation give rise to diplomatic protection? Yes. Under the *erga omnes* effect of human rights, any State could bring a complaint against another State, but a clear distinction must be made as to whether such a complaint was made as a consequence of diplomatic protection or of a particular right to raise a complaint under a given regime, in which case the complaint clearly did not fall within the ambit of diplomatic protection. He saw no need to invoke peremptory norms or general rules of international law in connection with diplomatic protection, for it went without saying that they did apply.

33. Mr. Sepúlveda's citation of chapter Eleven of NAFTA raised a very interesting point. If a State brought a claim in connection with non-compliance with a non-

self-executing norm which was not implemented by the necessary domestic law, the question arose as to whether such a claim involved diplomatic protection or not, and he would argue that it did not: the State was making a claim in its own right. The same could be said of the *case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)*, in which Paraguay was clearly bringing a claim in its own right, not in the exercise of diplomatic protection.

34. Mr. PAMBOU-TCHIVOUNDA, responding to a point made by the Special Rapporteur, said that it was not merely peremptory norms but international law as a whole which constituted a limitation on the use of diplomatic protection. Once diplomatic protection was accepted as an institution of international law and its use was accepted as a discretionary power of the State, the State had a primary obligation to exercise that power in accordance with international law as a whole.

35. Mr. ECONOMIDES said Mr. Candioti's point that diplomatic protection always existed in parallel with other possibilities available to individuals posed the difficult question of the relationship between diplomatic protection and all other available local or international remedies. Everyone agreed that domestic law took precedence in all cases and that diplomatic protection was something exceptional, since it implied intervention by a State as a kind of last resort. But it was not clear whether all international remedies took precedence or only those which led to a binding settlement. His opinion was that all international remedies did take precedence over diplomatic protection and that a State could intervene only if the settlement that such remedies produced was not respected.

36. Mr. Hafner was right to say that, in principle the Commission did not have to deal with general questions of international law. But there was the problem that diplomatic protection was a relationship which could create a dispute or an atmosphere of conflict between States. Accordingly, it would be wise to make express reference to the peremptory norms of international law, in particular the principle of the non-use of force, and also to the principle that countermeasures were not applicable in the sphere of human rights.

37. Lastly, on a technical point, it should be remembered that a State's population consisted not only of nationals but also of foreigners and stateless persons, who did not enjoy diplomatic protection.

38. Mr. MIKULKA said that he was largely in agreement with the content of the Special Rapporteur's preliminary report. However, if the comment just made by the Special Rapporteur on peremptory norms was interpreted *a contrario*, the Commission might find itself conducting a debate similar to the one on countermeasures. Countermeasures gave a State the right to disregard certain rules of international law but not the peremptory norms. Diplomatic protection, however, should be exercised purely and simply in conformity with all the rules of international law, not only those of *jus cogens*.

39. The question raised by Mr. Economides as to whether international remedies preceded diplomatic protection needed further study. It was not clear whether a

State could exercise diplomatic protection in parallel with an international recourse taken directly by an injured individual or whether the State had the right to exercise diplomatic protection in an attempt to overturn a decision against the individual by the international body concerned.

40. He shared the Special Rapporteur's doubts as to whether a rigid distinction should be maintained between primary and secondary rules. The Special Rapporteur's position prompted the question whether the Commission should not consider, under the current topic, some other issues not falling within the category of secondary rules—the question of nationality for example.

41. Mr. GOCO, responding to a point raised by Mr. Hafner, said that the question was whether a State's right existed independently of the injury suffered by the individual and of any legal action he might take. Paragraph 51 of the preliminary report said it was conceivable that the State could not bring an international claim against the will of the national concerned. There was also the Calvo doctrine, concerning an individual's contractual refusal of diplomatic protection from his State of origin. Could a State invoke diplomatic protection in such circumstances and proceed, on the basis of a treaty for example, against the expressed will of the injured individual? If it could, then the individual would become merely a procedural aspect of the case. That seemed to be the real issue the Commission had to settle.

42. Mr. SEPÚLVEDA said that the *North American Dredging Company* case dealt with by the United States-Mexican General Claims Commission was relevant to Mr. Goco's point about the Calvo clause. In its contract with the Mexican Government the company had agreed not to have recourse to the diplomatic protection of the United States. The Claims Commission had decided that the contract was valid and that therefore the claim brought by the United States Government was not admissible.<sup>6</sup> The case was often cited as a reaffirmation of the Calvo clause.

43. Mr. SIMMA said that he had always understood the *North American Dredging Company* case as upholding the principle that a natural or legal person could not renounce a right which was not his or its own.

44. Mr. SEPÚLVEDA said that the point was that the United States-Mexican General Claims Commission had rejected the claim brought by the United States Government on the ground that the contract was valid.

45. Mr. BENNOUNA (Special Rapporteur) said that Mr. Simma was wrong on the specific point at issue. The *North American Dredging Company* case was indeed cited in the literature as a validation of the Calvo doctrine, but things were not as simple as that. There was also a specific Western doctrine, as Mr. Simma had pointed out, that an individual could not renounce a right which was not his own. But the case law did not follow that line. The debate which he as Special Rapporteur had brought to the Commission was not an artificial one and it must remain

open. He intended to propose that, although there was no problem as to the exercise of the discretionary power of the State, the Commission must look more closely at the rights and obligations involved. The purpose of his preliminary report was in fact to delve into the nuances of the traditional doctrine.

46. Mr. KABATSI said the Special Rapporteur's position was that, in the light of the development of individual rights at the international level, the Commission should reconsider the traditional law as expressed in the *Mavrommatis Palestine Concessions* case. The Special Rapporteur was not happy with the "fiction" of the interest of the State, as opposed to the interest of the individual, in connection with the espousal of claims. He argued correctly that if it was currently true that in human rights cases an individual could use remedies other than diplomatic protection the Commission should abandon the strict "fiction" that the State was espousing its own right and not the right of the individual. The Special Rapporteur was seeking the Commission's guidance on that matter.

47. He also sought guidance as to whether the Commission should reconsider the Working Group's proposal made at the forty-ninth session to limit the topic to the codification of secondary rules.<sup>7</sup> The Special Rapporteur's position was that, whenever appropriate, the Commission should also discuss primary rules with a view to appropriate codification of the secondary rules. The Special Rapporteur did accept in paragraph 5 of his preliminary report that the topic was ripe for codification, that is to say, he accepted the Working Group's position and the fact that the customary origin of the principle in the *Mavrommatis Palestine Concessions* case was well established in international law. Even when he described it as a legal fiction, the Special Rapporteur was not really calling into question the right of the State to protect its nationals when local remedies had failed to do so. The debate in the Commission had provided the guidance sought by the Special Rapporteur: the concepts of the interest of the State and the interest of the individual should for the moment remain separate, even though they were complementary. In most cases the exercise of diplomatic protection involved the enforcement of human rights and there were, moreover, still cases in which a remedy was not directly available to the individual.

48. At the current stage, the Commission need not worry about the avenues available for enforcement of claims by individuals through the human rights treaty mechanism. It needed to follow the Working Group's outline and answer the various questions raised under the four chapter headings. Most of the details of the issues were stated in the report of the Commission on the work of its forty-ninth session.<sup>8</sup> The Commission's task was to clarify those issues.

49. He was inclined to agree with the Special Rapporteur that the codification exercise should be limited to secondary rules but that, whenever necessary, primary rules could also be considered in passing.

<sup>6</sup> *Opinions of Commissioners under the Convention concluded 8 September 1923 between the United States and Mexico—4 February 1926 to 23 July 1927* (Washington, D.C., U.S. Government Printing Office, 1927), pp. 31-32.

<sup>7</sup> *Yearbook . . . 1997*, vol. II (Part Two), p. 61, paras. 180-181.

<sup>8</sup> *Ibid.*, p. 62, para. 189.

50. Mr. KUSUMA-ATMADJA said that, so far as the position of individuals was concerned, the question was whether a State could exercise its right to protect its nationals even if the national concerned had indicated that he did not wish to rely on that right. It was an important issue as the situation would, of course, differ depending on whether private persons or legal persons were involved. He too therefore considered that the matter should be treated with the utmost caution.

51. Mr. GOCO said he would like to know whether, in the event of an alleged violation of the fundamental human rights, the State of the victim could, in the exercise of its discretionary power, refuse to accord diplomatic protection.

52. Mr. KABATSI said that, if the individual did not have access to the various remedies through the mechanisms provided by treaty, the State could exercise its diplomatic protection, and in his view, even if a fundamental human right had been violated, that remained the position. The State might, however, wish, for a variety of reasons, to decline to take up the matter.

53. Mr. HE said that diplomatic protection, which had had an unfortunate history, could be regarded as an extension of colonial power or as an institution imposed by powerful States on weaker ones. It still caused great concern to small and developing countries. The time had therefore come to re-evaluate the principles on which it was based.

54. The judgment of PCIJ in the *Mavrommatis Palestine Concessions* case had proclaimed it to be an elementary principle of international law that a State was entitled to protect its subjects when they were injured by acts contrary to international law committed by another State and for which those subjects had been unable to obtain satisfaction through the ordinary channels. It was worth noting that, in some countries, both natural and legal persons might well suffer an injury under internal law which could amount to a violation of the principles of international law. That occurred because of the different stages of development, different legal systems and different degrees to which the principles of international law had been incorporated into internal law. For instance, acts such as nationalization and requisition, which were lawful under internal law, might well be contrary to international law, while acts such as rebellion and armed action, which were contrary to internal law, might not necessarily be contrary to international law.

55. There was thus both a confrontation and a link between internal and international law and it was important to adapt the former to the principles of the latter. The Special Rapporteur noted in his preliminary report that the institution of diplomatic protection had evolved over time and on account of two factors in particular: the development of the rights of individuals, on the one hand, and of the rights of legal persons as foreign investors, on the other. The trend towards recognition of the rights of the individual, towards allowing individuals to have increasing access to international bodies and to be parties to proceedings before international courts, and also towards allowing foreign legal persons to have direct

access to ICSID, would have a significant impact on the traditional role of diplomatic protection.

56. He could not, however, agree that that role was outdated, given the need to have recourse to diplomatic protection to protect a national of a State injured by acts of another State that were contrary to international law. Nonetheless, in view of the developments he had mentioned, the changing framework of diplomatic protection would enable States to bring claims on behalf of injured nationals. Furthermore, the increasingly complex structure of legal persons as exemplified in the *Barcelona Traction* case—when a company could have one nationality and its shareholders several other nationalities—would make it even more difficult for the State of the nationality of the legal person to take action. The problem was whether the State whose nationality the company possessed had any real interest in bringing the case before an international court.

57. In view of all those factors, the traditional theory, framework and role of diplomatic protection should be re-evaluated.

58. Although the Working Group had decided that the topic should be confined to secondary rules, to focus exclusively on those rules would only make the work more difficult inasmuch as the Commission would have to study the conditions under which diplomatic protection had been exercised. Such conditions would include the “clean hands” rule—a borderline case, as already pointed out, between primary and secondary rules—and also exhaustion of local remedies. Both of them were complicated issues where the possibility of entering into the field of primary rules could not be ruled out.

59. Mr. BROWNLIE said it was to some extent true that the institution of diplomatic protection had had an unfortunate history and had been and still could be abused. But there was an obvious distinction between the essence of something and its abuse. A motor car, for instance, could be used to take people to hospital but also to assist in an armed robbery, yet it had not been abolished on that account. It was not true that diplomatic protection was used only by strong States against the weak. It was frequently used between States of equal status, often within the same region. When certain Jews in Tsarist Russia who had acquired United States nationality were being persecuted, United States protests had been directed at the Russian Government of the time;<sup>9</sup> in the 1960s, China had directed protests both to Indonesia<sup>10</sup> and to Mongolia<sup>11</sup> regarding the treatment of its nationals resident on their territories; and, again, in the late nineteenth and early twentieth centuries, there had been protests by China over the United States failure to protect Chinese residents in the United States against riots<sup>12</sup> and also by Italy in regard to injury to Italian nationals in riots in New Orleans.<sup>13</sup> It was important not to generalize unduly.

<sup>9</sup> Moore, *Digest* (1906), vol. II, pp. 8 et seq.

<sup>10</sup> “Chronique”, RGDIP, vol. 70 (1966), pp. 1013 et seq.

<sup>11</sup> *Ibid.*, vol. 71 (1967), pp. 1067-1068.

<sup>12</sup> Moore, *Digest* (1906), vol. VI, pp. 820 et seq.

<sup>13</sup> *Ibid.*, pp. 837 et seq.

Mr. GALICKI said that, in view of the preliminary report and the discussion in the Commission, the establishment of a working group on diplomatic protection would be beneficial for further development of the item.

61. It was no easy matter to answer the question posed in paragraph 54 of the preliminary report, namely, When bringing an international claim, is the State enforcing its own right or the right of its injured national? According to the traditional approach, the right to exercise diplomatic protection was a discretionary right of the State of nationality. On that basis, the position of an injured individual was very weak and completely dependent on the will of the State of his nationality. However, as rightly stated in paragraph 52, the attribution of rights to individuals by means of treaties may go so far as to allow individuals direct access to international machinery and courts to guarantee observance of such rights. In that connection, the examples cited in chapter I.B of the report seemed to suggest that, in the particular case of the inherent rights of individuals as currently covered by the developing international law of human rights, it might be possible to replace States by individuals or at least to allow individuals to act in parallel with States in those areas hitherto confined to the diplomatic protection exercised exclusively by States.

62. It should not be forgotten that the very concept of nationality—the basis for the exercise of diplomatic protection—had undergone significant changes. No longer could nationality be defined—as it had been in article 1, subparagraph (a), of the Draft Convention on Nationality prepared by the Harvard Law School<sup>14</sup>—as “the status of a natural person who is attached to a State by the tie of allegiance”. As the phenomenon of the subjectivization of individuals had developed, the “legal bond” of nationality had become less a “tie of allegiance” and more a matter of the reciprocal rights and duties between the individual and the State. The existence of those rights and duties as an element of nationality had been stressed by ICJ in the *Nottebohm* case. Furthermore, the right to nationality was recognized in an ever-increasing number of international treaties as one of the human rights to be enjoyed by all individuals.

63. While the concept of nationality as a “tie of allegiance” between the State and the individual matched the traditional approach to diplomatic protection, the concept of the right to nationality as a human right paved the way for certain further considerations concerning diplomatic protection as an institution closely connected to nationality. Some very interesting changes were already taking place in the attitude of States to the question of the protection they afforded their nationals. Certain new constitutions, the Polish Constitution<sup>15</sup> among them, provided that a national abroad was entitled to protection from his Government. He fully agreed, therefore, that there was clear evidence that some States, at least, were in favour of treating the right to diplomatic protection as a human right which could be claimed by individuals and did not lie exclusively within the discretion of States.

64. The right to State protection set forth in the Polish Constitution was contained in chapter II, that dealt with human and civil rights and it was guaranteed by judicial remedies. It might therefore be possible to recognize that, at any rate in constitutional practice, there might be a newly emerging human right to diplomatic protection.

65. In summary, first, the subjectivization of individuals, which had a strong impact on the traditional concept of diplomatic protection, should be considered in the Commission’s work on the elaboration of appropriate principles. Even if there was no general agreement on the question of individuals as subjects of international law, individuals were gradually acquiring an increasing number of subjective rights under international law. Secondly, the relationship between the new international law of human rights and the traditional rules on diplomatic protection should be analysed in depth. Thirdly, the question of a human right to diplomatic protection must be considered with a view to that right being exercised by the State of nationality. Lastly, in the light of the growing possibilities for individuals to have direct access to international bodies and courts, careful consideration must be given to the parallel exercise by States and/or individuals of the rights traditionally covered by diplomatic protection.

66. Mr. BENNOUNA (Special Rapporteur) said he agreed that an appraisal of the various internal laws and constitutional principles on diplomatic protection would be useful and he trusted that the Secretariat would assist in the matter.

67. He would be interested to see the relevant provisions of the Polish Constitution under which, according to Mr. Galicki, diplomatic protection would be elevated into a human right. Also, Mr. He had spoken of the need to determine to what extent diplomatic protection was governed by internal law and to what extent it fell within international law. There might well be a problem under internal law in the case of a remedy exercised by the individual vis-à-vis his State when it had not protected him. At the international level, on the other hand, the right to act or not to act remained at the discretion of the State: but discretionary did not mean arbitrary. Established rights to diplomatic protection might exist under internal law but, in his view, there were no such rights at the international level. At all events, international law had not yet reached that stage. For that reason, an evaluation of the various national laws would be of great interest. It had been suggested that States might be approached for their assistance in the matter but the problem was that, in general, States failed to reply. He would prefer it, therefore, if the Secretariat could make the necessary inquiry.

68. Mr. GOCO said it was clear that discretion could not be equated with arbitrariness. A State was naturally protective of its interests but, in the case of diplomatic protection, there were no hard and fast rules. At the same time, the role of the international media must not be overlooked, in view of the image that might be painted of a foreign State which withheld diplomatic protection from a suffering victim—though, presumably, a foreign State that did exercise its discretion not to grant diplomatic protection would have weighed up all the implications.

<sup>14</sup> *Research in International Law, I. Nationality* (Cambridge, Mass., Harvard Law School, 1929), p. 13.

<sup>15</sup> Poland, Constitution adopted on 2 April 1997, chapter II, art. 36.

## 2523rd MEETING

Friday, 1 May 1998, at 10 a.m.

Chairman: Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.

### Diplomatic protection (*continued*) (A/CN.4/483, sect. E, A/CN.4/484,<sup>1</sup> A/CN.4/L.553)

[Agenda item 6]

#### PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. MELESCANU said that, in the current debate on the preliminary report of the Special Rapporteur (A/CN.4/484), all the main theoretical questions had already been raised and, in particular, the questions of the relationship between the right of the State to exercise diplomatic protection and the rights of the individual and of the relationship between primary and secondary rules. However, from a practical standpoint, two important remarks seemed necessary. First, even though there had been few cases of diplomatic protection in the recent practice of States, the institution of diplomatic protection was nonetheless worthy of codification. Diplomatic protection constituted the national's guarantee of last resort. Furthermore, that codification must be based on the traditional conception of the institution; otherwise, States would not accept it, precisely because their practice drew only on that conception. But there had been an evolution, of which account must of course be taken. For example, it had to be considered whether a State which obtained compensation in the context of the exercise of diplomatic protection could refuse to compensate the national on whose behalf it had exercised that protection, on the grounds that the right it had exercised was its own right. In his view, the Commission must answer that question in the negative and impose an obligation on the State in that regard. In the light of that evolution, it would also not be possible to limit the exercise of diplomatic protection to patrimonial rights.

2. The second comment concerned the relationship between diplomatic protection and the exercise of the

recourse procedures currently available to individuals, particularly in the area of human rights. In his view, a clear distinction must be drawn between the exercise of diplomatic protection and the exercise of those rights of recourse by individuals, but it was also necessary to determine the relationship between those two institutions. For instance, it would have to be considered whether the State could exercise its diplomatic protection in parallel with individual recourse proceedings or only after the delivery of an unfavourable decision vis-à-vis its national. But the distinction remained quite clear-cut, for four reasons.

3. First, in the framework of the human rights protection mechanisms that gave individuals the right of petition, the action by the individual was almost always directed against the State of which he was a national. States thus had little occasion to exercise diplomatic protection in the field of human rights. Secondly, the institution of individual petition had been established specifically to replace diplomatic protection, to enable the individual to assert his rights directly: it could in no sense be seen as a development of diplomatic protection. Thirdly, there was a very clear difference between the two institutions, as diplomatic protection was part of customary law, whereas the exercise of individual petition procedures in human rights cases, always had a treaty basis. Fourthly, there were such marked differences between the international system for the protection of human rights and regional systems—particularly the most developed of the latter, namely, the European system—that it would be extremely difficult to find a common denominator that could be incorporated into the framework of diplomatic protection. Thus, diplomatic protection was a fundamental institution, which should be codified in terms of the traditional conception, while taking account of the evolution of the law.

4. Mr. SIMMA said that the difference between individual petition procedures in human rights cases and diplomatic protection was not as pronounced as it seemed to be. In some cases, an element of diplomatic protection could be an additional component in a human rights petition procedure. For instance, in the *Soering* case,<sup>2</sup> the German Government had brought a claim in the European Court of Human Rights on behalf of its national. The literature also recognized that there was at least a theoretical link between the two institutions.

5. Mr. PAMBOU-TCHIVOUNDA said he wondered whether the fact that Germany had stepped in in the *Soering* case referred to by Mr. Simma allowed the conclusion that it had effectively exercised its diplomatic protection. In his view, in order to answer that question, it would first be necessary to study the relationship between individual petitions in human rights cases and diplomatic protection.

6. Mr. BENNOUNA (Special Rapporteur) said it was clear that the exercise of diplomatic protection and of recourse procedures in human rights cases must be kept distinct and that no one had ever claimed otherwise. Diplomatic protection belonged with secondary rules, whereas human rights were primary rules. The fact remained that the law had evolved, if only as a result of

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>2</sup> European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 161, *Decision of 26 January 1989* and *Judgment of 7 July 1989* (Registry of the Court, Council of Europe, Strasbourg, 1989).

the adoption of the Charter of the United Nations, the Universal Declaration of Human Rights,<sup>3</sup> the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and that the new rights thereby conferred on the individual did indeed fall within the scope of diplomatic protection.

7. Mr. ECONOMIDES said that the relationship between diplomatic protection and mechanisms for individual petition was not that simple. Three cases must be distinguished. First, an individual could exercise his right of petition against the State of which he was a national; such a case had nothing to do with diplomatic protection. Secondly, an individual could exercise his right of petition against a foreign State, in which case there was a parallelism, as the State could exercise its diplomatic protection on behalf of its national. In practice, however, a Government would never do so, but would leave it to the person concerned to exercise his individual right of petition. Thirdly, a State could bring its own recourse proceedings against another State, in a human rights case in which it could also exercise its diplomatic protection. It was for the State to choose which path it wished to follow and the Commission should not concern itself with that situation. It was therefore too simple to say that it was merely a question of an opposition between primary and secondary rules. The question must be studied in greater depth.

8. Mr. KABATSI asked Mr. Simma whether, in the *Soering* case, the State had exercised its own right rather than that of the individual for whom it had substituted itself.

9. Mr. SIMMA said that three categories of State could bring a case before the European Court of Human Rights, namely, the State against which the petition had been brought, the State bringing the petition and the State of which the claimant was a national. If, as in the case referred to, it was the latter State that stepped in, it could be said that there was an element of diplomatic protection, although it was also the rights of the individuals deriving from the European Convention on Human Rights that it was seeking to protect.

10. Mr. BROWNLIE said that, although it was accepted that the system of recourse established under the European Convention on Human Rights borrowed a good deal from the world of diplomatic protection, the State that brought a claim in the court did not take over the claim of the individual concerned, but brought a claim in parallel, which accounted for the fact that the State and the individual had been separately represented before the court in the *Loizidou v. Turkey* case.

11. Mr. AL-KHASAWNEH said that the successful conclusion of work on the topic would depend to a large extent on the Commission's ability to strike a balance between realism and idealism; for the rules governing diplomatic protection had been developed at different times and with differing emphases.

12. First, there had been the traditional conception, which was bilateral, discretionary and gave the State pride of place as a subject of international law at the expense of the real injured party. Next, to limit the abuses arising from disparities between States, there had been the Calvo clause<sup>4</sup> and, more recently, the attempts to reformulate that restriction in the 1970s in the context of what had come to be known as the new international economic order. But, subsequently, the curious fact had emerged that the same States that had fought against abuses of diplomatic protection in international forums had at the same time concluded investment promotion agreements giving the State of nationality the right to resort to international arbitration or even vesting that right in legal or natural persons, thereby making them subjects of international law. Cognizance must be taken of that state of affairs if the Commission's work on the topic was not to remain a purely academic exercise.

13. On the other hand, as was noted in paragraph 34 of the preliminary report, there were currently a number of large multilateral treaties in the field of human rights that had established injury to an alien as a violation of human rights. Unlike the situation with investments, however, the means of obtaining redress available to the individual had remained rudimentary, offering a striking contrast between the wide scope of human rights and the very small number of subjects in a position to exercise them. Notions of *erga omnes* obligations did not change that picture. It was also noteworthy that, in recent practice, States had tended to see claims of individuals in terms of human rights abuses rather than of diplomatic protection, at least where investments were not the point at issue. In fact, the two approaches were seen by States not as mutually exclusive, but as complementary.

14. The conclusion to be drawn was that the object of the current exercise should essentially be to codify the rules relating to diplomatic protection in the traditional sense. The major developments that had taken place in the field of human rights should not replace the traditional conception as the Commission's starting point. The exercise should also deal with the codification and progressive development of secondary rules, bearing in mind that the distinction between primary and secondary rules was not always very clear, as could be seen in the case of the "clean hands" rule. The old system of diplomatic protection had stood the test of time and was rich in precedent, but had been declining because of the establishment of more rigorous rules concerning investment disputes and developments in the field of human rights. It was precisely the tensions between those trends that made the topic an interesting one.

15. Mr. PELLET welcomed the fact that, at the very start of his preliminary report, the Special Rapporteur had raised many important questions which derived from two major problems that he would take up one by one: the historical origins of diplomatic protection, the legal fiction on which that institution was based and its relationship with human rights; and the nature—primary or secondary—of the rules to be codified by the Commission and the topic's relationship with that of State responsibility.

<sup>3</sup> General Assembly resolution 217 A (III).

<sup>4</sup> See 2522nd meeting, footnote 3.

16. The Special Rapporteur had pointed out that the institution of diplomatic protection could not be dissociated from the two age-old ideas on which modern-day international law was based: State sovereignty and international responsibility. He had therefore been right to refer in paragraph 6 of his preliminary report to Vattel,<sup>5</sup> the champion of State sovereignty triumphant. The idea that international law was primarily an issue between sovereign States had been forcefully reaffirmed in the judgment in the “*Lotus*” case,<sup>6</sup> which had been decided three years after the *Mavrommatis Palestine Concessions* case, in which the “traditional” theory of diplomatic protection had been stated in no uncertain terms.

17. However, the Special Rapporteur’s indignation about the institution of diplomatic protection was not entirely justified. The original purpose had been to mitigate the disadvantages and injustices to which natural and legal persons had been subjected. Hence, far from being an oppressive institution, diplomatic protection had at least partially rectified the injustices of a system that reduced the private person, both individuals and legal persons, to the rank not of a subject of international law, but of a victim of violations of that law. Nor was diplomatic protection in essence discriminatory, as stated in paragraph 8 of the report. It was discriminatory in its exercise, which was by definition almost exclusively the prerogative of the most powerful States. In that regard, Mr. Brownlie had warned that it was important not to generalize unduly: the institution was available to all States, although he would admit that some were “more equal” than others. In that sense, diplomatic protection was a component of the law of responsibility, which was, according to Jessup, the result of “dollar diplomacy”, which had taken shape mainly in the late nineteenth and early twentieth centuries in the very unequal relationship between Europe and North America, on the one hand, and Latin America—the third world of that time—on the other. Latin America had reacted against the rules imposed on it, as shown by the Calvo clause and the Drago doctrine.<sup>7</sup>

18. The institution of diplomatic protection was, moreover, not in itself a threat to human rights. It was, rather, a means of protecting those rights, even if that was not its primary purpose, and, when a State violated the rights of an individual, in the person of a national of another State, it enabled that State to take action in the absence of other protection mechanisms. In addition, the Special Rapporteur was perhaps wrong to adopt a human rights point of view exclusively, since it was different in conceptual and practical terms from diplomatic protection, which operated in other areas that had nothing to do with basic human rights, such as the protection of private economic interests, where it existed side by side with other mechanisms like ICSID, which gave private individuals direct access to international law.

19. The entry of private persons and, more specifically, of the individual, into the sphere of international law had very little to do with the dualism between legal systems that the Special Rapporteur had criticized. What was demonstrated by the examples he gave in the field of human rights—and he could have taken others from international economic relations—was that the individual had become a subject of international law—and he agreed with the Special Rapporteur on that point—and that that added a basic and entirely relevant component to the subject matter under discussion.

20. If the individual thus became a subject of international law, however, it could be asked whether it was appropriate to maintain the “legal fiction” which had been created in the late nineteenth and early twentieth centuries and which had been admirably expressed by PCIJ in the *Mavrommatis Palestine Concessions* case. That fiction had had no other purpose than to protect the interests of private individuals, who had admittedly not had any rights at the international level: it had been “as if” the State had been exercising its own right in taking the place of its national. It had to be decided whether that fiction served any purpose. In the first place it was difficult to see why the term itself had unleashed so many passions. Since it was well known that the law was made up of fictions or, in other words, of normative reconstructions of reality. In the case under consideration, diplomatic protection was a fiction because the factor that brought it into play, that is to say, harm to the interests of a private individual, was disguised as something else, that is the violation of a fairly elusive right of the State of ensuring that international law was respected in the person of its national. International lawyers were used to it, but the reasoning behind the system was being taken rather too far, especially since the law did not take the hypothesis to its logical conclusion: even leaving aside the Calvo clause which was of doubtful lawfulness and certainly entirely inconsistent with the basic fiction, and leaving aside the requirement of the exhaustion of local remedies by a private injured party and not by the State, there was still the eloquent example of compensation, which was assessed in terms of the damage suffered by the individual, not by the State.

21. Having concluded his analysis of the legal fiction, he had to admit he was in two minds. The ideal solution would probably be to acknowledge that private persons were subjects of international law with not only the capacity, but also a real possibility, to assert their rights directly at the international level. Effective international mechanisms would have to be set up for that purpose. Some did exist in the area of human rights or the protection of investments, for example, but they were exceptions. For all other purposes, it could be considered that the age-old institution of diplomatic protection would still serve a useful purpose and that it would be better to think twice before calling it into question. The Special Rapporteur was proposing that the veil should be lifted once and for all. He himself would advise caution. The Commission would do better to distinguish clearly between the two aspects of the problem, namely, the exercise of the right protected and the right itself. It should therefore first clearly recognize that it was indisputably the State of which the injured private individual was a national that had the right to exercise diplomatic protection, on the

<sup>5</sup> E. de Vattel, *Le droit des gens, ou Principes de la loi naturelle* (*The Law of Nations or the Principles of Natural Law*), English translation of the edition of 1758 in *The Classics of International Law*, vol. III (Washington, D.C., Carnegie Institution of Washington, 1916).

<sup>6</sup> *Judgment No. 9, 1927, P.C.I.J., Series A, No. 10.*

<sup>7</sup> See *Yearbook . . . 1956*, vol. II, pp. 216-217, para. 228.

understanding that, if an international mechanism was available to that individual, the problem did not arise. The Commission should then recognize that the rights protected were not those of the State, but, rather, those of the injured individual, whose identity must be more clearly defined in a future report. In any event, it must clearly recognize that the State had the discretionary right to exercise or not to exercise its protection.

22. The Special Rapporteur seemed to have such a dual approach in mind. It could be made even more explicit by indicating, first, that the fiction on which the *Mavromatis Palestine Concessions* formula was based was no longer relevant and that, when a State exercised its diplomatic protection in favour of one of its nationals, it was in fact the right of that national that the State was attempting to uphold; secondly, that, in the absence of institutions enabling protected individuals to act directly at the international level, the State had the discretionary power to exercise or not to exercise its diplomatic protection; and, thirdly, that the Commission would think *de lege ferenda* about ways of encouraging the State to exercise its protection. On that last point, however, it could do no more than to express preferences and make recommendations, since its responsibility was to codify international law and develop it progressively, not to revolutionize it. The movement to grant the individual the status of a subject of international law was well under way. The idea of raising diplomatic protection to the rank of a human right nevertheless seemed premature and, in any event, debatable, owing to the formidable technical and legal problems involved, some of which had been brought up by Mr. Hafner (2522nd meeting).

23. As to the relationship between diplomatic protection and State responsibility, the first question that arose was whether secondary rules alone should be taken into account or whether primary rules could also be considered. The distinction between the two was not always self-evident, but he was certain that there was every advantage to be gained by sticking very closely to the general approach adopted by a former Special Rapporteur, Mr. Ago, for the study of State responsibility. First of all, as the Special Rapporteur, Mr. Crawford, had pointed out in chapter II.B.1 of his first report on State responsibility (A/CN.4/490 and Add.1-7),<sup>8</sup> article 1 of the draft articles on State responsibility prepared by Mr. Ago<sup>9</sup> had been a stroke of genius because it had eliminated damage from the definition of international responsibility. Mr. Ago had also had that other stroke of genius of moving from so-called “primary” to “secondary” rules and of dealing not with the violations of the law themselves, but only with their consequences—that is to say, with the topic to be considered, since those very consequences constituted international responsibility: no matter what rule was violated, the consequence was always that the violator was responsible. The same approach should be adopted with regard to diplomatic protection.

24. In that connection, the terms in which paragraphs 60 to 64 of the preliminary report were drafted were rather disturbing. The Special Rapporteur referred to the deci-

sion of the Iran-United States Claims Tribunal in case A/18,<sup>10</sup> which seemed absolutely indefensible in modern-day law. The “Ago approach” was all the more essential in that nearly all of the doctrine in Romance languages made the topic of diplomatic protection an extension of that of responsibility. He himself believed that it should be an integral part thereof and should have formed part of part three of the draft articles on State responsibility.<sup>11</sup> Diplomatic protection was, after all, one of the ways of implementing that responsibility. It was indeed the only way where there was no agreement enabling a private individual to exercise his rights directly at the international level when harm resulted from an internationally wrongful act, which, it must be recalled, always gave rise to the responsibility of the author State.

25. In conclusion, he explained how he saw the interrelationship between diplomatic protection and State responsibility. First of all, they were linked in terms of reasoning: the State was responsible for any violation of international law which it had committed or had been attributed to it, as stated in part one of the draft articles on State responsibility. If that first condition was met, a number of consequences arose (part two of the draft), the main one being the obligation to provide compensation. Compensation gave rise to no problem if the internationally wrongful act committed by the State had caused damage to another State (leaving aside the hypothesis of international crime), in which case the issue remained at the inter-State level, but it did give rise to a problem when the injured party was not another State, but a private individual, who, with rare exceptions, did not have the capacity to act at the international level. It was precisely at that level that diplomatic protection came into play and thus proved to be an extension, a consequence and a component of the law of State responsibility. Accordingly, it would be wise not to reject the two strokes of genius that characterized the draft on State responsibility prepared by the former Special Rapporteur, Mr. Ago, as some of the wording at the end of the report under consideration seemed to be suggesting.

26. Mr. HAFNER said that two delicate points would have to be cleared up in the discussion that ensued. First, if, following the conclusion between two States of a treaty providing for the obligation of a State A to adopt legislation concerning the nationals of a State B, State A failed to comply with that obligation, would a claim by State B be part of the exercise of diplomatic protection or of a right of the State itself? In the latter case, the treaty would have conferred no immediately applicable right on the individuals concerned, since diplomatic protection could be exercised only if one of the rights granted to them under the domestic legislation of State A had been violated. Secondly, that issue would have consequences for the question whether the assessment of compensation came under the law of responsibility, or under diplomatic protection. In his view, the context of responsibility would govern the situation described above, although account should be taken of the link between the two.

<sup>8</sup> See footnote 1 above.

<sup>9</sup> *Yearbook* . . . 1973, vol. II, p. 173, document A/9010/Rev.1, para. 58.

<sup>10</sup> See 2520th meeting, footnote 7.

<sup>11</sup> *Ibid.*, footnote 8.

27. Mr. PELLET, referring to the first point, said that the analysis based on the case law of PCIJ, which had ruled that a treaty dealing with the treatment of aliens would confer rights only on the contracting States, was no longer correct in the modern age. In the relations between States, each State party to the agreement was entitled to have the other contracting State fulfil the provisions of the agreement, but, in the relations between State A and the nationals of State B, the treaty, addressing the treatment of aliens, vested them with rights justifying the exercise of diplomatic protection in the absence of an appropriate international mechanism. On the second point, it was true that diplomatic protection was a means of applying the rules on State responsibility in cases of mediate injury and that it established a link between the internationally wrongful act and its consequences, that is to say, first, the obligation to make reparation. The calculation of the compensation itself offered a striking illustration of the fiction on which the institution rested, since the compensation due to the State in respect of the rights which it supposedly possessed was made on the basis of the injury suffered by its nationals.

28. Mr. ECONOMIDES said that diplomatic protection could still be used by powerful States in the modern age, but that they managed to settle issues by diplomatic means without having to bring them before international bodies, to which, in contrast, small States had recourse; the two famous cases, *Mavrommatis Palestine Concessions* and *Ambatielos*,<sup>12</sup> had been brought by Greece as plaintiff. Too much importance was accorded to the notion of fiction. Diplomatic protection had actually come into being following the conclusion of the first agreements on permanent-resident status conferring rights on individuals in writing. In the event of a violation of those rights, the individual, as a subject of international law, had no other recourse than to make representations to the courts of the host State, but the sending State, which had been directly injured by the violation of the treaty, had taken the view that, having suffered injury, it had an interest in taking action. It was only very much later that the theoretical construct of the fiction had appeared.

29. Mr. ELARABY, drawing attention to the abuses by the big Powers which had marked the history of diplomatic protection, said that, whatever the result of its work, the Commission would have to try to fill a number of gaps in order to deny powerful States the possibility of taking action against weaker States. It would also have to give attention to the unequal development of human rights rules, in time and from country to country, so as not to create a need for increased intervention.

30. Mr. BENNOUNA (Special Rapporteur) said that the history of the institution had indeed been marked by instances of abuse, but the purpose of diplomatic protection could not itself be criticized. He had in fact referred to human rights in order to show that, in parallel with the question of investments, the individual was increasingly the addressee of certain rules of international law. However, the study of diplomatic protection was not designed to provide a definition of the rights in question.

31. Mr. Sreenivasa RAO said by way of a preliminary comment that the Commission should take account of the historical evolution of the institution of diplomatic protection and try to move away from the fiction by according the individual as direct a role as possible in the relationship in question, for States could essentially take action within the framework of State responsibility, subject to the conditions and parameters proper to that sphere. The consideration of the historical evolution prompted him, moreover, to wonder whether the Commission could limit itself to the study of the secondary rules of diplomatic protection. He looked forward to fresh guidance from the Special Rapporteur on that point. With regard to the nationality link, he would like the Special Rapporteur to explain the meaning of the last sentence of paragraph 60 of the preliminary report, at least as far as the English version was concerned.

32. Mr. ROSENSTOCK said that he shared Mr. Pellet's doubts about paragraphs 60 to 64 of the preliminary report. The notion of diplomatic protection must be understood as the formulation of its claims by a State, for the gradual emergence of new instruments and mechanisms had not fundamentally changed the nature of diplomatic protection. The study of the topic from a contemporary perspective might, for example, prompt a rereading of the *Nottebohm* case, with more importance attached to human rights and the need to prevent statelessness, and might possibly lead to the production of different criteria. It would not, however, be a good idea for the members of the Commission to reopen the debate on notoriously controversial points, which were, moreover, merely subsidiary in relation to the question of diplomatic protection in the strict sense. That had indeed been the meaning of the Commission's decision at its forty-ninth session to limit the topic to the codification of secondary rules.

33. Mr. BENNOUNA (Special Rapporteur) said that he disagreed with Mr. Rosenstock and that it would be very useful, at the first session devoted to consideration of the topic of diplomatic protection with a view to its codification, to review the history of diplomatic protection, including any abuses to which its exercise had given rise, as well as the limits of the topic. There was no need to shrink either from a theoretical debate or from the doctrinal opposition expressed during the preliminary discussion, for such a debate would remove the obstacle of substantive opposition which lay in wait.

34. Summing up the discussion of the topic, he said that most of the speakers had acknowledged that the institution of diplomatic protection had developed at a given period in history and that the juridical construct on which it was based had taken account of the facts of international law as they had existed before the adoption of the Charter of the United Nations. The distortions and abuses to which the institution had been subjected reflected the profoundly unequal nature of international relations at that time and, in particular, the absence of such counterweights to the sovereignty of States as the rights of peoples and the rights of individuals.

35. All the speakers had stressed the importance of diplomatic protection and its continued validity as a means of protecting the victims of denials of justice in various

<sup>12</sup> *Merits, Judgment, I.C.J. Reports 1953*, p. 10.

national legal systems; hence the need to strengthen its role in guaranteeing the rights of individuals. From that standpoint, diplomatic protection and the machinery for the protection of human rights acted as complements to each other in the promotion of the pre-eminence of law in the treatment of individuals. At the current time, diplomatic protection was undergoing modernization in the light of the development of international law since the adoption of the Charter of the United Nations. The task was therefore both to codify a topic which was ripe for codification and to relocate it in the contemporary historical context.

36. At the current time, in fact, some rights were accorded directly to the individual at the international level. The individual possessed those rights from the outset and retained them intact, but they could be defended by his State of nationality by means of the institution of diplomatic protection. It thus emerged from the discussion that it must be accepted that, in accordance with the traditional case law and doctrine, the State of nationality had a discretionary power by virtue of the nationality link, but that, in view of those new rights of the individual, a State was not automatically and in all scenarios asserting its own right when exercising diplomatic protection. It had thus been proposed that the question put in paragraph 54 of the preliminary report should be answered by drawing a distinction between, on the one hand, the right either of the individual as the direct addressee of certain rules of international law or of the State and, on the other hand, the exercise of that right, which in all scenarios was a matter for the discretionary power of the State of nationality. A kind of right of the individual to enjoy the protection of his State of nationality was indeed beginning to emerge in some national constitutions, but that obligation did not yet exist in international law. With the help of the Secretariat, the Commission would seek to ask States to inform it about the status of their legislation on the topic.

37. An individual also had the possibility of recourse to international bodies, including courts of arbitration, and the State could always espouse his cause and enforce his rights through the procedures available to it vis-à-vis the host country. In future, he would try to clarify the relationship between those two different means of recourse. It had been pointed out in that connection that the boundaries between some of the legal categories used to delimit the topic at the Commission's forty-ninth session were neither watertight nor rigid, especially with respect to the distinctions between direct and indirect injury and between primary and secondary rules. In the case of that second distinction and to reply to the question put in paragraph 65 of the preliminary report, the main tendency in the Commission was to accept that the frame of reference, for the purposes of the topic, consisted of secondary rules, but that, in its consideration of the topic, the Commission should bear in mind the inevitable clashes with primary rules, which must be taken into account when answering questions about, for example, the rights in question, the nationality or the nationals concerned, the "clean hands" rule, and so forth. It was clear from the discussion that wisdom did not consist of reproducing the past, but of reading the past with an eye to the present.

38. He wished to make it clear that his comments about the Commission's secretariat should not be interpreted as

criticism, but, on the contrary, as an appeal to the Secretary-General to boost the resources of the Codification Division to enable it to cope with the very heavy workload which it had to bear, in respect of the Commission in particular.

39. Mr. PELLET said that the terms "direct injury" and "indirect injury" were dangerous in the context of State responsibility and that it was more a question, in the topic under consideration, of the distinction between mediate and immediate injury. Furthermore, while a right to diplomatic protection certainly did not exist in international law, it might nevertheless be asked whether, in the event of a serious violation of the rights of the human person, a State which did not exercise its diplomatic protection would not for all that be violating a rule of general international law.

40. Mr. MELESCANU said that the notion of denial of justice used by the Special Rapporteur must be understood in the general sense of the term. While some national constitutions did contain an obligation to provide diplomatic protection, it was very doubtful whether that constituted an obligation in international law; hence the need for a careful redrafting of the questionnaire on the topic which was to be sent to States.

41. Mr. KUSUMA-ATMADJA said that he was generally in agreement with the Special Rapporteur's conclusions, provided that the points raised by other speakers, in particular Mr. Pellet, were incorporated in them. He would also welcome clarification of the notions of legal construct or fiction and of the distinction between "individual" and "person". He cited three cases in which Indonesia had accorded its diplomatic protection to its nationals over the past year and said that soft law could in some cases prove more effective.

42. Mr. BENNOUNA (Special Rapporteur), referring to the Commission's further work on the topic, said that the conclusions he had offered were the ones he had personally drawn from the discussion. The Commission must at the current time, perhaps during the drafting of its report to the General Assembly, produce some preliminary conclusions of its own, provide guidance for the Sixth Committee's debates on a number of points and prepare the questionnaire to be sent to Member States.

43. The CHAIRMAN pointed out that the Commission must comply with the programme of work it had submitted to the General Assembly.

*The meeting rose at 1.15 p.m.*

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## 2524th MEETING

*Tuesday, 5 May 1998, at 10 a.m.*

*Chairman:* Mr. João BAENA SOARES

Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

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**Unilateral acts of States (A/CN.4/483, sect. F,  
A/CN.4/486,<sup>1</sup> A/CN.4/L.558)**

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur for the topic of unilateral acts of States to introduce his first report (A/CN.4/486).
2. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that, in accordance with its request at the forty-ninth session,<sup>2</sup> the Commission had before it his first report on unilateral acts of States. He trusted that he would receive members' comments and guidance for further work in preparing a substantive report for the next session.
3. The first report, which was in the nature of an introduction to the topic, reflected much of the doctrine, jurisprudence and State practice on which the Sixth Committee had commented (A/CN.4/483, sect. F). It took account of the Commission's earlier work and in particular of the conclusions contained in the report of the Working Group established at the Commission's forty-ninth session.<sup>3</sup> Despite the many doctrinal works on unilateral acts of States in general and the number of unilateral legal acts in particular, they were not necessarily consistent. The main purpose of the first report, therefore, was to decide on a systematic approach to the study of such acts, in keeping with the methodology proposed.
4. PCIJ and ICJ, having considered unilateral declarations of States on a number of occasions, had concluded that they were binding regardless of whether they fell within the treaty sphere (*Legal Status of Eastern Greenland* case). In two other cases, ICJ had held that there had been legal unilateral declarations (*Nuclear Tests* cases) while in others that there had been political declarations which had no legal force (*Frontier Dispute* and *Military and Paramilitary Activities in and against Nicaragua* cases).
5. As to the scope of the topic, the first report took the view that it would not be possible to work on the codification and progressive development of the rules to govern the functioning of a specific category of the legal unilateral acts of the State until a definition, or at least the elements of a definition, were found. In particular, it was important to decide whether a unilateral act that could be the subject of codification and progressive development

was a formal unilateral act, in other words, a declaration that would be to the law of unilateral acts (if deemed to be a branch of international law) what a treaty was to international treaty law.

6. Chapter I of the first report related to the existence of unilateral acts of States and chapter II related to strictly unilateral acts of States. The latter term had been used for the sake of convenience simply to differentiate such acts from non-autonomous or dependent acts whose operation was governed by existing rules.

7. There was absolutely no doubt that, as reflected in international practice and general doctrine, unilateral acts did exist in international law. States performed a variety of unilateral acts in their foreign relations: some political, others legal and many others indeterminate. But they all had an important effect internationally. The topic called for an initial delimitation of the acts that would fall outside the ambit of strictly unilateral or autonomous acts, and, also, for a subsequent limitation with a view to laying down criteria for determining that category of acts. It was important to note that, just as not all treaty acts fell within the law of treaties, so not all unilateral declarations would fall exclusively within the law of unilateral acts. The introduction to the first report drew a distinction between non-legal unilateral acts—or political acts, unilateral legal acts of international organizations and the conduct, attitudes and acts of the States which, though carried out voluntarily, were not performed with the intention of producing specific legal effects.

8. The purpose was to endeavour to arrive at a definition of a strictly unilateral act, with a view to preparing more precise reports on rules pertaining to the preparation, validity, effects, nullity, interpretation, revocation and modification of such acts. To that end, the Commission should, in a kind of parallel approach, take account of the law of treaties and particularly of the methodology it had adopted when examining the matter, but bearing in mind the specific nature of unilateral acts.

9. The introduction to the first report, which sought to arrive at an initial delimitation, first took up political acts. It was of course no easy matter to determine the nature of an act performed by a subject of international law and, in particular, the State. A political act might be purely political if it produced only political effects and, consequently, did not produce legal effects—a significant occurrence in State practice. But there was no reason why an apparently political act, formulated outside the context of negotiations and in a political context without any of the formalities specific to an international legal act, could not contain legal elements that bound the State. The intention of the State was essential in determining the nature of the unilateral act. It would be for the courts to interpret whether the State, in performing a political act, had intended to enter into legal obligations. That was apparent from the *Nuclear Tests* cases and the decisions taken by ICJ when it had inferred that political declarations made outside the context of negotiations could contain legal elements binding on the State.

10. Accordingly, acts which were regarded as strictly political, in other words, which produced solely political

<sup>1</sup> Reproduced in *Yearbook* . . . 1998, vol. II (Part One).

<sup>2</sup> *Yearbook* . . . 1997, vol. II (Part Two), p. 66, para. 213.

<sup>3</sup> *Ibid.*, p. 64, chap. IX, sect. B.

effects, must be excluded from the scope of the report. Obviously, such political acts were significant in international relations. States could enter into political commitments via such acts so as to regulate their conduct at the international level, and, even if non-compliance did not give rise to a legal sanction, the political responsibility of the State would be at issue, affecting its credibility and hence its participation in international relations. Strictly political commitments could not be equated with legal commitments, but there was a common element in that both acts governed the conduct of the State in international relations, although they might have different consequences especially in the case of non-compliance.

11. Again, the first report did not deal with the unilateral legal acts of international organizations, a subject that nonetheless called for special consideration. Such acts undoubtedly existed, as was evident from an ever-increasing body of practice. However, unilateral acts of international organizations were founded on the will of States as reflected in the constituent instruments of those organizations, on the powers vested in the organizations, and could give rise to obligations. That also differentiated them from unilateral acts of the State, which could, in principle, only create rights in favour of third parties. From legal writers and from the practice of international organizations, at least those of a universal character, it could be inferred that a wide variety of acts were formulated as resolutions: they were sometimes recommendatory and sometimes involved decisions, but had different legal effects. Unilateral acts under decision-making resolutions were legally binding, such as those that related to the operations of the organization or that were addressed to a subsidiary body and could also be vested with legal force. Others, in the nature of recommendations and addressed to States, although not binding, were highly relevant to international law, particularly so far as the formation of customary rules was concerned. Yet other unilateral acts, which had received little attention from legal writers, were those formulated by the organization's highest administrative authority, in the exercise of its powers, and were not only those of an internal nature but also those relating to one or more States or to the international community as a whole.

12. That account, which showed how complex the topic was, highlighted the difficulties of drawing up rules common to States and international organizations, especially in the matter of the binding nature of such unilateral acts. Although States and international organizations were subjects of international law, there were significant differences in terms of their powers and the formulation of their acts, which made it necessary, for the time being, to separate acts of international organizations from the consideration of unilateral acts of States.

13. The first report also excluded unilateral acts of States which might be connected with international responsibility, the issue the Commission was considering on the basis of the first report on State responsibility submitted by the Special Rapporteur, Mr. Crawford (A/CN.4/490 and Add.1-7)<sup>4</sup> and the first report on prevention of transboundary damage from hazardous activities submit-

ted by the Special Rapporteur, Mr. Sreenivasa Rao (A/CN.4/487 and Add.1).<sup>5</sup> That did not mean acts relating to international responsibility were of no interest for unilateral acts. They too were unilateral although some might be contrary to international law and others not. Unilateral declarations formulated by a State, which could have international legal effect, could be directly related to the question of international responsibility. The exclusion related more to the actual subject of responsibility than to unilateral acts themselves.

14. Chapter I of the first report, on the existence of unilateral acts of States, took up the fundamental question of sources of international law and sources of international obligations, distinguishing between formal legal acts and the legal rules that created such acts and focusing on unilateral declarations as legal acts whereby legal rules, and in particular legal obligations, were created for the declarant State. In his view, a unilateral declaration was a formal legal act whereby legal rules could be created; accordingly, it could be the subject of special rules governing its operation. It had been felt important to consider more closely declarations as a formal legal act of the State, regardless of content: that had a bearing on a later section of the report which dealt with criteria for determining the strictly unilateral nature of legal acts of States. Again, distinguishing between the formal declaration and the rule it embodied could make it easier to consider unilateral acts of States. That did not, however, mean the substantive act was not taken into account when deciding whether a unilateral declaration was autonomous or independent.

15. Chapter I also spoke of the various substantive legal acts of States with a view to determining those which might fall outside the treaty sphere and therefore require special rules to govern their operation. Unilateral acts connected with the law of treaties fell, without undue difficulty, into the treaty sphere insofar as the relevant rules and in particular the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention") would apply. That was true, in particular, of acts such as signature, ratification, formulation of reservations and even interpretative declarations.

16. Similarly, acts relating to custom were excluded, though unilateral acts were undoubtedly of great importance in that respect. An important question had to be considered: a unilateral act of the State could form part of the process of the formation of a customary rule, but at the same time it could be autonomous if the requisite conditions obtained in order for it to be regarded as an autonomous or strictly unilateral act. At all events, the first report showed that in the process of the formation of custom a unilateral act was part of a tacit consensual process inasmuch as such acts were basically a reaction to other pre-existing acts.

17. Another category of apparently autonomous unilateral acts excluded from the first report were those resulting from the exercise of a power granted under a treaty or by virtue of a rule of customary law. Such was the case, for instance, with unilateral acts of the State involved in the establishment of maritime zones, and particularly of

<sup>4</sup> See footnote 1 above.

<sup>5</sup> Ibid.

the exclusive economic zone, something that was generally set out in an internal legal act. In those instances, even though they created rights in favour of the declarant State and obligations for third States, they were valid in international law. That affirmation had called for a general comment in the report on internal unilateral legal acts of States which were not connected with pre-existing rules, in other words, internal legislation and its extraterritorial legal effects.

18. In that connection it was important to note that unilateral legal acts could not create obligations for third States which had not participated in their elaboration, something that was in keeping with settled principles of international law, unless the third State so agreed. Internal unilateral legal acts were without a doubt relevant to international law; that was true, for instance, in the case of the formation of custom and when such acts were connected with the law of treaties, particularly where the development of international commitments was concerned. Consequently, the State's internal legislation could not be of extraterritorial scope, in other words, it could not create obligations for third States which had not participated in its elaboration.

19. Furthermore, unilateral legal acts of States should be disregarded where, by virtue of their very nature, they formed part of a treaty relationship, as in offer and acceptance or the simultaneous unilateral declarations to be found in international practice which reflected a treaty relationship and to which the existing rules would apply.

20. He thought a brief comment on estoppel should be made. Estoppel was a rule of evidence which, though Anglo-Saxon in origin, had at the current time found a place in the doctrine and jurisprudence of international law but which, while it had been considered on a number of occasions by international judicial bodies, had rarely been used as the basis for a ruling. He would refer members in that connection to the *Corvaia* case between Italy and Venezuela in 1903.<sup>6</sup> The term "estoppel" was accepted in international doctrine, although some writers thought it inappropriate to transfer a concept of internal law to international law when general rules that were applicable already existed. Jurisprudence, for its part, had apparently considered it only in its restrictive form, namely, estoppel by representation. That was apparent from, among others, the *Legal Status of Eastern Greenland*, *North Sea Continental Shelf*,<sup>7</sup> *Temple of Preah Vihear*,<sup>8</sup> *Nottebohm*, and *Barcelona Traction, Light and Power Company, Limited*,<sup>9</sup> cases and the *Arbitral Award Made by the King of Spain on 23 December 1906*.<sup>10</sup> Estoppel in itself was not of interest to a study of unilateral acts, but the conduct and the actions of the State which allowed it to be invoked did bear an apparent relationship to unilateral legal acts. However, while it was clearly important to consider them when studying the acts under consideration, the conduct of the State which allowed another State to rely on estoppel in any proceed-

ings was of a different kind. Estoppel related to acts or conduct that created certain expectations in a third State on the basis of which that State adopted an attitude that caused it harm or damage. The matters which might allow estoppel to be invoked in proceedings could arise from a positive act or a passive one, such as silence. In estoppel, the main thing was the objective appreciation of the third State, namely, whether it had relied on the intention as deduced from the attitude of the first State. Notwithstanding a certain similarity between the conduct and acts that allowed estoppel to be invoked, a unilateral declaration was a formal legal act carried out precisely with the intention of producing legal effects, which would not be the case with the conduct and attitudes connected with estoppel. Moreover, a unilateral declaration would place the State under an obligation from the moment of its formulation. In the case of estoppel the effect flowed not from the will of the State whose conduct it was but from the representation made by the third State concerning the will of the author. The conduct of the third State was fundamental, whereas, in the case of a substantive unilateral act, such as promise, and as indicated by ICJ in its decisions in the *Nuclear Tests* cases, the conduct of the beneficiary did not determine whether it was binding in character. Interestingly enough, on that point, some writers took the view that, in the *Barcelona Traction, Serbian Loans*<sup>11</sup> and *North Sea Continental Shelf* cases, estoppel was treated as a special means of establishing a treaty relationship.

21. The first report also expressly excluded certain conduct and attitudes on the part of the State that were not formal legal acts although they could have legal effects. That applied to silence, which was a failure to act on the part of the State or, as some felt, one form of consent. Silence was a passive attitude which, in most cases, was reflected in tacit assent. It was not a strictly unilateral act within the meaning of the topic under consideration, since it could not have an autonomous effect nor could it create a new legal relationship. Still less was it a formal unilateral legal act comparable to a unilateral declaration. The same was true of notification, which, regardless of whether it was a legal act, although he agreed that it did not produce effects per se, was not formally autonomous since it related to a pre-existing act.

22. Chapter II dealt with the criteria which, in his view, determined the strictly unilateral nature of the legal act and the legal basis for its binding character, in an effort to arrive at a definition of a strictly unilateral act. Such an act, which could produce effects at the international level, should be considered as a single expression of the will of one or more States, in other words, what was involved were individual and collective unilateral acts. He had termed such acts hetero-normative in that they produced effects and in particular created rights in favour of third parties who had not participated in their elaboration. That criterion was not, however, sufficient to determine whether such acts were autonomous, independent or purely unilateral. It was necessary to think in terms not only of the single attribution but of the autonomy of the act and of the autonomy of the obligation entered into by the declarant State. A strictly unilateral legal act had to be

<sup>6</sup> UNRIAA, vol. X (Sales No. 60.V.4), pp. 609 et seq., at p. 633.

<sup>7</sup> *Judgment, I.C.J. Reports 1969*, p. 3.

<sup>8</sup> *Merits, Judgment, I.C.J. Reports 1962*, p. 6.

<sup>9</sup> *Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6, in particular pp. 24-25.

<sup>10</sup> *Judgment, I.C.J. Reports 1960*, p. 192.

<sup>11</sup> *Judgment No. 14, 1929, P.C.I.J., Series A, No. 20.*

autonomous and independent of any manifestation of will, whether prior, simultaneous or subsequent. Otherwise, the act would be unilateral in form and would fall into the treaty sphere. In addition, however, as clearly noted in the report, the autonomy of the obligation was a decisive criterion in establishing its strictly unilateral nature.

23. Any legal act created, by virtue of its very structure, rights and obligations, and a unilateral act naturally created obligations for the State which performed it and rights in favour of third parties. But in that case the obligation arose not at the time of acceptance or of any subsequent conduct on the part of the third State but when the State that formulated the declaration or carried out the unilateral act intended to enter into a commitment and to assume the international legal obligation, which was possible when it exercised the power of self-limitation conferred upon it by international law. There were important practical consequences to the autonomy of the obligation. As noted in the report, when the courts considered whether an act was strictly unilateral and determined its legal effects, they would examine the formulation of the act and not the conduct of the other State although the latter could acquire rights, as was so held by ICJ in its judgments in the *Nuclear Tests* cases.

24. Chapter II referred to the legal basis of the binding nature of unilateral acts of States. In the first place, as in treaty law, under which every treaty had to be performed in good faith, a unilateral declaration had to be respected in the same way. Given the need for mutual trust and international legal certainty, good faith also had to be regarded as fundamental to the binding nature of unilateral acts of States. Furthermore, the decisions of ICJ in the *Nuclear Tests* cases, which were essential to a study of the sources of international law and international obligations, made it clear that the binding nature of a substantive unilateral act—a promise, in the event—was based on good faith. The binding nature of such acts by the State would also be based on the power of self-limitation, deriving as it did from the capacity to act at the international level and to enter into international obligations that were not necessarily subject to the principle of reciprocity. The State could enter into international obligations unilaterally and autonomously, in the exercise of its sovereignty and by the capacity conferred upon it by international law. Accordingly, the binding nature of a unilateral legal declaration by the State would be based not on any legal interest the third State might have but on the actual intention of the State that formulated it, something which had important practical consequences when the international courts came to interpret an act of that kind.

25. Again, with the law of treaties, the *pacta sunt servanda* rule lay at the basis of its binding nature, as was apparent from article 26 of the 1969 Vienna Convention. In the same way, in the case of unilateral acts a special rule, such as *promissio est servanda* could be used for the specific case of promise. It was also possible in that connection to use the rule *acta sunt servanda*, or, more specifically, *declaratio est servanda* as a basis for the binding nature of the unilateral declarations of the State.

26. A definition was therefore fundamental for the future work and the first report endeavoured to submit its

constituent elements. A strictly unilateral declaration could be regarded as a clear and unambiguous autonomous manifestation of will, expressed explicitly and publicly by a State, with the object of creating a legal relationship and, in particular, of creating international obligations for itself, in relation to one or more States which had not participated in its elaboration, without any need for that State or those States to accept it or for subsequent conduct signifying such acceptance.

27. Clearly, unilateral acts of States did exist in international law. Some of them were truly autonomous in the sense that they were strictly unilateral and were not subject to any other manifestation of will, and through them, new legal relationships were created. Consideration by the Commission of those acts was of practical interest and considerable political relevance, since international law must adjust to the fact of life that States were increasingly resorting to the formulation of unilateral acts, many of which had a legal content and some of which fell within the field of strictly unilateral acts. If the Commission took the view that a unilateral declaration, as an act whereby international legal rules could be created, was a subject for the formulation of rules governing its operation, it would be advisable to consider forthwith the scope of the work ahead. To that end, it would be helpful if the Working Group established at the previous session could be reconstituted. It would also be advisable to push on with work on the content and scope of the topic, with a view to reaching a decision on the matter. It was important to note that a final document on the topic should exclude unilateral acts other than declarations. The 1969 Vienna Convention referred to treaties—or written agreements—which did not mean there were no other conventional acts in international law. In his view, therefore, any further work on the topic should take very careful account of the law of treaties, not only from the standpoint of form but also from that of the procedure for adopting the 1969 Vienna Convention and the methodology used at that time.

28. He thanked all those who had assisted him with their comments and had supported him during his work.

29. Mr. BROWNLIE expressed his congratulations to the Special Rapporteur on a very helpful first report on what was probably by far the most difficult and protean topic on the Commission's agenda, and also one which, as colleagues who practised before international tribunals would recognize, had important practical applications. While it might be premature to decide on the ultimate form of the Commission's work, that consideration should influence the way in which the work was conducted. His first impression was that, given the nature of the subject, the most useful form the product could take would be that of an expository study. On the other hand, attempts to codify the subject might prove positively unhelpful.

30. His concerns on the matter stemmed from the fact that he seriously doubted whether the topic was a unified subject. If he was right, it did not mean the topic was flawed, but it should nevertheless influence the way in which the subject matter was approached. He was reluctant to impose categorical limits on an "umbrella" topic of which the outside world might take a more untidy view.

Unilateral acts should therefore not be defined narrowly—though the Commission might still wish to classify them in various ways. The question arose of the effect of the conduct of States, and of implied acceptance or acquiescence, as in the decision in the *Arbitral Award Made by the King of Spain on 23 December 1906*, in which Nicaragua had been held to an arbitral award essentially on the basis of her subsequent conduct. In his opinion, a pure definition of a unilateral act—if one could be found—should not also serve as a definition of the mandate. He did not mean to imply that it was unhelpful to try to isolate the concept of a unilateral act, at least for some purposes. But he was not sure it would be wise for the Commission to treat that definition as the perimeter of the subject. In the final analysis, even if one accepted—as one should—the Special Rapporteur's setting aside of various forms of subject matter as not falling within the Commission's mandate, the fact remained that the Commission was dealing with a series of separate legal institutions. Even at a cursory glance, he had already identified five such institutions.

31. First, there was implied consent on the basis of conduct, including silence. Secondly, there was the issue of opposability. Although the *Fisheries case (United Kingdom of Great Britain and Northern Ireland v. Norway)*<sup>12</sup> had probably been decided on the basis of general international law relating to the system of baselines, the reasoning in the decision, and especially the last six pages of the judgment, were essentially based on opposability. The fact was that over a period of decades, in the face of the development of the Norwegian system of baselines, the United Kingdom—which was after all another riparian State, and one whose fishermen had been directly affected by that system after 1906—had kept silent, making no formal protest until as late as 1933. Opposability thus probably formed part of the same family as protests and reservations of rights.

32. Thirdly, there was estoppel. With all due respect to the Special Rapporteur, he was not convinced that in international law estoppel could still properly be described as an institution of Anglo-Saxon doctrine. There was currently a very well-established jurisprudence in ICJ, starting with paragraph 26 of the judgments in the *North Sea Continental Shelf* cases, incorporating a version of estoppel—with the condition of detrimental reliance—into public international law. There were at the current time six such cases and five of them referred back to that same paragraph.

33. Fourthly, there were declarations which were binding per se on the basis of good faith, as accepted by ICJ in the *Nuclear Tests* cases. Fifthly, in the *Corfu Channel* case, a major part of the evidence of Albanian responsibility relied on by the Court had been what it called the “attitude” of Albania—both its statements and its silences in the period after the mines had exploded. All those examples suggested that the intention of the first State actor was not in all cases a necessary condition for the existence of legal effects. That was another respect in which the Commission should take care to employ categories as useful dividers, rather than to fix unnecessarily rigorous outer limits to the subject.

34. Mr. HAFNER said that all five institutions referred to by Mr. Brownlie were the result of “activities” or “attitudes” of States, rather than of “acts” of States as the term was usually understood. Should the unilateral act be understood as comprising all the activities of the State that had an effect, or as comprising only activities of the State that were intended to create a legal effect, in which case the term “act” would cover a narrower field than the term “activity”?

35. Mr. BROWNLIE said he accepted that a problem did exist in that connection. At the same time, he did not accept that all five examples he had cited involved activities or conduct. The *Nuclear Tests* cases were regarded as relating to unilateral acts, and although there was doubtless a grey area, it would be unduly doctrinal for the Commission to confine itself to certain types of unilateral acts. Quite often there was a pattern of conduct that included unilateral acts and also significant silences. As for Mr. Hafner's question concerning the need for a legal intention of some kind, it was a condition that would be appropriate for some, but not all, departments of the subject. Perhaps accepting the complexity and departmentalization of the subject was an easier way out than insisting that the subject was more unitary than it really was.

36. Mr. GOCO said that the first report on unilateral acts of States contained a convincing exposition of what could not be regarded as unilateral acts. While there was no doubt that formal unilateral acts of States existed in international law, the majority of such acts nonetheless fell within the sphere of treaty relations.

37. In paragraphs 96 and 97 of the first report, the Special Rapporteur also pointed out that States carried out a number of acts which could be regarded as falling within the treaty sphere; and referred to a number of legal acts which were unilateral in form but which fell within the realm of the law of treaties as such. The report went on to mention a variety of other State acts which, though producing legal effects and binding on the State concerned, did not fall within the category of unilateral acts. It cited the Statute of ICJ, Article 38 of which set out the main formal sources of international law, without, however, mentioning unilateral acts of States. The fact that unilateral acts of States were not mentioned in article 38 could not, of course, in itself preclude their treatment as such.

38. The report also made a serious attempt to separate the legal acts of States from their political acts. Demarcating the division between the two was no easy task. Despite an attempt to define a political act as one underpinned by the political will of the State performing the act, the basis for whose obligatoriness resided in morality and politics, in the final analysis it was the intention of the State in entering into the commitment that determined its legal or political character.

39. The aim of the current exercise was, first of all, to identify, by considering the various acts and forms of conduct of States, the constituent elements of a definition of a unilateral legal act, and to determine whether they existed in international law and, if so, whether the rules governing those acts could be the subject of codification and progressive development. That aim was in full conformity with the mandate assigned to the Special Rapporteur.

<sup>12</sup> *Judgment, I.C.J. Reports 1951*, p. 116.

teur by the Working Group at the forty-ninth session of the Commission.<sup>13</sup>

40. In general, acts and conduct of Governments could not be directed towards the formation of agreements, yet were capable of creating legal effects. While there were certain identifiable acts that could be deemed unilateral acts—protest, promise, renunciation, recognition, declaration—there were still many that could be treated as unilateral acts only by means of an interpretation of their constituent elements. In his conclusion the Special Rapporteur himself admitted the difficulty of pinning them down and placing them in a specific category. A similar view had been expressed in the Sixth Committee. That was precisely where the difficulty lay: while there was no dearth of practice, doctrine and jurisprudence on the acts and conduct of States, they were not always consistent.

41. The aim of obligatoriness under international law was for the concerned State to be bound by its act or conduct. A unilateral act must have consequences, even if the intention to enter into an undertaking, as in a treaty, was absent. For such an act might affect a third State or third party, so that it could indeed bear legal effects or obligations. But to identify those acts and find a degree of consistency or an underlying pattern in them might be difficult. To be bound as a consequence of a unilateral act depended to a large extent on an appreciation of the facts. In the *Nuclear Tests* cases, the Court had decided that France was legally bound by its public declaration to stop conducting atmospheric nuclear tests. However, in the *North Sea Continental Shelf* cases the same Court had held that unilateral assumption of the obligations of a convention by conduct was not likely to be presumed and that a very consistent course of conduct was required in such a situation.

42. There seemed to be little treatment in the first report of effects or consequences. The binding character of a unilateral act would be illusory if the legal relationship the act created were to be terminable unilaterally and at the will of the author State. For if the act was unilaterally revoked or terminated, what would become of its binding effect?

43. Finally, the report laid down the criteria for a strict definition of unilateral acts and the legal basis for their binding character. He doubted, however, whether those criteria were sufficient to encompass all acts. As to the legal basis, in his view, only the principle of good faith of the declarant or promisor State could serve as a legal basis for obligatoriness. If such good faith was expressed, then there would be no call to bring the matter before an international tribunal.

44. Mr. LUKASHUK drew attention to paragraph 45 of the first report on unilateral acts of States, in which the Special Rapporteur stated that the obligatoriness of a political engagement was at times far more effective and consequential than that of a legal engagement. Mr. Pellet had begged to differ, giving it as his view that legal obligations were always supreme. Yet if Mr. Pellet, on his way to the university to deliver a lecture in fulfilment of his legal obligation, were to encounter a child drowning in

a lake, he would undoubtedly intervene in order to rescue the child, thereby putting his moral duty before his legal obligation.

45. More importantly, the Special Rapporteur spoke, not of the supremacy of political applications, but of their effectiveness, which was quite another matter. During the cold war, for instance, a whole complex of “rules of the game” had been evolved by the Union of Soviet Socialist Republics and the United States of America in the sphere of security. Both sides had recognized that those political rules were highly effective—more so, indeed, than some treaties. That, however, did not undermine the authority of treaties and the role they played. General de Gaulle had once remarked that treaties are like women: good while they are young. For lawyers, a more seemly motto would be: treaties are like women, in that women always remain women.

46. The Special Rapporteur considered the sources of international law as methods and procedures for creating international law and international rules. It was well known that a source of international law signified not only the method of creating rules, but also the form that such rules took. It was in that sense that ICJ used the concept of a treaty in its practice. The Special Rapporteur needed to have recourse to that conception in order to resolve the central problem of the first report, namely: that while unilateral acts of States did not constitute a source of law, that did not mean a State could not create international law through its unilateral acts (para. 81). It appeared, however, that by not constituting a source of international law, a unilateral act could not in itself create rules of international law. As the Special Rapporteur rightly stressed, a unilateral act could create an international obligation of the State, which was another matter.

47. He also doubted the Special Rapporteur’s view that a unilateral act could establish unilateral relations. It seemed to him that legal relations must always be at least bilateral. Love could be unilateral, but there was no such thing as a unilateral marriage contract. Consequently, one could scarcely agree with the proposition contained in paragraph 133 of the first report that a unilateral act should be understood as an act which was attributable to one or more States and which created a new legal relationship with a third State which had not participated in its elaboration. In point of fact, such a legal relationship could not be created without the agreement of the third State. An important question arose in connection with a unilateral act involving several States, one on which the Special Rapporteur unfortunately did not touch, namely: what were the relations and obligations between the participants in a unilateral act, and to what extent were they binding? The Special Rapporteur, guided by practice, rightly defined the rule giving rise to the binding force of the unilateral act as the principle of good faith. So there was no need to invent any special rule such as *declaratio est servanda*, proposed by the Special Rapporteur in paragraph 157. The principle of good faith was enough.

48. Those debatable questions confirmed the complexity of the topic. Consequently, it would be advisable to define the fundamental parameters of the study from the outset. In his view, it would be helpful to turn first to national law, from which it could be seen that Roman law

<sup>13</sup> See *Yearbook . . . 1997*, vol. II (Part Two), p. 65, para. 209.

had never attached any significance to a unilateral manifestation of the will of an individual: only agreements had legal consequences. The French Civil Code, too, contained no concept of unilateral acts, referring only to quasi-contracts, which were a different matter. Admittedly, German law contained the well-known concept of *Rechtsgeschäft*, which was close to that of a unilateral act. The Italian Civil Code of 1938 provided for *promesse unilaterali*, which, however, had legal significance only if provided for by law. That proposition had very important implications for international law: unilateral acts could have significance if provided for by the norms of international law. In his separate opinion on the *South West Africa* cases in 1962, Judge Jessup had stated that “unilateral contracts” were possible in the United States (see page 403 of the separate opinion). It was not clear, however, what was referred to.

49. That brief overview of national law showed that national systems left very little room, if any, for unilateral legal acts. Thus, international law occupied a special place in that regard, offering a broader scope for unilateral acts. Interestingly enough, Grotius had considered promises, as well as agreements, to be a source of legal obligations, with the important proviso that a promise could have legal effect only when accepted by the addressee.<sup>14</sup> And that, alas, meant it was no longer merely a promise. Perhaps it was closer to the United States concept of “unilateral contracts”.

50. The issue of unilateral acts had arisen frequently in the practice of international courts, for example in the *Legal Status of Eastern Greenland* case and the case of the *Free Zones of Upper Savoy and the District of Gex*.<sup>15</sup> But the unilateral act in such cases was most often a component of a bilateral action. International law had quite clearly embraced the concept of the unilateral act in the decision of ICJ in the *Nuclear Tests* cases. In its declaration, the French Government had certainly not given the impression that its intention had been to undertake a legal obligation. The Court, however, had stated that the existence of such an intention was a decisive factor. The Charter of the Nürnberg Tribunal<sup>16</sup> had placed assurances on the same footing as treaties in defining a crime against humanity as the preparation or waging of war in violation of treaties, agreements or assurances.

51. He had been able to uncover only one truly unilateral act and, in fact, it established not only obligations but precise norms at the international level. It was the Declaration made by the Government of Egypt on the Suez Canal in 1957,<sup>17</sup> which had created the legal regime for

the Canal. In it, Egypt had clearly expressed the intent that the Declaration serve as an international legal instrument.

52. All other unilateral acts had been *acta tertiis* in respect of other States, namely they had created no rights or duties without the consent of such States and had established no legal relationship. If third States availed themselves of certain rights, however, they were then obliged to fulfil certain duties. There were, on the other hand, a great many unilateral acts that were not accompanied by proof that their authors intended them to have legal force, but such acts could still have legal consequences in accordance with the rules of estoppel.

53. One of the specific features of unilateral acts was the renunciation of rights. The practice of international courts emphasized that such renunciation must always be clearly expressed: it could be neither presumed nor inferred. Another specific feature was recognition as indicated by ICJ in its advisory opinion on the *International Status of South West Africa* (see page 135).

54. Acquiescence played a pivotal role in the formation of rules of international law, embracing as it did custom and tradition. It likewise incorporated silence or failure to protest in situations requiring positive action. In many instances, acquiescence entailed very definite legal consequences. Finally, protest, a purely unilateral act, had legal consequences as well. Those were the main types of unilateral acts, but it remained for the Special Rapporteur to undertake the complex task of identifying and classifying the many others that had not yet been mentioned.

55. Certain issues should be addressed in the future work on the topic: How was the intent of States to give a unilateral act the character of a legal obligation to be established? What was the role of third States in establishing a legal relationship on the basis of a unilateral act? What regime should be set up for revocation or revision of a unilateral act?

56. Mr. ECONOMIDES thanked the Special Rapporteur for an excellent first report that prudently delineated the parameters of the topic, which was indeed one of the most difficult in international law. A coherent theory on unilateral acts of States had yet to be developed, in contrast to other areas of the law like treaty acts and international custom. The Commission's future work would thus be more in the nature of progressive development, rather than codification, of the law.

57. Certain categories of unilateral acts must be excluded from the scope of the study. One of them was unilateral acts designed solely for domestic impact and which had no effect at the international level. Some unilateral acts that had an effect at the international level should also be excluded. Such acts were those whereby a State exercised powers conferred under international law, for example in relation to the territorial sea, the contiguous zone or the exclusive economic zone.

58. Other acts that must be excluded from the study were those whereby States discharged at the domestic level their international obligations. Examples were the implementation of Security Council resolutions under Chapter VII of the Charter of the United Nations or of directives of the European Communities. Unilateral acts

<sup>14</sup> H. Grotius, *De jure belli ac pacis, libri tres* [1646] (Book II, Chap. XI, para. XIV), *The Classics of International Law*, Carnegie Endowment for International Peace (Oxford, Clarendon Press, 1925), vol. II, English translation.

<sup>15</sup> *Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 96.

<sup>16</sup> Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

<sup>17</sup> Declaration (with letter of transmittal to the Secretary-General of the United Nations) on the Suez Canal and the arrangements for its operation (Cairo, 24 April 1957) (United Nations, *Treaty Series*, vol. 265, p. 299).

that could contribute to the formation of international custom by strengthening the material component, *opinio juris*, or both, should also be excluded. The same was true of unilateral acts relating to an international treaty such as parliamentary approval or ratification, reservations, interpretative declarations and denunciation. Again, unilateral acts by which States wilfully or involuntarily violated international law must also be excluded, as they were wrongful acts and could incur the international responsibility of the State.

59. The acts of international organizations, including international courts, must be excluded, since the topic was defined as unilateral acts of States. Nevertheless, inspiration could be drawn from the law applicable to the acts of international institutions, which was much further developed than the law on unilateral acts of States, and from the decisions of such bodies. He did not, however, see the point of distinguishing between political acts and legal acts of States. It was a very fine distinction to begin with, and political acts were just as relevant to the topic as were legal acts. It was not the nature or characteristics of the unilateral act that mattered most, but rather the underlying intention, particularly the intention to produce an effect at the international level.

60. Despite convincing arguments by the Special Rapporteur in favour of their exclusion from the scope of the topic, he believed that silence, acquiescence, declarations of State agents before international courts and notification merited a more in-depth investigation with a view to determining in which cases and under what conditions they could create non-treaty rights and obligations at the international level. The autonomy with which the act was performed was clearly the decisive factor, but account should also be taken of certain non-formal acts that could create such rights and obligations in a non-autonomous fashion. Such an inquiry could facilitate a final decision on whether such non-formal acts should be excluded from the topic or treated as exceptions.

61. The distinction between formal unilateral acts and substantive unilateral acts was apt. It was also true that the majority of unilateral acts were set out in a declaration, which was, accordingly, the most common formal unilateral act. Nevertheless, the possibility that unilateral acts might in future be expressed in other legislative or regulatory texts could not be ruled out.

62. What should the Commission set as its objectives? Naturally, the study must pinpoint the unilateral act, showing that it was one that created certain rights and obligations for States. Normally, unilateral acts did not create objective rights such as those which, according to a doctrinal distinction, proceeded from law-making treaties as opposed to contractual treaties. Mr. Lukashuk had already cited an exception to that rule, and one could likewise mention the political communiqués issued after meetings of heads of State, for they were unilateral declarations that sometimes dealt with legal issues and even set down normative principles, but they were not treaties or agreements. Such cases were, however, the exception rather than the rule. Unilateral acts essentially created subjective rights and obligations, but when those were produced at the international level, they were covered by

international law and could thus properly be described as sources of international law.

63. The Special Rapporteur cited recognition, promise, renunciation and protest as unilateral acts that, in some circumstances, could create rights and obligations at the international level, but, personally, he would argue that estoppel also fell into that category. They would have to be carefully discussed and it would be necessary to determine their specific features, their basis, the parties able to adopt them, the form in which they were made public, their conformity with international law and the intention of States in adopting them. As Mr. Goco and Mr. Lukashuk had pointed out, it would also be necessary to study the delicate matter of revocation of a unilateral act, which, in contrast to a treaty act, was not based on reciprocity.

64. Mr. FERRARI BRAVO said that doctrine in his country contemplated unilateral acts, but he wondered whether the exercise was really worthwhile, and indeed, whether the Commission should engage in the study currently being undertaken by the Special Rapporteur, who had nevertheless done a remarkable job of building on the foundation created by the Working Group on unilateral acts of States at the forty-ninth session.

65. If two or more entities or parties directed unilateral acts against one another, there was always a reciprocal undertaking that was defined as a contract or a treaty. The action of the parties was thus creative, because it brought into being, by the intention of the parties, something that had not existed before. Hence there was every justification for elaborating precise rules concerning the manifestation and execution of that intention—in other words, for developing the law of treaties. But if the intention was manifested by one party alone, as was, by definition, the case with unilateral acts, could it really be described as creative? In his opinion, an intention not put into effect was not creative, although it could bring certain legal obligations into play if certain preconditions were met. In reality, a unilateral act was usually performed in response to a pre-existing situation and was often prompted by a dispute over what the pre-existing situation had been.

66. As to whether a unilateral act could create international law, a declaration of war was no doubt a unilateral act which did have legal effects, but in such cases everything was already predetermined by the rules of the law of war. If a unilateral act did not create international law and was merely something which brought international law into play, he doubted whether the topic really needed codification. Unilateral acts were so varied precisely because States wanted such variety. If unilateral acts were governed by an international convention, how would unilateral declarations be made, what declarations would be valid and what would be their consequences? States would not in fact be willing to go down that road, for it would eliminate the possibility of making further uses of a unilateral declaration.

67. The Commission could discuss the topic, but only in the context of specific situations—of environmental law, the law of war,—rather than *in abstracto*. But such an exercise would not prove very useful, and the Commission might find itself sailing on a boundless ocean.

68. Mr. MELESCANU said that the whole discussion of whether unilateral acts had legal effects could be placed between two extreme positions. At one extreme it could be argued that there were virtually no unilateral legal acts but only international agreements concluded in a simplified manner with varying degrees of formality, so that the legal effects of such acts were based on an agreement between the parties. It might be objected that there were cases in which the party to whom the unilateral act was addressed did not react. The principle of *qui tacet consentit* could well apply and provide a legal basis for arguing that, even in such cases, a voluntary agreement was established between the parties. Mr. Ferrari Bravo had given some of the arguments in favour of that extreme but defensible position.

69. The fact that Article 38 of the Statute of ICJ did not mention unilateral acts was of some importance. The Special Rapporteur had pointed out that some unilateral acts did not constitute sources of international law but nevertheless created international obligations. That was the basic idea on which the whole report should rest, and the Commission must first reach agreement on it, for otherwise, the legal basis of any codification would be very weak.

70. The other extreme position would be to argue that all unilateral acts could create legal effects in certain circumstances. The Commission had to make a proper distinction between acts creating legal effects of themselves and other acts deriving either from an international convention or, and here there was a big danger, from international customary law. If it was accepted that the Commission should not study unilateral acts deriving from a treaty obligation, how could the situation not be the same with respect to unilateral acts deriving from international custom?

71. "Unilateral acts of States" was one of the most difficult topics to codify. Perhaps the Commission should engage in a more thorough examination of it before deciding to make an attempt at codification. Such an examination would in itself produce very interesting results.

72. Mr. HAFNER responding to two of the points made by Mr. Ferrari Bravo, said that the Commission's mandate from the General Assembly<sup>18</sup> imposed a duty to codify unilateral acts, something it could not decline. The only possibility to pursue a different approach would be to try to persuade the Assembly to reconsider its decision. To argue that unilateral acts should be dealt with only in their specific contexts was tantamount to saying that treaties should be dealt with in their specific contexts and not as a general phenomenon of international law. Unilateral acts did have common features, irrespective of their context, and the Commission could examine them.

73. Mr. FERRARI BRAVO said that, in the case of treaties, two declarations had to be taken into account. The first need was to establish the equivalence of those declarations and the way in which one echoed the other. That already provided sufficient material for codification, and it was perfectly possible to have a theory of treaties

without knowing what their purpose was. The situation of unilateral acts was quite different.

74. A unilateral act was an act in its pure form which could create nothing except in terms of its context, so the context became much more important than the act itself.

75. Mr. LUKASHUK congratulated the Special Rapporteur on his introduction of a detailed first report in which he had, in particular, succeeded in resolving the problem of political and legal obligations. The former were sometimes even more effective and significant in terms of their results than the latter. International rules were not only legal; there were also moral rules, the rules of *comitas gentium*, usage, traditions and, in particular, international political rules, such as the rules created in the course of the Helsinki process, that governed cooperation between States on many levels. OSCE had been established with the aid of political instruments. It followed that the problem of political obligations went beyond the bounds of the topic under consideration and was of wider significance.

76. He agreed with those lawyers who held that law and politics were inseparable and that every legal instrument was also political in nature. However, what was at issue in the current case was not the content of an obligation, but the nature of its binding force. States could give an instrument with identical content either political or legal binding force. OSCE instruments, for example, contained a special mention to the effect that their provisions had political binding force and were not subject to registration with the United Nations as international treaties.

77. A new topic had clearly emerged in the discussion: simplified or informal agreements. It would be difficult to reach a conclusion on unilateral acts without considering that topic, because the widely used practice of informal agreements stood between the codification of the law of treaties and the codification of unilateral acts. It was important to study the two topics in parallel.

78. Mr. SIMMA said that the difficulty of dealing with the topic led to a "bilateralization" of unilateral acts focusing on estoppel or, as Mr. Lukashuk had suggested, equating the problem of unilateral acts with the problem of informal agreements. The topic of unilateral acts was in fact broader than that. An agreement implied a meeting of minds, whereas a unilateral promise, for example, would have legal effects only as intended by the State making the promise. One such effect was reliance, which might be equated with estoppel in some circumstances.

79. Mr. ROSENSTOCK said that, if reliance was essential, then at least a functional equivalent of will existed. The topic was then bilateralized and shifted in the direction indicated by Mr. Lukashuk, for the reliance was what created the legal situation, which was very similar to an offer and an acceptance, that is to say, a voluntary commitment, reliance on which was equivalent to acceptance.

80. Mr. GOCO pointed out that the General Assembly had invited the Commission further to examine the topic of unilateral acts and indicate its scope and content. Since actual codification would indeed be very difficult, perhaps the Commission could produce guidelines for States, as suggested by the Special Rapporteur; that approach

<sup>18</sup> General Assembly resolution 51/160, para. 13.

would be consistent with the General Assembly's instructions.

81. Mr. MELESCANU said that he would like to know whether Mr. Simma thought that the principle of *acta sunt servanda* was analogous to that of *pacta sunt servanda*. And did a unilateral declaration create legal effects if it was not accepted by the State to which it was addressed?

82. Mr. SIMMA, responding to the point made by Mr. Goco, said that guidelines on the topic might prove counter-productive by creating a straitjacket for States. The good thing about unilateral acts was that States were free to couch them in whatever terms they pleased, as long as they realized that they might have unwanted consequences. As to Mr. Melescanu's question, the principle of *acta sunt servanda* could not apply, because acts were binding only in the sense that the State making a unilateral statement would be held to it. Treaties, in contrast, were fully binding. A recent work on unilateral acts had in fact come up with at least six theories on the binding nature of such acts.

83. Mr. ECONOMIDES said he was not sure that ICJ was competent to create law, but it was certainly competent to state the law and it had accepted unilateral acts as a source of international rights and obligations. In fact, the discussion in the Commission could not take place unless there was some relevant case law, and it had all the material necessary for studying unilateral acts. On a technical point, he wondered whether Mr. Ferrari Bravo would agree that the law of war no longer existed in the sense that, under the Charter of the United Nations, it had no application except in the case of self-defence.

84. Mr. HERDOCIA SACASA said that the point raised by Mr. Economides about ICJ was illustrated by the *Nuclear Tests* and the *Frontier Dispute* cases, in which the legal existence of unilateral acts and their effects had been clearly established. The Court had ruled, *inter alia*, that only when the State making the declaration intended to be bound by it did that intention confer on the State's position the character of a legal commitment. Therefore, everything depended on the State's intention.

85. As to the relations between unilateral acts and other acts or the existence of sufficient case law on the autonomy of the act itself, the Court had ruled elsewhere that no counterpart was necessary for a declaration to have legal effects and that no subsequent acceptance or other reaction by another State was needed either, because that was incompatible with the strictly unilateral nature of the legal act in which the declaration had been made.

86. It was the Commission's task to develop those existing fundamental texts of international law.

87. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that the initial exchange of views had confirmed the complexity of the topic and that the work of the Special Rapporteur was fundamental to the discussion. In his first report he had attempted to systematize a theory of the unilateral acts of States. The exercise was not merely an academic one: the Commission must also take account of the legal realities because unilateral acts did exist in international law. The question was whether such legal declarations created effects unilaterally or whether they entered the realm of treaties.

88. The distinction between sources of international law and sources of international obligations was interesting, because it led to the question of formal declarations dealt with in the report. Any future codification work could not be based on anything other than the formal legal act.

89. Silence or failure to react to a declaration could not itself be regarded as a unilateral act, which was a positive formal act. Just as treaties were the most usual means of providing legal effects in treaty law, in the law of unilateral acts the unilateral act was the most important means of doing so.

90. The existing material on unilateral acts could be codified; a doctrine and case law already existed on the topic, and the formal unilateral act existed in international law as an act creating legal rules. The autonomy of such acts was a very important point, on which ICJ had ruled that unilateral declarations could exist independently of other manifestations of will. The autonomy of the obligation was also important: a State could enter into a commitment without any counterpart or other basis of reciprocity.

91. The Commission would also have to consider further the difficult question of revocation of unilateral acts.

#### Other business

[Agenda item 11]

92. The CHAIRMAN announced that the Gilberto Amado Memorial Lecture, sponsored every other year by the Brazilian Government, would be given by Ambassador Ramiro Saraiva Guerreiro, former Minister for External Relations of Brazil, on 13 May 1998. The title was "The creation of the International Law Commission and some considerations on supposed new sources of international law".

*The meeting rose at 1 p.m.*

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## 2525th MEETING

*Wednesday, 6 May 1998, at 10.05 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

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**Unilateral acts of States (*continued*) (A/CN.4/483,  
sect. F, A/CN.4/486,<sup>1</sup> A/CN.4/L.558)**

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. PAMBOU-TCHIVOUNDA said that the first report on unilateral acts of States (A/CN.4/486), which highlighted the multifaceted and highly elusive nature of the topic, called for three broad comments, the first of which concerned the approach to the topic. Apart from the fact that the first report could have been more concise, its main defect was that it did not contain any reflections on the actual significance of the topic, which would have been extremely helpful in clarifying it. Given the whole range of unilateral acts of States, it was difficult to see how the Special Rapporteur had come to single out declarations and had taken them as symbolic of all such acts. Nor was it particularly easy to see the extent—other than from the pedagogical or symbolic standpoint—of the contrast between legal acts and political acts in paragraphs 44 and 45 of the report—as though the social function of the law were alien to the no less social function of politics. It was not very easy to understand why no parallel had been drawn—as it might with profit have been—between the regime of unilateral acts of States in public internal law and the regime—yet to be developed—of unilateral acts of States in public international law. In both cases, the State was present as a public power, but whereas, in one, the unilateral method of intervention was the rule, in the other, it was the exception. The line of demarcation between a meeting of the minds and a unilateral expression of will should be one of the keys to the special identity of the topic.

2. The second broad comment related to method. In that connection, the Special Rapporteur should try, in future reports, to avoid two pitfalls. First, he should not focus on the period of the current quinquennium, so as not to find himself obliged to forgo a study of State practice—a necessary work of research in any codification. Secondly, the Special Rapporteur should take care not to simplify the topic by eliminating from its scope certain types, such as silence, acquiescence and notification, which could turn out to be essential at a later stage in the work on the topic. From that standpoint, the codification and progressive development of international law formed an indivisible pair.

3. As to the substance of the topic, the question was how the formal criterion of the attribution of the act to the State or States which formulated it, discussed in paragraphs 133 to 135 of the report—and which itself depended on both the external and the internal validity of the act—would serve to define only a “purely” unilateral act—a declaration—and not the other acts, which were, wrongly, marginalized. The limiting nature of that criterion did not stand up to analysis, for what was involved was, on the contrary, a common denominator. The same applied to the criterion derived from the autonomy of the obligation, which could serve only to magnify significantly the variety of situations covered and hence the diversity of the

regimes to be elaborated. To take but one example, in the case concerning *United States Diplomatic and Consular Staff in Tehran*, ICJ had inferred a whole series of consequences on the question of refraining from acting which could, in proper form, constitute a special regime governing inaction. From that standpoint, the law of treaties could only enrich the law relating to unilateral acts of States.

4. Whatever the scenario, the regime governing the performance of a unilateral act was closely linked to the initial nature of that act, namely, its validity. And the regime governing enforcement and functioning was linked to the object of the act. Accordingly, a deciding factor as to content and intent in the law relating to unilateral acts of States would correspond to the deciding factor of object and purpose in the law of treaties. Much of the regime governing opposability and public knowledge would turn out to be linked to the scope of the act. The dialectic of obligations and interests and corresponding rights involved time factor considerations which prompted a question as to the repercussions in the law relating to unilateral acts of States. Capacity to act was another consideration to be taken into account. When unilateral acts were directed at the international community as a whole, who would assert the rights of that community as inferred from the position taken by a particular State? Which State had the capacity to act and which organized international community was involved? Bearing all those considerations in mind could only enhance the strength of those minimal rules whose preparation would be most in keeping with the Special Rapporteur’s task and would give the topic its true meaning.

5. Mr. SIMMA said he considered that the Special Rapporteur’s task depended to a large extent on how the codification of the topic was conceived. The form of draft articles seemed very difficult to envisage, as there would then be numerous definitions and very general, and hence ineffective, substantive rules. At best, one could envisage warnings, as it were, to heads of State and politicians against the possible consequences of unduly explicit intentions. The only realistic form therefore seemed to be an expository study of the topic. For that purpose, it would be necessary first to identify what should be included in, or excluded from, such a study. The vast number of unilateral acts of States in no way precluded their systematization and classification. Thus, three major categories could be identified. The first concerned acts to which international law attributed no special and uniform consequences other than those deriving from the specific situation. Warning shots fired by one vessel against another could, depending on the given situation, fall within the terms of a Security Council resolution or constitute a breach of Article 2, paragraph 4, of the Charter of the United Nations. That first category would certainly not come within the scope of the study, no more than silence would, even if international law did attribute certain consequences to the latter. The second category concerned unilateral acts to which international law itself attributed consequences. It covered, for instance, occupation of *terra nullius*, giving up territory or a *negotiorum gestio*. The case of declarations was not so clear, although a declaration of war undeniably fell into that category. There was, of course, no longer any *terra nullius* and Arti-

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

cle 2, paragraph 4, of the Charter prohibited recourse to war, but acts that came within that second category, which should also be excluded from the scope of the study, still occurred.

6. The third category related to unilateral acts which were deemed by the State from which they emanated to have the legal consequences desired by that State or intended to have such consequences. That category could itself be divided into two subcategories. The first involved unilateral acts which could be termed “dependent”, namely, acts whose effects would depend on a corresponding act by one or more other States. One could cite as examples of such acts offer and acceptance in the context of the law of treaties as well as accession, ratification, formulation of reservation and denunciation, and declarations made pursuant to Article 36, paragraph 2, of the Statute of ICJ. The second subcategory related to acts which, to produce their effects, did not require a response in the form of a corresponding act emanating from another State. Such acts did not have to be accepted, but merely received in the sense that they had, obviously, to be brought to the attention of other States. That applied to recognition, protest, renunciation of rights and unilateral promises. It was the acts that fell into that category of autonomous unilateral acts which the Special Rapporteur should study further and which called for certain immediate comments.

7. The first comment was that the question of the binding force, or obligatory nature, of such autonomous acts was different in each case. In the case of recognition, the main question would be whether the act was revocable. In the case of protest, it would be mainly a matter of determining the circumstances in which a State was required to protest in order to avoid certain consequences, for example, to avoid being bound by an emerging rule of international customary law.

8. The most interesting problem, however, concerned the binding force, for the States from which they emanated, of unilateral promises—a term which, in his view, was to be preferred to “unilateral declaration”, which was too formal and so capable of encompassing very different acts. Indeed, it had been from a promise by France not to continue nuclear tests that ICJ had inferred certain consequences in the *Nuclear Tests* cases. In what circumstances, therefore, was a unilateral promise binding on the State from which it emanated? There were at least six theories about the matter, which could be placed in two groups: subjective theories and objective theories. According to the former, it was the intention of the State which made the promise that created the obligation, on the basis, it seemed, of the *pollicitatio* of Roman law. In his view, the subjective element, albeit necessary, was not sufficient; an objective element must also be present. The objective theories appeared to rest on the concept of estoppel or on broader notions such as good faith. That had been very clearly explained by Reuter, who had stated that the affirmation (of the binding nature of a unilateral promise) was based on the principle of good faith and more particularly on the obligation to abide by the convictions born of its conduct.<sup>2</sup>

<sup>2</sup> P. Reuter, *Droit international public*, 5th ed. (Paris, Presses universitaires de France, 1976) (collection “Thémis”), p. 142.

9. One last distinction seemed necessary, for the idea of relying on a promise could be understood in the concrete sense, and the principle was then that a unilateral promise was binding if, in the light of the concrete circumstances, its addressee had relied on it and it was then that the concept of estoppel would come into play; but it could—and in his view must—also be taken in a more abstract sense: a unilateral promise was binding if, in the light of the circumstances, its addressee, or even the community of States, could legitimately rely on it. A first example was that of the negative security guarantees formulated on various occasions by nuclear-weapon States. For instance, in 1978, at the Tenth Special Session of the General Assembly, devoted to disarmament, the Union of Soviet Socialist Republics (USSR) had declared that it would never use nuclear weapons against States that refrained from producing or acquiring such weapons and had none on their territories.<sup>3</sup> Two years later, Austria had declared that it considered that the respective declarations of the Governments of nuclear-weapon States, including the USSR, were binding on the nuclear Powers concerned, under international law.<sup>4</sup> Mr. Brezhnev had reiterated that promise in 1982, but in 1993, the Russian Federation seemed to have distanced itself from it. That example showed that it was preferable for a State that wished to rely on a unilateral promise to have it incorporated into a treaty. That was what had happened in 1990, when in the context of the negotiations that had led to German reunification, the Federal Republic of Germany had unilaterally promised to limit the strength of the federal army to 370,000; a few months later, an obligation to the same effect had been set forth in the “2 + 4” Treaty.<sup>5</sup>

10. In that context, promises that seemed at first sight to be unilateral often turned out to be an element in a negotiation or a bilateral process. The famous Ihlen declaration (see *Legal Status of Eastern Greenland*, pages 69-70), for example, had been made in response to a Danish démarche and had thus been made in a context of reciprocity. Conversely, it was not unusual for unilateral declarations merely to reiterate an obligation entered into previously: the Declaration made by the Government of Egypt on the Suez Canal in 1957<sup>6</sup> could thus be regarded as founded on the Convention respecting the Free Navigation of the Suez Maritime Canal (Constantinople Convention of 1888). He also noted that unilateral acts of States were not a source of law, but they created legal obligations and the principles and rules on the basis of which they created such obligations formed part of the general principles of law or of international customary law.

11. Mr. BROWNLIE referring to the statement by Mr. Simma, said that the members of the Commission owed it to the Special Rapporteur to consider carefully the

<sup>3</sup> Department for Disarmament Affairs, *The United Nations General Assembly and Disarmament 1984* (United Nations publication, Sales No. E.85.IX.7), annex to chapter VIII, p. 119. See also *Official Records of the General Assembly, Tenth Special Session, Plenary Meetings, 5th meeting*, para. 44.

<sup>4</sup> *Official Records of the General Assembly, Thirty-fifth Session, First Committee*, 40th meeting (A/C.1/35/PV.40), p. 70.

<sup>5</sup> Treaty on the Final Settlement with respect to Germany (Moscow, 12 September 1990), ILM, vol. XXIX, No. 5 (September 1990), pp. 1187 et seq., art. 3, para. 2.

<sup>6</sup> See 2524th meeting, footnote 17.

categories of acts that he defined for the purposes of the study and that it was not enough to propose other categories at the outset. The Special Rapporteur had made a respectable intellectual attempt to find an area already well mapped out by doctrine and jurisprudence and paragraph 57 of his first report was apposite in that regard, as was paragraph 56 on the analogy with the procedure adopted in respect of the law of treaties. He himself accepted the fundamental category identified in those paragraphs, namely, formal unilateral acts of States, although he thought that other institutions should also be studied, beginning with estoppel, which occupied a prominent place in the jurisprudence of international courts.

12. Mr. ELARABY, referring to Mr. Simma's comments on the negative security guarantees formulated by nuclear-weapon States, said that non-nuclear-weapon States were not really satisfied with those guarantees and would have preferred nuclear-weapon States to sign agreements containing similar commitments. With regard to the nuclear-weapon-free zones that had been created, most recently in Africa in 1996,<sup>7</sup> negative security guarantees could be regarded as having legal effects and had been accepted as such.

13. Mr. SIMMA, replying to Mr. Brownlie, denied having rejected the Special Rapporteur's categories at the outset and said it was only with a view to helping the Special Rapporteur that he had proposed some further categories. Estoppel, which was indeed a concept well established in public international law, came into play only after the unilateral act and was not in itself a unilateral act. He also fully endorsed the comments by Mr. Elaraby, which supported his view that it was always preferable to confirm a unilateral promise in the framework of a treaty.

14. Mr. MIKULKA said he thought that, while the categories proposed by Mr. Simma were satisfactory on the theoretical level, the frontier dividing them was not always clearly demarcated and it was necessary to have some idea of what acts could in no circumstances produce legal effects so as to determine *a contrario* what acts did produce legal effects. On the other hand, he agreed with the distinction drawn between dependent acts and autonomous acts, but wondered whether the former really fell within the scope of the study and whether, given that their legal consequences arose from a meeting of wills, they did not in fact constitute agreements in a very rudimentary form.

15. He also agreed with Mr. Simma that there were some unilateral acts to which international law attributed certain specific legal consequences, sometimes in existing instruments such as the 1961 and 1969 Vienna Conventions. It might nevertheless be asked whether it served any useful purpose to list all the acts in question, although one must also avoid going to the other extreme and excluding them from the study at the outset. A critical analysis of what had already been codified, with a view to finding some common features, would facilitate the current study. Lastly, he thought the Commission should also

consider the extent to which unilateral acts of bodies or subdivisions of the State were indeed attributable to the State, for, in some fields, such as violations of international obligations, the State was defined much more broadly than in other fields such as the law of treaties.

16. Mr. Sreenivasa RAO, referring to the question of estoppel, said that it was the unilateral act that created a conviction on the basis of which other States would found their conduct and that, in that respect, the institution fell within the scope of the study.

17. Mr. SIMMA said he was surprised that anyone could regard estoppel as a scenario falling within the scope of the Commission's study: it was hard to see how it could constitute a unilateral act, as it resulted from a situation in which State A, reneging on a previous attitude, caused harm to State B. There could be estoppel only if at least two States were involved.

18. Mr. Sreenivasa RAO said that Mr. Simma was concentrating on the consequences of the unilateral act, whereas his own intention had been to speak of the initial act, which had legal consequences from the outset, for it could give rise to a situation of estoppel from the outset. Seen from that standpoint, estoppel came within the scope of the topic.

19. Mr. GALICKI said he congratulated Mr. Simma on his systematizing efforts. The Commission should be grateful to him for those efforts, as it would in any case be obliged to define the various types of unilateral act.

20. As Mr. Mikulka had said, it would be a very delicate operation to distinguish between the first two categories of unilateral act proposed by Mr. Simma. Nor would it be easy to delimit the third category, which was founded on the principle that the author of the act specified the legal consequences he wished to attach to that act. It was the latter category that was at the core of the topic. But the example of a declaration of neutrality would suffice to show the ambiguity of that category, since such a declaration could also belong to the second category, according to the circumstances. The Commission should thus endeavour to define what distinguished the situation in which international law attached certain legal consequences to an act from the situation in which it was the author of the act who intended it to entail certain legal consequences. As the two situations could be superimposed in practice, the distinction between the one and the other category would be all the more difficult to determine.

21. With regard to Mr. Simma's comment that unilateral acts of States were not a distinct source of international law according to the classification applied, but instead created obligations in law, it would be recalled that an obligation in law was not formed in a vacuum and that it only ever existed vis-à-vis a partner, several partners or even *erga omnes*. The partner thereby created acquired to a certain degree the right to act in a certain manner. A situation thus arose in which rights and obligations emerged in the sphere of international law, from which it was concluded that they were international obligations and rights. In his view, that distinction between sources of international law and sources of international obligations should be further developed. The study being

<sup>7</sup> African Nuclear-Weapon-Free-Zone Treaty (Pelindaba Treaty) (Cairo, 11 April 1996) (A/50/426, annex).

undertaken by the Commission provided a timely opportunity to do so.

22. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that Anglo-Saxon jurists tended to see estoppel as a device in the procedure for production of evidence in a trial. The Commission was dealing with the unilateral legal acts of States, so that it must exclude from its analysis attitudes, forms of conduct and activities of States that were not strictly speaking acts, even if they produced legal effects. But estoppel could be invoked with respect to acts, forms of conduct, and so on, having legal effects and, against that background, it was interesting to study it in relation to unilateral acts of States.

23. Mr. HAFNER, referring to the example of negative security guarantees, said that, in evaluating the legal validity of the declaration made by the nuclear Powers, Austria had relied on the decision by ICJ in the *Nuclear Tests* cases. In the light of the criteria used in that decision, it had concluded that the declaration was binding for the States that had made it. The nuclear Powers had been extremely surprised: to hear them tell it, that had not at all been their intention.

24. He saw the problem in the following way: the declaration could be assumed to have had the effect of being binding, in other words, it was for other States, where appropriate, to prove that that assumption was false. In this case, it could be argued that, if the declaration of the nuclear Powers was deemed to be binding for its authors, it was difficult to see why those Powers would have continued to negotiate a denuclearization treaty, an undertaking which showed that they had had no intention of being internationally bound by their declaration. The expression of will, the criterion identified by ICJ, had not been manifest in their case.

25. Mr. BROWNLIE said that he too wondered whether or not estoppel was part of the topic. In his opinion, the Commission must not be overly theoretical. In practice, many international lawyers considered that estoppel was indeed part of the field of unilateral acts of States. It was inconceivable that the Commission should leave aside a legal device of such importance, and for purely doctrinal reasons at that.

26. In addition, the Commission must draw a clear-cut distinction between classical unilateral acts and self-characterizing acts: the Declaration made by the Government of Egypt on the Suez Canal had been deposited with the Secretary-General of the United Nations and had clearly explained the intentions of its authors. In general, however, the unilateral acts of States did not contain a definition of what they were. The specific problem raised by the oral Ihlen declaration, cited in paragraph 88 of the first report, was that it had not been self-characterizing and had been characterized only in the course of contentious proceedings. Many of the examples given by various members of the Commission were similar in nature, referring as they did to acts that were not considered to have effects *ab initio* because they had not been ratified by Parliament, for example, whereas the Constitution provided for that procedure. Such acts did not declare what they were at the time they were committed: their meaning became a relevant consideration only a posteriori. The

Commission could therefore not leave them out of its thinking solely on the grounds that their formulation was directly analogous to the conclusion of a treaty or other instrument which stated what it was from the very moment it was concluded.

27. Mr. HERDOCIA SACASA welcomed the attempt at classification made by Mr. Simma, but thought the Special Rapporteur had been basically right in singling out certain acts which were placed by doctrine in the realm of unilateral acts of States, but were in reality based on treaty law. His work had been to uncover the constituent elements of what ICJ had described in many of its decisions as a purely unilateral legal act. In the *Nuclear Tests* cases, it had indicated that that type of act called for no counterpart, not even subsequent acceptance by another State, because—and that was a fundamental consideration—to require a reaction from a State other than the author of the unilateral act would be to go against the strictly unilateral nature of the original act. The Special Rapporteur had tried to remain within those closely circumscribed limits.

28. He nevertheless believed that the Commission should give more detailed consideration to other types of unilateral acts and situations, such as silence, acquiescence and estoppel, to which other members had already referred. It was only after such an analysis that the Commission would have an overall view of its topic.

29. Mr. ECONOMIDES said he thought Mr. Simma was being excessively pessimistic. A treaty act, that is to say, an agreement between States, was a situation that was not entirely easy to arrive at, since it involved the will of two parties. That could be seen very well in the case of the Ihlen declaration, which ICJ had regarded only as a unilateral declaration that had certain legal consequences, although Mr. Simma seemed to believe that it had elements of a treaty.

30. It could be said that the acceptance by Austria of the declaration made by the USSR in 1978 (see paragraph 9 above) was not enough to transform the Soviet Union's act into a treaty act by which it would be internationally bound in respect of Austria. If a State offered its port facilities to its neighbour and that neighbour declared that it accepted that offer, that did not establish a treaty-based international commitment. The first State could easily have concluded an agreement, but precisely because it had not wanted to bind itself at the international level, it had reserved the right to reverse its initial position. A unilateral act was thus an easy, useful step which was frequently resorted to by States that did not wish to enter into commitments at the international level and which could subsequently move in the direction of an agreement or a treaty. That technique in international relations was widely used in State practice and the Commission would be wrong to limit its study to a simple analysis of the doctrine.

31. Mr. ELARABY said he agreed with Mr. Sreenivasa Rao that the more light the Commission could shed on the unilateral acts of States and their consequences, the clearer the case of estoppel would be. That legal device, by which a State expressed its reaction to a unilateral act that had legal effect was clearly part of the topic under consideration. It would be unacceptable, for example, if a

declaration before the Security Council or the General Assembly whose legal consequences were not necessarily foreseen by the author placed the State from which it emanated in a situation of estoppel. For many countries, a simple general policy declaration could not be viewed as having legal effect such that the declaration put them in a situation where estoppel might come into play.

32. Mr. CRAWFORD said he also thought that estoppel must not automatically be excluded from the scope of the Commission's study. It was a device that was widely accepted by international courts. It could be analysed from the standpoint of the circumstances in which a State could not revoke a unilateral act. From that point of view, estoppel was clearly part of the topic under consideration.

33. Mr. PELLET said that he agreed with the view expressed by the Special Rapporteur in paragraphs 59 to 131 of the first report: unilateral acts of States did indeed exist. The doctrine spoke of them. Case law was based on some of them and, above all, States performed them and invoked, or protested against, those of other States. The problem was that States performed unilateral acts without knowing it, since they were not clearly defined and the regime applicable to them was still vague. That was why the topic was of such importance and why the Commission had done well to include it in its agenda.

34. In order to codify the subject matter and, ultimately, engage in the progressive development of the law governing it, the Commission did not have to decide at the outset what final form its conclusions would take, but it was clear that the topic lent itself to the formulation of draft articles and commentaries which must obviously begin with definitions. That was the purpose of the report under consideration and he endorsed the approach adopted by the Special Rapporteur.

35. He did have a question, however, about methodology: were unilateral acts of States to be defined in general or simply for the purposes of the Commission's study? That question must be answered from the outset, since different definitions could be arrived at according to the approach adopted, and it must be established from the very beginning whether there was a generally accepted definition of unilateral acts of States. There was obviously no such definition. As the Special Rapporteur and a number of other members of the Commission had pointed out, unilateral acts of States were not among the sources of international law listed in Article 38 of the Statute of ICJ and no court had ventured to provide a general definition. Even ICJ had referred only to a unilateral "declaration" in the *Nuclear Tests* cases.

36. The work on a definition must start from the fact that there was an act, that is to say, the expression of the will of a subject of law aimed at producing legal effects, or, according to Jacqué's classical definition, "the expression of will which is attributable to one or more subjects of international law and intended to create a norm to which international law attaches the creation of rights and obligations".<sup>8</sup> Those characteristics would distinguish

unilateral acts from the other acts which the Special Rapporteur had rightly excluded from the scope of the study, although for reasons that were not entirely convincing.

37. That was the case of what he called "political acts". For a jurist, a political declaration could not be an act because, even if it was international, it was not intended to produce effects in law for the simple reason that its author did not wish it to do so, as the Special Rapporteur explained very well in paragraph 44 of the first report. A political declaration was to unilateral acts what a gentleman's agreement was to treaties: it resembled those acts, because it emanated from a single State, but it did not create rights or obligations within the legal meaning of those two terms. Whether they were unilateral or concerted, however, political declarations had an effect: they could result in estoppel and they could, again like unilateral acts, contribute to the formation of rules of customary law. But they did not directly create subjective rights and were not binding on their authors. In that connection, he disagreed with the Special Rapporteur, who referred to the "obligatoriness" of political acts in paragraphs 43 and 45 of his report. Political acts were, by definition, not binding for anyone, not even for the State that had made the declaration, and that was precisely what made them different from unilateral acts. That did not mean that States took no account of them or even that they did not give them precedence over the law, since the law was not everything: politics, morals and religion played their part, too.

38. Referring solely to the definition given, the views which appeared in paragraphs 48 to 57 and 95 of the report seemed at once too vague and too complicated. It was easier to explain why silence or conduct were not part of the topic: neither was an expression of will meant to have legal effects. The Special Rapporteur was, however, wrong to rule out what he called acts relating to the international responsibility of States. Such acts were not a particular category of unilateral acts: they constituted what the draft on State responsibility<sup>9</sup> referred to as "internationally wrongful acts" and, in the framework of the topic under consideration, raised the essential question whether they were valid or not. But it was not because they entailed the responsibility of a State that they must be excluded. He was also surprised at the importance which the Special Rapporteur and several members of the Commission attached to the question of estoppel, which had nothing to do with the definition of a unilateral act. The real question was whether a unilateral act could give rise to a situation of estoppel and in what conditions. The answer was that it probably could, but that involved the effects of unilateral acts and not their definition, and it would be premature at the current stage to take a position on that point and even more so to eliminate the problem entirely.

39. A second feature of a unilateral act was that it must emanate from a sole subject of law and, as the Special Rapporteur put it, constitute a single expression of will. It should first be pointed out that, as the Special Rapporteur acknowledged, the author of the act might be "composite". He was thinking, for example, of the decisions of

<sup>8</sup> J.-P. Jacqué, *Éléments pour une théorie de l'acte juridique en droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1972), p. 181.

<sup>9</sup> See 2520th meeting, footnote 8.

the four allied Powers in Germany, which had often taken a treaty form, but which, from the point of view of the German people, and, later, the two Germanies, had appeared as unilateral acts. It was probably unnecessary to dwell on that phenomenon, but it deserved to be borne in mind. Secondly, it should be noted that some unilateral acts contained bilateral or synallagmatic elements. Those were acts, such as offers, which, by virtue of the fact that they were accepted, took on a different legal value. As Mr. Ferrari Bravo had pointed out (2524th meeting), any acceptance by the party to which an act was addressed might make it impossible for the author of the act to withdraw or amend it. That was also a point to which it would be necessary to return.

40. The fact that a State acted unilaterally was not sufficient to constitute a unilateral legal act from the point of view of international law. Depending on the definition, such an act must also express the intention of creating rights and obligations, and that raised the important question of who those rights and obligations were created for, a point on which the report was not very clear. Yet a basic distinction must be drawn between auto-normative acts, for example, those which created obligations for the party issuing those acts and rights for the party to which they were addressed or, where applicable, for the international community as a whole, as had been the case of the 1957 Declaration made by the Government of Egypt on the Suez Canal in which Egypt had committed itself to respect the freedom of navigation in the Suez Canal, and hetero-normative acts, whose purpose was to create obligations for States or subjects of international law other than the party which had issued such acts. Although touched on occasionally in the report, that basic distinction was not made explicit even though it seemed essential.

41. As far as auto-normative acts were concerned, many technical problems arose with regard to their legal regime, but, as the Special Rapporteur pointed out in paragraphs 152 to 162 of his report, the justification for their binding nature was to be found in the principle of good faith, which supported not only the principle of *pacta sunt servanda* embodied in article 26 of the 1969 Vienna Convention, but also the *acta sunt servanda* rule which the Special Rapporteur had taken from the outline prepared at the forty-eighth session.<sup>10</sup> However, that principle was of no use when the purpose of the unilateral act was to create obligations not for its author, but for other subjects of international law, in most cases other States.

42. Although the principle of the equal sovereignty of States meant that no State, regardless of how powerful, had the general right to impose obligations on other States in the international sphere, there were, in particular cases, unilateral acts of a hetero-normative nature, such as the act by which a State freely set the boundaries of its territorial waters at 12 nautical miles. Although the Special Rapporteur did not deal directly in his report with the question of the justification for the binding nature of that type of act, he outlined a response by asserting that such an act, the principle of which was based on a rule of customary international law concerning the law of the sea,

was not purely unilateral or, to use another expression, autonomous, and was therefore outside the scope of the study. That response was not convincing because the rule or justification thus enunciated was not by nature different from the principle of *acta sunt servanda* or *promissio est servanda*; in both cases, there was an *habilitation* (“entitlement”), in the sense which Kelsen had given to that term.<sup>11</sup> Hence, it was possible to formulate a general principle valid for all unilateral acts: they had binding effect provided that and insofar as there was an entitlement rule conferring such effect on them. Contrary to what some had maintained, the question of the justification for the binding nature of unilateral acts was essential and lay at the very heart of the mystery that was international law, which, first and foremost, linked sovereign entities that could, in the international sphere, only exercise jurisdiction, that is to say, powers delimited by law. He greatly hoped that the Commission’s future work on the topic would stress that essential and self-evident fact.

43. With regard to which subject should be chosen for the purposes of the future draft articles, he did not think that the Special Rapporteur’s idea of confining the study to autonomous unilateral acts of States was wise. The Commission, which wanted to produce a general system of unilateral acts and not a list of special regimes, could leave aside certain unilateral acts, such as ratification or reservations, because they were governed by special rules, but not because of their lack of autonomy. Just as, when it had codified the law of treaties, the Commission had not dwelled on the particular features of the rules characterizing human rights, disarmament or environment treaties but had taken them into consideration, where appropriate, as examples or counter-examples, so it must, in the area of unilateral acts, take note that particular regimes existed, consider whether they could, after all, be of use in identifying general rules and try to explain their distinctiveness.

44. Lastly, he was deeply convinced that the undertaking on which the Commission had embarked was realistic. Although there were undeniable differences between setting the limits of territorial waters, the recognition of a State, notification of the occupation of a territory, a declaration of war or a commercial promise, such differences were no greater than between a bilateral air freight treaty and the Charter of the United Nations or the European Convention on Human Rights. Those differences had not prevented the law of treaties from being codified in a way which everyone agreed was, on the whole, satisfactory. The same exercise was therefore possible for unilateral acts, provided that the Commission considered generally applicable rules, their creation, validity, interpretation and application—what some might call secondary rules—without dwelling on the content of unilateral acts or the particular legal regime characterizing some of those acts.

45. Mr. ADDO said that, as the topic did not lend itself easily to codification, it might be wise for the Commission, as proposed by Mr. Brownlie, to confine itself for the time being to an expository study of the topic before proceeding to a possible restatement of the law in that

<sup>10</sup> *Yearbook . . . 1996*, vol. II (Part Two), p. 141, document A/51/10, annex II, addendum 3.

<sup>11</sup> H. Kelsen, “Théorie du droit international public”, *Recueil des cours de l’Académie de droit international de La Haye, 1953-III* (Leiden, Sijthoff, 1955), vol. 84, pp. 1-201, in particular, pp. 10-12.

area. The absence of an all-embracing, uniform and precise definition added to the difficulty of the task, since the nature of unilateral acts could be fully grasped only on the basis of the peculiarities displayed by their various types.

46. As to the grounds for the binding force of unilateral acts, it was not until the *Nuclear Tests* cases that ICJ had deduced that effect from good faith, a principle of customary international law. However, that principle concerned only some acts, such as recognition, protest, notification and renunciation, which had become legal institutions of international law in their own right whose legal force was based directly on customary international law. As the declaring State was in a position to create law unilaterally under certain circumstances and on the basis of a valid customary law, it was unquestionable that that type of act could have a considerable impact. Two questions of concern on which the Special Rapporteur should focus was that of whether a unilateral declaration was of an irrevocable nature and that of the status of the representative of a State who was able to commit the State through a unilateral act.

47. Mr. GOCO, stressing the complexity and scope of the topic, as shown by the debate, asked for some indications about the direction the Commission's study would take.

48. Mr. LUKASHUK said that, at first, the Special Rapporteur should confine himself to the topic of purely unilateral acts so as to arrive at a concrete result; otherwise, the task might be impossible.

49. Mr. PAMBOU-TCHIVOUNDA, supported by Mr. THIAM, said that, as the debate had not been concluded, the question of what direction to give to the work was premature.

50. Mr. ECONOMIDES said that there were three currents of opinion in the Commission: that expressed by the Special Rapporteur in favour of restricting consideration to formal and autonomous acts which created rights and obligations at the international level; that which called, in addition, for the consideration of other non-formal or non-autonomous acts which also made it possible to create rights and obligations in international law; and a point of view which he personally supported and which consisted in including formal autonomous acts in the topic and making the decision on the other acts contingent on a more thorough examination of the preliminary study.

51. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that it was important to give some thought to the approach the Commission should adopt. The focus of the report was the attempt to define unilateral acts or, in any case, formal acts as a mechanism for creating norms. It would be unrealistic to claim to produce an exhaustive work of codification, but it was incumbent on the Commission to decide above all whether the instrument, that is the formal declaration, could, regardless of its content, be the subject of special rules which differed from those of the law of treaties.

*The meeting rose at 1.10 p.m.*

## 2526th MEETING

*Thursday, 7 May 1998, at 10 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

### Unilateral acts of States (*continued*) (A/CN.4/483, sect. F, A/CN.4/486,<sup>1</sup> A/CN.4/L.558)

[Agenda item 7]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. DUGARD said that it was useful to define the topic at the outset, but definitions were always dangerous, particularly if they were intended to set strict parameters on the discussion. Presumably the definition contained in paragraph 170 of the first report on unilateral acts of States (A/CN.4/486) was not offered as an absolute statement of the law on the subject, for the definition would require modification. He shared the view that estoppel must be included in the study.

2. The doctrine of unilateral acts was based on a handful of judicial decisions, particularly in the *Nuclear Tests* cases in 1974, but hard cases made bad law. At the time, ICJ had wanted to avoid pronouncing on the issue. It had sought an escape route from what was a political case and found it in the principle of unilateral acts. Its decision was currently discussed as if it had been uncontroversial, but at the time it had been likened to the Court's 1966 judgment in the *South West Africa* cases, which had provided an example of judicial avoidance of confrontation with political authority. He could agree with the statement made by Judge ad hoc Sir Garfield Barwick on that occasion to the effect that there was nothing to warrant the conclusion that those making the statements intended to enter into a solemn international obligation and it was more natural to conclude that the statements were statements of policy (see pages 448-449 of his dissenting opinion). That view had been shared at the time by most academic writers.

3. Those considerations pointed to the difficult distinction to be drawn between legal and political acts. The Special Rapporteur had tried to define political acts in paragraph 43 of the first report. However, it was doubtful

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

whether there could ever be a satisfactory definition and the Commission would have to live with the fact that it was always hard to distinguish between unilateral acts intended to have legal consequences and those intended to be purely political, for the distinction would depend on the contexts in which the statements were made. That point had been emphasized by the Court in 1986 in the *Frontier Dispute* case in which its judgment showed a reluctance to find that Mali intended to bind itself. In contrast to the *Nuclear Tests* cases, Mali could have entered into a binding agreement if it had so wished. The same reluctance to draw legal consequences from a unilateral act was found in the earlier advisory opinion in 1950 in the *International Status of South West Africa* case, in which the Court failed to find that a statement made by South Africa before the United Nations in 1947 was legally binding. In short, the judicial decisions were confusing and needed more attention from the Commission.

4. In his definition of a unilateral act, the Special Rapporteur referred to the requirement of publicity, a factor also stressed by ICJ in the *Nuclear Tests* case when it held that an undertaking if given publicly and with the intent to be bound, even if not made in the course of negotiations, was in fact binding. The need for publicity had been confirmed in its order of 22 September 1995.<sup>2</sup> On the other hand, the statement at issue in the *Legal Status of Eastern Greenland* case had not been a public one. The element of publicity should therefore be given more attention than it had received in the first report.

5. It was not the Commission's practice to analyse judicial decisions in detail, but it should consider the handful of cases dealing with the legal consequences of unilateral acts because they provided the basis for the current study. As had already been pointed out, there was no reference to unilateral acts in Article 38 of the Statute of ICJ and the topic was not carefully developed by doctrine. In fact, the doctrine relied heavily on the few decisions of ICJ, which presented a confusing picture. The Commission's task was to make some sense out of that confusion.

6. Mr. PELLET, taking up Mr. Dugard's point about publicity, said he was not sure that in the *Legal Status of Eastern Greenland* case the decision of PCIJ should be regarded as based on a unilateral act. It could be seen as being based on a verbal agreement. Furthermore, the publicity must work to the benefit of the party to which the unilateral statement was addressed. In the *Nuclear Tests* cases, France had been deemed to have given an assurance to the international community as a whole. In the *Legal Status of Eastern Greenland* case the unilateral statement, if it was seen to be unilateral, had been addressed to Norway. The point was that the party which drew rights from the unilateral commitment must be aware of the promise made. In the matter of publicity, Mr. Dugard was wrong to set the *Legal Status of Eastern Greenland* case in opposition to the *Nuclear Tests* cases.

7. Mr. BROWNLIE said that he would be disturbed if the Commission went in for psychological and political

analysis of decisions of ICJ. Much law did in fact emerge from cases regarded at the time as narrowly based. It was true that special circumstances had tempted ICJ to walk off stage in the *Nuclear Tests* cases, and there was reasonable scepticism about the application of the principle of good faith to the particular facts. But that was another matter, and States did currently rely on the *Nuclear Tests* cases.

8. The sources of the law on unilateral acts were very varied and included much State practice. The Commission should avoid taking the view that the law depended on a small number of maverick decisions of ICJ. As early as 1962, Erik Suy had published what was still a very useful account of unilateral acts without being attacked for having "invented" the subject.<sup>3</sup>

9. Mr. FERRARI BRAVO said that he had doubts about the scope of France's unilateral declaration in a case in which ICJ had in the end handed down a decision favourable to France. But it was possible to draw a lesson from the *Nuclear Tests* cases and from the advisory opinion of ICJ on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.<sup>4</sup> It was clear that in that context unilateral acts had a different value from the value they might have in a different context. It was quite possible to create a theory of the law of nuclear weapons—an anti-law of international law, as he had called it in his declaration appended to the advisory opinion. The nuclear weapons context consisted of things which both existed and did not exist, or of acts which might not be true unilateral acts. One example was the guarantees given by nuclear-weapon States to non-nuclear-weapon States in the framework of the Treaty on the Non-Proliferation of Nuclear Weapons.

10. The Commission could probably determine whether a mini-theory of unilateral acts could be established on the basis of a consideration of the problem of nuclear weapons. But, as he had said at the beginning of the discussion of the topic, no general theory of unilateral acts existed. Specific theories could exist on certain points of international law which called for unilateral action, for example in matters connected with nuclear weapons, and it was that context which formed the existing international law on the topic. The General Assembly, however, had not authorized the Commission to deal with unilateral acts on the basis of an examination of the problem of nuclear weapons. The Assembly could, of course, be asked whether that was its wish. The Commission might be able to classify unilateral acts performed in connection with nuclear weapons, but it was unlikely that any classification could be exported beyond the bounds of that sphere.

11. Mr. GOCO said he too had doubts about the division of unilateral acts into political and legal acts. He asked whether it was the case that, when a State committed an act having international repercussions, the act created legal obligations but, in the absence of international repercussions, it was a purely political act. The Special Rapporteur defined political acts in terms of the political will of the State performing the act and argued that the binding

<sup>2</sup> Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests (New Zealand v. France) Case*, I.C.J. Reports 1995, pp. 288 et seq., at p. 305.

<sup>3</sup> E. Suy, *Les actes juridiques unilatéraux en droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1962).

<sup>4</sup> I.C.J. Reports 1996, p. 66.

nature of the commitment lay in morality and politics. In the final analysis, it was the intention of the State which determined the nature of the act.

12. At the height of the dispute between Malaysia and the Philippines about a part of Borneo, an amendment to the Constitution of the Philippines concerning the delimitation of its national territory had included the disputed part of Borneo.<sup>5</sup> The amendment was a political act and it had international implications in that it affected Malaysia, but it was not clear that it created legal obligations.

13. Mr. ECONOMIDES said he agreed with Mr. Brownlie that international case law, especially of ICJ, although very important did not play an exclusive role in connection with unilateral acts. Since that case law was so important, it would be helpful if the secretariat, in conjunction with the Special Rapporteur, could furnish, not necessarily immediately, a document listing all the decisions of ICJ on unilateral acts and reproducing the relevant passages.

14. Mr. DUGARD said that Mr. Pellet's comment focused on the crux of the issue: the conflict between the decision of PCIJ in the *Legal Status of Eastern Greenland* case and the decision of ICJ in the *Nuclear Tests* cases. PCIJ had held that legal consequences could only be attached to a unilateral act committed in the course of negotiations, whereas ICJ had been prepared to free the topic from the context of negotiations, thereby taking it one step further. Mr. Pellet was right to say that the Commission must examine the implications of the two cases. The key issue was whether a unilateral act must be made in the context of negotiations in order to have legal consequences.

15. Mr. HE said that at the forty-ninth session, the Working Group on unilateral acts of States had put forward a number of reasons why the Commission should consider the topic.<sup>6</sup> It had stressed that States had frequently carried out unilateral acts with the intention of producing legal effects and that the significance of such acts had been growing as a result of political, economic and technological developments. It had argued that, in the interest of legal security and of certainty, predictability and stability in international relations, efforts should be made to clarify the functioning of that kind of act and its legal consequences and to state the applicable law.

16. On the basis of the Working Group's conclusions<sup>7</sup> the Special Rapporteur had set out the purpose of studying the topic: to identify the constituent elements of a definition of unilateral legal acts. He had tried to limit the scope of the topic by excluding a number of unilateral acts. There was no problem with the exclusion of the unilateral acts of international organizations, acts connected with the international responsibility of States, or acts which were in conformity with international law but led to international liability. However, difficulties might arise with

regard to the exclusion of political acts viewed as distinct from legal acts. A clear-cut distinction between the two types of act was very difficult. Most political issues had some legal content and vice versa. For example, were the nuclear guarantees provided by nuclear Powers individually or collectively mainly political or legal in nature? Nothing in international law appeared to preclude such guarantees from producing international legal effects and thus from being regulated by international law.

17. Again, there was no problem with the exclusion of acts falling within the treaty sphere, but difficulties did arise in connection with the acts identified by the Special Rapporteur as not constituting international legal acts in the strict sense. Silence, for example, was not a legal act in the strict sense but rather an expression of will. However, by silence a State might acquire rights and assume obligations in specific cases, so that it might be regarded as a unilateral legal act, although it was difficult to equate silence with a typical unilateral act such as a declaration.

18. He agreed with the Special Rapporteur that the main thrust of the topic should be concerned with declarations, the most common formal unilateral acts of a State. Other substantive unilateral acts, such as recognition, promise, renunciation and protest, should however also be addressed since they too were relevant to any study of the matter. The general approach to the study should therefore be much broader than that advocated by the Special Rapporteur.

19. The existing title of the topic, "Unilateral acts of States", which covered a variety of unilateral acts as reflected in the legal writings, was more appropriate than "Unilateral legal acts of States". It was a little early to decide on the form of the outcome of the Commission's work, though he personally would favour a guideline or doctrinal study. Regardless of the ultimate form, however, nothing could detract from the value of the current study on such a difficult and sensitive aspect of international law.

20. Mr. HAFNER, commenting first on various points raised during the discussion, said that reference had been made, in connection with Austria, to negative security guarantees. In the case in point, Austria had never accepted any such guarantees but had only made a statement indicating that it considered them to be binding. Notwithstanding Mr. Ferrari Bravo's views, he was not sure that the Commission should not take up the issue of nuclear weapons, for the subject of the topic was unilateral acts, irrespective of their content. Mention had also been made of the Russian Federation's withdrawal from certain declarations made by the former Union of Soviet Socialist Republics (USSR). His understanding was that the Russian Federation had taken that course on the ground that there had been a change of circumstances and that, consequently, it had no longer been able to maintain what had been a unilateral promise. The incident in question was not therefore necessarily proof that unilateral declarations were not binding. It might, however, be wise to take a closer look at the actual circumstances in which the withdrawal had been made. He shared Mr. Brownlie's view as to the relative nature of the statements made in ICJ and had some doubts about the judgments in the *Nuclear Tests* cases. If those judgments were applied in

<sup>5</sup> Republic Act No. 5446 of 18 September 1968, section 2 (United Nations, Legislative Series, *National Legislation and Treaties Relating to the Territorial Sea, the Contiguous Zone, the Continental Shelf, the High Seas and to Fishing and Conservation of the Living Resources of the Sea* (Sales No. E/F.70.V.9), p. 111).

<sup>6</sup> *Yearbook* . . . 1997, vol. II (Part Two), p. 64, para. 196.

<sup>7</sup> See 2524th meeting, footnote 3.

diplomatic practice, it would place a burden on States which they might not be prepared to accept in their daily practice. Also, he fully supported Mr. Economides' request for a document setting forth the various international decisions made with regard to unilateral acts.

21. The Special Rapporteur, who was to be commended on an excellent first report in a most complicated area of international law, had endeavoured to pinpoint the basic theory underlying unilateral acts. The problem, however, was that theories never went unchallenged. Also, they could not be subject to, but could only be the result of, rules. Yet it would be difficult to agree on certain rules in the absence of a generally accepted theory. The Special Rapporteur should therefore explain the theory on which his conclusions were based, but should go no further. In the light of the foregoing, he would himself refrain from discussing theoretical assumptions and would rather concentrate on the practical legal consequences.

22. The first substantive issue discussed in the first report concerned acts that should be excluded from the scope of the study. He was convinced that the Commission should not deal with the unilateral acts of international organizations since, as rightly pointed out in the Sixth Committee, such acts differed substantially from the unilateral acts of States. It was inconceivable that the Commission was meant to discuss the legal effect of, say, the resolutions and directives that emanated from the European Union, the decisions of its Court of Justice or regulations of the European Commission, or that it should, for example, endeavour to assess the legal basis of the most recent Security Council draft resolution on a third ad hoc tribunal.

23. Again, it would not be wise to deal with political acts of States or to seek to define them, since the Commission's task was to define legal acts, in other words, acts having legal consequences. He fully agreed that acts contrary to international law should be excluded from the study, but great caution must be exercised. For instance, it was doubtful whether the Truman Proclamation,<sup>8</sup> made after the Second World War, was in conformity with international law. The same applied to the Declaration on the maritime zone by Chile, Ecuador and Peru<sup>9</sup> concerning the extension of the territorial sea up to 200 nautical miles, although that Declaration had subsequently acquired a certain legal effect through the reaction of other States. It was necessary, rather, to determine the effect of all such acts, since very often their object was to change the obligations imposed on the State. That had occurred in Austrian practice not only in regard to neutrality but in other cases as well. For instance, at a given moment, a circular note had been addressed to all the embassies in Vienna about the admissibility of screening diplomatic bags at the airport. That could be said not to have been in conformity with international law, though it certainly fell within the scope of any discussion of unilateral legal acts.

<sup>8</sup> M. M. Whiteman, *Digest of International Law*, vol. 4 (Washington, D.C., U.S. Government Printing Office, 1965), pp. 756-757.

<sup>9</sup> Signed at Santiago on 18 August 1952 (United Nations, *Treaty Series*, vol. 1006, p. 323).

24. Silence should not, however, be included among unilateral legal acts, and for a reason that differed from the one adduced by the Special Rapporteur, namely, silence did not of itself create a legal obligation but produced a legal effect only if it was a reaction to a certain allegation or activity. It should be dealt with on that basis.

25. He entirely agreed with the Special Rapporteur that the topic was concerned with legal acts as a source of international obligations and not as a source of international law. Hence there was no need to elaborate on paragraphs 100 to 104 of the first report, which dealt with the formation of customary law.

26. Joint declarations raised a specific legal point, though he doubted whether the joint declaration by the Presidents of Venezuela and Mexico,<sup>10</sup> which was referred to in paragraph 83 of the first report, and seemed to amount to an agreement between two States containing provisions in favour of third States, was a good example of the kind of joint declaration relevant to the topic as a legal or political nexus was created between the two States issuing the declaration. It might be worth while to compare the provisions of the 1969 Vienna Convention which related to stipulations in favour of third States with unilateral declarations. He doubted whether paragraph 124 of the first report corresponded to the actual wording of the 1969 Vienna Convention, according to which the irrevocability of such a stipulation depended not on acceptance by the third State but on the intention of the author of the stipulation to provide a clause of such a nature.

27. Another issue of concern related to internal legal acts. Paragraph 110 of the first report suggested that they had international legal effect if they were in conformity with international law, though probably what was really meant was that they would have international legal effect only if that effect was especially provided for under international law. What was actually involved therefore was what Mr. Pellet had called an *habilitation* (2525th meeting), and what he personally would term an "entitlement", whereby a unilateral act had international legal effect only if such entitlement existed by virtue of general customary international law or, as frequently occurred, of a bilateral treaty. It was thus a matter of determining the basis for such entitlement under general international law.

28. The question then arose as to whether the concept of entitlement made it necessary to understand unilateral acts and certain transactions, in the sense of *negotia*, such as recognition and renunciation. There were two arguments against that procedure. In the first place, if only transactions in the sense of *negotia* were to be dealt with, then acts other than declarations would have to be considered inasmuch as recognition, for instance, could be performed implicitly and so did not require a formal declaration. An example of that was furnished by the recognition of the former Yugoslav Republic of Macedonia by a number of States. It had been said that the Republic had been recognized not by formal declaration but by the conduct of the relevant States as evidenced in the General

<sup>10</sup> Agreement on Energy Cooperation Program for the Countries of Central America and the Caribbean, done at San José on 3 August 1980 (ILM, vol. XIX, No. 5 (September 1980), p. 1126).

Assembly when it had been admitted to membership in the United Nations.<sup>11</sup>

29. The second argument was that such an approach would lead to the conclusion that States could perform transactions only if they were explicitly entitled to do so under international law. In other words, this would mean that any competence enjoyed by States to act at the international level derived from international law. There was no denying that there was a tendency to move in that direction but, in his view, international law had not reached that point yet. Thus, what had to be proved by a State was not the entitlement to perform a certain activity but whether an activity was prohibited by international law. That concept also characterized the relationship between general international law and specific regimes relating to unilateral acts.

30. Similarly, internal legal acts did not give rise to international obligations unless the obligation resulted from a general rule of international law to that effect. In other words, it could have legal effect only under the conditions which ICJ, for instance, required for unilateral acts: there must be evidence of an intention to be bound. An internal legal act did not of itself reflect such an intention, which must therefore be proven. For instance, if a State by law, opened a university to students from all over the world, that did not mean it was unable to revoke that law. The State could at any time close access to the university unless it had made a declaration or legal act with a specific intention to be bound. But that had to be proved.

31. Moreover, he did not share the view set out in paragraph 114 of the first report, namely, that the study should exclude unilateral acts which produced legal effects only when the addressee State(s) accepted the offer made in the acts. For example, in a clearly political act—in connection with the declarations made by the members of the Soviet Government<sup>12</sup>—the Austrian delegation had undertaken to ensure that Austria would make a declaration of neutrality and obtain a measure of international recognition. To that end, Austria had enacted the Constitutional Law on the Neutrality of Austria<sup>13</sup> which, it was the common view, had had no effect at the international level. Such effect had been produced only by the notification of the legal act to all States with which Austria had had diplomatic relations at the time, with a request for recognition. Recognition had then been given, explicitly or implicitly. The question was whether the explicit recognition changed the unilateral nature of the initial Austrian act. In his view, it did not and the issue currently at hand was under which circumstances could Austria revoke its neutrality. Two views had been advanced. One was that it was not possible to revoke Austria's neutrality because of the second act, namely the recognition, unless the other States consented to the revocation. The other view was

that recognition did not amount to acceptance of Austrian neutrality and, accordingly, Austria was free to revoke its neutrality at an appropriate time.

32. It had also been said in this context that notification together with recognition amounted to a quasi-contract under international law. In his opinion, all such theories merely indicated that it was no easy matter to distinguish a unilateral act; in any event, almost all such acts had a certain bilateral element. If he remembered rightly, Iceland had once made a declaration<sup>14</sup> in an attempt to become a neutral State but, in the absence of any reaction from other sources, the general view was that it had not become a neutral State. Consequently the acts referred to in paragraph 114 of the first report should not be excluded from further work on the topic, otherwise the majority of unilateral acts would be excluded as they nearly all contained a bilateral element. The Special Rapporteur also referred to the bilateral nature of promises by citing, in paragraph 159 of his report, Grotius and Pufendorf, who stated that an expression of will of the addressed State was also necessary.

33. To his mind, three different approaches for dealing with unilateral acts should be distinguished: dealing only with legal declarations or legal acts in the narrow sense; with unilateral activities of States; and with what he would term transactions. The Commission therefore had to decide whether it wished to consider the procedures by which a legal obligation or legal effect could be produced or whether it should concentrate on the kind of legal transaction, for instance, on recognition, renunciation, protest, objections and so on. If it decided to consider the various kinds of transaction, it must go beyond declarations and include, for example, silence, which could cause some difficulty. The other question the Commission should ask itself was whether the kinds of unilateral act described in various legal textbooks were exhaustive or declaratory and whether there were other kinds of transactions that it should take up.

34. Another possibility was to concentrate on procedure as proposed by Mr. Brownlie, which brought him to the question of estoppel. It could be argued that estoppel was merely the effect of a particular activity. Neither in the literature nor in judicial awards was there any unanimity on that institution. The judicial awards sometimes even referred to estoppel as something like *venire contra factum proprium* or *allegans contraria non audiendus est*. There was, of course, also a narrower understanding of the matter. At all events, it seemed to be in the nature of a certain legal consequence or effect and as such escaped precise regulation. Furthermore, if the Commission dealt with estoppel it might also be asked to deal with institutions like acquiescence or perhaps even acquisitive prescription. Estoppel, it would be remembered, had already been dealt with, for instance, in article 45 of the 1969 Vienna Convention, relating to loss of the right to invoke a ground for invalidating a treaty. It might be possible to extend the application of that clause by providing that a State could no longer invoke the legality of the act of

<sup>11</sup> See General Assembly resolution 47/225.

<sup>12</sup> See "Memorandum concerning the results of the conversations between the Government delegation of the Republic of Austria and the Government delegation of the Soviet Union" (Moscow, 15 April 1955) (*Supplement to the American Journal of International Law* (Washington, D.C.), vol. 49 (1955), pp. 191-194).

<sup>13</sup> Adopted by the Nationalrat, Lower House of Parliament, 26 October 1955, text in G. Stourzh, "Austrian neutrality: its establishment and its significance", *Internationale Spectator Jaargang XIV*, No. 5, 8 Mrt. 1960.

<sup>14</sup> See "Declaration between Denmark, Finland, Iceland, Norway and Sweden Establishing Similar Rules of Neutrality, with Rules" (Stockholm, 27 May 1938), *Supplement to the American Journal of International Law* (Washington, D.C.), vol. 32 (1938), pp. 150-154.

another State which prejudiced its rights if it had acquiesced in the legality of that act. But then it would prove necessary to define acquiescence and perhaps also good faith, which could not be regulated.

35. He was not altogether clear what the General Assembly expected of the Commission in that respect, but if it did decide to make a change, the Commission should make it very clear that it was concerned not with the traditional view of the different kinds of transactions but with the procedure for the transactions. The Special Rapporteur had already stated that he would deal not with the content but with the form of unilateral legal acts and then concentrate on declarations. Personally, he could go along with that on condition that the Commission dealt with declarations as something that went beyond pure promise. If it did so, then it could perhaps become necessary to revert to the question of the different kinds of transactions. Thus, the Commission should first study the question of declarations and, could then discuss the question of estoppel, with a view to securing the reaction of the General Assembly.

36. Mr. LUKASHUK said that he wished to comment on Mr. Hafner's remarks concerning the declaration of the USSR on the non-use of nuclear weapons. His own position, which should not necessarily be taken as reflecting the views of his Government, was that as a successor to the USSR, the Russian Federation was bound by that declaration. Mr. Hafner had rightly said that the situation had changed so greatly that the Russian Federation would be entitled to review its obligations where necessary and appropriate. That, however, was mere theory and it had to be pointed out that there was a huge number of unilateral and bilateral instruments that were politically binding but no norms existed—or were likely to exist in the near future—to govern their operation. Regulation was certainly necessary, since there was the question of legal succession and of the cessation of obligations. All such issues concerning political obligations would be resolved by the application of the norms of treaty law *mutatis mutandis*. That was the only way to address such a complicated problem.

37. Mr. PELLET said that he strongly supported Mr. Hafner's remarks concerning political declarations: the idea of something being politically obligatory seemed legally incorrect.

38. He utterly failed to see how silence could be regarded as an act. It was conduct and the very opposite of an act. Any study of conduct would amount to an anti-topic so far as he was concerned. When the Commission had codified the law of international responsibility<sup>15</sup> it had chosen its terms very carefully and an "internationally wrongful act" (*fait internationalement illicite*) was deemed to mean both acts and omissions, including silence. Silence might be used as a point of reference, as a comparison, but it was not an act. It was the opposite.

39. As to the relationship between the content and the form of transactions, the Commission was not starting out properly. It was obvious that different forms could lead to the same content. Silence, which was not an act but a

form, could lead to recognition, and a treaty could lead to recognition. He did not see why, simply on the pretext that there were transactions which could be the subject also of unilateral acts, they should be studied as such. The Special Rapporteur's topic was not recognition but the special procedure known as unilateral acts which could lead to recognition, just as another procedure like silence or another procedure like a treaty could. The same applied to estoppel. Estoppel could result from a unilateral act, from silence or from a treaty, but it was time to call a halt to the emphasis being placed on it. Whether it actually formed part of the topic was not an acceptable way of posing the problem. It was not because of the Anglo-Saxon fondness for estoppel that it was the topic: it was but one element in the topic and could arise out of it. Different forms could lead to the same content, norm or transaction; conversely, identical forms could obviously result in different transactions. A unilateral act could lead to recognition, estoppel and so on. Again, by confining matters to universal declarations, stress was being placed on the form. The Commission should arrive at a balanced definition of a unilateral act, which was a manifestation certainly, but a manifestation of will.

40. Mr. ECONOMIDES said that, *pace* Mr. Hafner, unilateral acts of international organizations very closely resembled unilateral acts of States as far as their effects were concerned. An act of an international organization could be a source of international law analogous to treaties. For example, any binding act of an international organization, such as the European Union's regulations and binding resolutions, was at the current time a source of international law. So too were unilateral acts of States such as the French declaration in the *Nuclear Tests* cases, which had been an act creating rights and obligations and which must be considered a source of international law.

41. A distinction was being drawn between sources of international law and acts that simply created rights and obligations at international level without constituting formal sources of that law. That distinction was entirely erroneous, at least at the theoretical level—unless one accepted that in order for an act to be a source of international law it must be an exclusively normative act, thereby excluding all synallagmatic acts under the old distinction between law-making treaties, which constituted international law, and contractual treaties, which did not. That approach was wrong, because international law also governed contractual treaties.

42. A second resemblance was that acts of international organizations could be elements in the creation of international custom. Examples were General Assembly resolutions of a normative character, and even the Manila Declaration on the Peaceful Settlement of International Disputes.<sup>16</sup> But at the same time unilateral acts, too, could contribute to the formation of international custom. Moreover, acts of international organizations could play the role of an auxiliary source—one analogous to doctrine and jurisprudence. Examples were the judgments of PCIJ and ICJ and also some normative recommendations of the Assembly. The same was true at the level of domestic law: some judgements of domestic courts treated ques-

<sup>15</sup> See 2520th meeting, footnote 8.

<sup>16</sup> General Assembly resolution 37/10, annex.

tions of international law in such a way as to serve as an auxiliary source.

43. There were thus many resemblances between the two types of unilateral act, and as the law of international organizations was far more developed than that of unilateral acts, one could to some extent draw inspiration from the former. But he agreed with Mr. Hafner that the Commission should not take up the question, if only for the reason that it did not fall within the Commission's mandate.

44. Mr. HAFNER said he had tried to make it clear that the Commission must decide whether, on the one hand, it wished to approach unilateral acts from the standpoint of procedure, form or *modus*, or whether it wanted to tackle them from the standpoint of transactions, by which he meant something corresponding more to the Latin word *negotium*, namely, their content. If the Commission wished to adopt the former approach, should it include only procedures intended to create a legal effect, or should it include other activities of a State? He had raised doubts as to whether the latter course would be possible, as a problem of demarcation would then emerge. For those reasons he had favoured starting with a consideration of declarations. However, the problem had then arisen that he had been unable to find features common to all the various kinds of declarations with regard to their legal effect. If a common feature could be found, then there would be no need to consider the different kinds of transactions.

45. As to the question raised by Mr. Economides, in his view there were substantial differences between unilateral acts of international organizations and those of States. He did not think it was currently possible to deal with the effects of European Union directives, as elaborated by judgements of the Court of Justice of the European Communities: that area was too complex and had reached a more advanced state of development. It was difficult to draw general conclusions applicable to all unilateral acts of international organizations. The task was far more difficult than the one that had faced the Commission when it had attempted to discuss the treaties of international organizations. Even then, the outcome had been that the United Nations Conference on the Law of Treaties had decided to exclude such treaties from the ambit of the 1969 Vienna Convention.<sup>17</sup> Thus, despite the fact that unilateral acts of States and of international organizations shared some common features, the differences outweighed the similarities, and the time was not ripe to deal with the latter category.

46. Mr. PELLET said that when the European Union made a declaration in the framework of its universally recognized competence, it substituted itself for its member States and when it acted purely on the international level it conducted itself as a State. In fields such as international trade, the "old" States were at the current time

effectively a thing of the past. It was the European Union that acted. Thus, if the European Union as such made a unilateral declaration at the international level, that declaration was ultimately no different in nature from one made by a State. However, the European Union's internal resolutions posed problems very different from those with which the Commission was concerned.

47. He was still unable to understand Mr. Hafner's obsession with drawing a distinction between the concepts of *instrumentum* and *negotium*. A treaty was both, being an *instrumentum* resulting in a *negotium*. He did not see how a unilateral act could be regarded purely and simply as an *instrumentum*, as it led inevitably to a *negotium* indissociable therefrom. That was why he had expressed some reservations regarding the Special Rapporteur's expressed intention to confine himself to the declaration form in his study.

48. Mr. SIMMA said he entirely shared Mr. Pellet's views regarding the distinction between an *instrumentum* and a *negotium*, and concerning the effects of declarations of international organizations such as the European Union on third parties. He had already given it as his view that the term "declaration" could be a receptacle for a variety of legal acts.

49. Mr. Economides had spoken of unilateral legal acts as sources of international law. In that regard, it was important not to become involved in *Begriffsjurisprudenz*. He had taken the view (2525th meeting) that unilateral legal acts could be sources of obligations but not sources of law. But, of course, everything depended on how one defined "law". If, rejecting Kelsen,<sup>18</sup> one considered that concrete judgements were not norms, and that only general rules were norms, then unilateral acts would not be norms, but they could create binding effects on the basis of certain norms and general principles, or of customary law.

50. Mr. MIKULKA said he fully supported the Special Rapporteur's proposal to re-establish a working group on unilateral acts of States. It was important to start by establishing perimeters for such a broad topic. In that context, he agreed that unilateral acts of international organizations should be set aside, since, despite some grey areas, they did not fall within the Commission's mandate. The problem of wrongful acts resulting in international responsibility should also be set aside. However, certain formal unilateral acts of States in the framework of the law of responsibility—for example, a claim for reparation as a precondition for recourse to countermeasures—did of course fall within the scope of the Commission's study. He thus endorsed the two principal limits to the topic proposed by the Special Rapporteur. Like other members, however, he felt that too restrictive an approach would be undesirable.

51. He had already touched on the question of the distinction between political acts and legal acts in the strict sense, when responding to Mr. Simma's remarks (2525th meeting). He could accept the Special Rapporteur's proposal not to deal with political acts, provided that proposal was interpreted as excluding the strictly political

<sup>17</sup> See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968* (United Nations publication, Sales No. E.68.V.7); *ibid.*, *Second Session, Vienna, 9 April-22 May 1969* (United Nations publication, Sales No. E.70.V.6); and *ibid.*, *First and Second Sessions, Vienna, 26 March-24 May 1968 and Vienna, 9 April-22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5).

<sup>18</sup> See 2525th meeting, footnote 11.

effects of unilateral acts of States: for certain unilateral acts could produce both political and legal effects, and only the latter were of interest to the Commission. The proposal should thus be expressed in rather different terms.

52. There were several branches of international law in which the legal effects of certain unilateral acts were already well defined: the law of treaties, of immunities and of armed conflicts, for example. The Commission might take those areas as the starting point for an analysis of the conditions for validity and opposability—the conditions in which unilateral acts produced legal effects—so as to ascertain whether a common basis really existed which could also serve for a study of the effects of unilateral acts in spheres other than those that had already been codified. He was not very optimistic as to the outcome of the exercise: it might lead to the conclusion that there were very few elements common to all those forms of legal act. What was interesting was the specific effects in different spheres of international law. The legal effects of a declaration made in the context of the law of treaties—a declaration of withdrawal of a reservation, for example—were entirely different from those of a declaration of neutrality, made in a different branch of international law.

53. As to the form the Commission's work should take, it might be best for the Special Rapporteur initially to confine himself to a comprehensive analytical study of the problems, in the light of which the Commission might then decide that the topic was ripe for the formulation of draft articles accompanied by commentaries.

54. Mr. CANDIOTI said that the first report raised various questions that the Commission must resolve at the current session in order to be able to continue its work in accordance with the tentative schedule established at its forty-ninth session.<sup>19</sup> Thus, the Special Rapporteur proposed excluding various categories of act from the scope of the study so as to focus on what he called strictly unilateral legal acts. That approach was useful, but it must not be followed too rigidly. Some unilateral acts falling within the ambit of the law of treaties, the formation of custom or judicial procedure had characteristics in common with autonomous unilateral acts, and the similarities could serve better to illustrate and distinguish the characteristics of the latter.

55. Like the Special Rapporteur, he believed that unilateral acts of international organizations, albeit a topic of great interest, were outside the scope of the Commission's mandate and should form the subject of a separate study at a later stage in its work.

56. Silence, acquiescence and estoppel were really bilateral rather than unilateral phenomena, but were of interest for the effects they could have with respect to unilateral acts, and should therefore be taken into account insofar as they were relevant to clarifying the way in which unilateral acts functioned.

57. The Special Rapporteur had sensibly proposed focusing attention on unilateral declarations as the normal mechanism for giving form to classic unilateral acts such

as promise, recognition, renunciation and protest. A declaration was the most usual, though not of course the only, means of formulating unilateral acts, regardless of their content. The Commission could usefully make that its starting point, but bear in mind that the form was not a rigorous requirement and that in some categories of unilateral act, such as recognition, international law recognized the mere conduct of States, without need for a declaration or notification, as a valid form of expression of the will to accept a particular situation or right as opposable. Notification, too, could be assimilated to declaration, and some internal acts of States which had international legal effects were also possible forms of unilateral act recognized by international law.

58. The Special Rapporteur also deemed it necessary to identify or develop a rule or principle expressing the binding nature of unilateral acts, to take the form of *acta sunt servanda* or *promissio est servanda*. His own reaction was that such a development, albeit unobjectionable, was also unnecessary. He preferred to abide by the ruling of ICJ in the *Nuclear Tests* cases, that the binding force of those acts was to be found in the principle of good faith.

59. The definition of a strictly unilateral declaration contained in paragraph 170 of the first report could be the starting point for the Commission's work, without prejudice to its being refined thereafter, as the study progressed. Clearly, attention would have to be paid to the jurisprudence, and especially to State practice, analysing how unilateral acts were formulated, what purposes they served, when they were considered legally binding rather than mere declarations of policy, and what were the perceptions and attitudes of other States vis-à-vis those forms of conduct. A compilation of data on State practice and a list of cases would be useful adjuncts to the Commission's work on the topic. That material would assist in ascertaining to what extent international law recognized certain forms of State conduct as binding unilateral legal acts, what elements they must exhibit in order to be recognized as such, who could formulate them on behalf of the State in order for them to be attributable to the State, the circumstances in which they were valid, what form they could—or in some cases must—take, what effects they produced, how they could be terminated, revoked or modified, and so forth.

60. It should be recalled that the Commission had invited Governments to provide it, *inter alia*, with information on the practice and experience of each State in that regard.<sup>20</sup> Pending their replies, the Special Rapporteur, possibly assisted by the secretariat and members of the Commission, would perhaps also have to take on that additional task of research and classification.

61. The Commission had proposed submitting the Special Rapporteur's first report for consideration at the fifty-third session of the General Assembly, indicating how the work should continue and stating its views on what the outcome might be.<sup>21</sup> The Commission must also come up with at least a preliminary opinion on that question at its current session. Though it was too soon to take a decision on the final form of the work, the complexity of the topic

<sup>19</sup> *Yearbook* . . . 1997, vol. II (Part Two), pp. 66-67, paras. 211-216.

<sup>20</sup> *Ibid.*, p. 67, para. 215.

<sup>21</sup> *Ibid.*, pp. 66-67, para. 214.

seemed to call for a study leading to conclusions concerning the rules of international law applicable to unilateral legal acts. As was the Commission's custom, those rules could then take the form of draft articles.

62. A mandate for the working group proposed by the Special Rapporteur should be formulated before the Commission concluded its plenary debate on the topic. One immediate task that could be assigned to the working group would be to analyse the definition of a unilateral declaration proposed by the Special Rapporteur in paragraph 170 of his first report and to transform it into a draft article. The working group could also draw up a general schema for the draft articles, dividing the material into chapters and making preliminary proposals concerning the content of each article. The outline contained in the report of the Commission on the work of its forty-ninth session could be used as a basis for that task.<sup>22</sup> The Commission must not lose sight of the plan of work for the quinquennium it had adopted at its previous session. On the basis of that plan, the working group and the Special Rapporteur could also consider an outline of the content of his future reports and transmit their conclusions to the plenary for consideration. Participants in the working group should be chosen so as to be representative of the various schools of thought revealed in the debate.

63. Mr. PAMBOU-TCHIVOUNDA endorsed the suggestion about the preparation of a compilation of State practice and pointed out that all the members of the Commission could assist the secretariat and the Special Rapporteur in that endeavour. They could each, upon returning to their countries of origin, draw up a list of court decisions relevant to the topic and transmit the list to the Special Rapporteur.

64. The CHAIRMAN, speaking as a member of the Commission, said he, too, thought that preparing a compendium of State practice would be a good idea.

65. Mr. YAMADA commended the Special Rapporteur on an excellent first report which contained comprehensive findings and an outstanding analysis of a difficult topic. He had no difficulty with any of the Special Rapporteur's main conclusions: that the Commission should deal with strictly unilateral acts, the criteria for which were "a single expression of will" and "autonomy", and that the legal basis for the binding nature of such acts was the principle of good faith. He would appreciate clarification, however, on three points.

66. First, while he agreed that the unilateral act of a State did not have to be accepted by other States, what about the reactions of other States? Did they have no role in determining the legal effect of the unilateral act? Could they be totally disregarded? The *Nuclear Tests* cases had been a clear-cut instance of an autonomous unilateral act, but in most instances, and especially in the volatile financial and economic fields of recent years, a unilateral act was followed by a series of reactions by other States.

67. Secondly, a unilateral act had the legal effect of limiting the policy options of the author State. It could, however, often limit the policy options of other States—

particularly those targeted by the act. What was the legal effect of the unilateral act in such cases? Did it remain intact, regardless of the implications for third States? For example, by becoming a party to the Treaty on the Non-Proliferation of Nuclear Weapons, Japan had undertaken a legal obligation neither to manufacture nor to possess such weapons. But it had also repeatedly made a public pronouncement about not allowing the introduction of such weapons into its territory that remained a unilateral declaration and the Government had given no public indication of whether it intended to undertake a legal obligation in that regard. If one assumed, for the sake of argument, that such an intention had been expressed, then the pronouncement would have a number of implications for nuclear-weapon States.

68. Under a mutual security treaty signed with the United States of America,<sup>23</sup> that country was authorized to station its forces in Japan for the defence of Japan and security and stability in the Far East. Could the United States' policy option of nuclear deployment for United States forces in Japan be limited by Japan's unilateral action? The matter had in fact been dealt with by an exchange of notes providing for prior consultation. Many other nuclear-weapon States followed the United States policy of neither confirming nor denying the existence of nuclear weapons, which was a crucial element in nuclear deterrence. Would the naval fleets of the United Kingdom of Great Britain and Northern Ireland and France, for example, have to abandon that policy and declare that they were not equipped with nuclear weapons before making friendly calls in Japanese ports? What about the right of innocent passage of nuclear-powered naval vessels in the Japanese territorial sea?

69. His third question revolved around the notion that unilateral acts must have legal effects in order to maintain the legal order of international society, and accordingly, that they could not be arbitrarily amended or withdrawn. But if no amendment or withdrawal was permitted, States would hesitate to make unilateral acts. Consideration should be given to the procedures by which amendment and withdrawal could be effected.

70. Mr. ECONOMIDES, following up on the final point, said the question of whether unilateral acts were a source of international law was of great importance. If they were, then they had the same force and validity as all other sources of international law, including treaties and agreements and customary law. If they were not, if they constituted strictly internal acts of a State, then all other sources of international law would take precedence over them.

71. Mr. HAFNER said he agreed that the Commission would inevitably have to revert to the issue of revocability of unilateral acts. The State's intent should be the factor determining the act's revocability. In such circumstances, the conditions set out in the law of treaties for the termination of an obligation would apply.

<sup>22</sup> *Ibid.*, chap. IX, sect. B.3, pp. 65-66.

<sup>23</sup> Security Treaty (San Francisco, 8 September 1951) United Nations, *Treaty Series*, vol. 136, p. 216.

72. Mr. YAMADA said his comment had been intended to draw attention to the need for consideration of the procedures and circumstances which might justify the revocation or amendment by States of their unilateral acts.

73. Mr. GOCO, taking up Mr. Hafner's comment, questioned whether the expression of an intention had to be considered as a decisive factor in determining the existence of a unilateral act. If so, then the State would in all instances be bound by a declaration of intention. In the *Nuclear Tests* cases, France had had no intention, when making its declaration, of engaging in a unilateral act. But the declaration had been made publicly and ICJ had interpreted it as being binding upon France. No intention had existed at the outset, yet because of the act's effects in international law, a unilateral act had been deemed to have been performed.

74. Mr. HAFNER said that any act not accompanied by the intention that it should be binding would produce such a legal effect only under certain circumstances that had to be spelled out in international law. It could be done by estoppel.

75. Mr. GOCO pointed out that a declaration made unilaterally could not be unilaterally revoked because of the consequences of such revocation for third States. On the other hand, a State might argue that it had not intended to make a unilateral declaration and wished to revoke what had subsequently been construed as one because of the consequences of such a declaration for third States.

76. Mr. PAMBOU-TCHIVOUNDA said he agreed that the fundamental issue of when and how revocation was possible would have to be taken up by the Special Rapporteur as it was an integral part of the regime to be established. He believed revocation was indeed possible: what a political entity did, it could also undo. But what was the minimal threshold for acceptance of the discretionary use of the State's capacity to undo an act? The notion of reasonableness found in the law of treaties should come into play in the regime to be established for withdrawal of unilateral acts.

77. Mr. HERDOCIA SACASA said the judgments of PCIJ and ICJ showed that it was indeed possible for States to amend or revoke unilateral acts, but he agreed with Mr. Pambou-Tchivounda that certain limits had to be established. In the *Nuclear Tests* cases, ICJ had indicated that a unilateral undertaking could not be interpreted as being based on an arbitrary—in other words, unlimited—power of reconsideration (see paragraph 51).

78. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ had stated that, although the United States had the right inherent in any unilateral act of a State to modify the contents of a declaration it had made in 1946 or to terminate it, it had nevertheless assumed an inescapable obligation to carry out the terms and conditions of the declaration, including the six months' notice proviso.<sup>24</sup> Nicaragua could therefore oppose the actions of the United States because the six

months' notice period was an undertaking that was an integral part of the instrument that contained it.

79. Mr. MIKULKA urged the Commission to reflect on the difficulty of engaging in an abstract discussion of forms and procedures in isolation from the specific legal environment and content of specific unilateral acts. Acts were of differing effect, depending on whether they were performed as part of military activities or in the context of the law of the sea, for example. Declarations and protests were entirely different actions, and revoking them had entirely different legal consequences—yet they were both unilateral acts.

80. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said it was true that the discussion of revocation and amendment was premature so long as a definition of unilateral acts themselves had not yet been developed. It was the legal act, whether formal or substantive, that should be analysed, not the expressed or implicit intention, although the act was, of course, grounded in the intention of the State.

81. Mr. GOCO, recalling the Special Rapporteur's suggestion that a working group be established, pointed out that the Working Group established at the forty-ninth session could perhaps be reconstituted.

82. Mr. CANDIOTI said that the Working Group established at the forty-ninth session could indeed be used as the basis for the one to be established at the current session. It was important, however, to ensure that all three schools of thought outlined by Mr. Economides were represented. He would also suggest that the Special Rapporteur should produce an outline of the conclusions that could be drawn from the Commission's initial discussion of the topic.

*The meeting rose at 1.05 p.m.*

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## 2527th MEETING

*Friday, 8 May 1998, at 10 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Al-Khasawneh, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

<sup>24</sup> *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 392 et seq., at p. 419.

**Unilateral acts of States (*continued*) (A/CN.4/483, sect. F, A/CN.4/486,<sup>1</sup> A/CN.4/L.558)**

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. ELARABY said that two main questions had arisen in the debate. Concerning the question whether a category of such unilateral acts existed in international law, he thought that all members who had taken the floor had replied that it could and had referred to a number of judgments by ICJ. In that connection, a compilation of all international judgements would be useful. On the question of a possible codification of the rules governing such acts, he was of the view that such an exercise "in some form" would bring more certainty, predictability and stability to international relations. On a general point, he said that simply clarifying the distinction between the category of declarations of principle and that of declarations with legal consequences and attempting to define the rules regulating the latter category would unquestionably be an important contribution to the progressive development of international law.

2. Four points deserved to be given attention by the Commission. The first, which had been raised in paragraphs 41 to 45 of the first report on unilateral acts of States (A/CN.4/486), was the difficulty of establishing a clear distinction between political acts and legal acts on the basis of the nature or scope or even the intent of the State alone. Mr. Simma had already referred (2525th meeting) to the question of declarations by nuclear-weapon States in connection with denuclearized zones outside agreements on the creation of such zones, which currently was more or less regulated by the fact that the five nuclear Powers were parties to the Treaty on the Non-Proliferation of Nuclear Weapons. A second example concerned the question, which the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council was examining, of the legal effect and possible revocability of the declaration which Germany might make with regard to the exercise of the right of veto if it became a permanent member of the Security Council. In the presence of that grey area of sorts between the political and the legal consequences of a unilateral declaration, the most pertinent criterion for measuring the degree of confidence to be given to such a declaration would be that of the nature, whether political or legal, of the mechanism to be implemented in the event of failure to comply with the commitment.

3. The second point which deserved the Commission's attention was whether a unilateral legal act could constitute a source of international law. It could be considered, in that context, that Article 38, paragraph 1 (b), of the Statute of ICJ by implication encompassed the legal consequences of unilateral legal acts because, in the past, the latter had contributed to the development of customary rules, notably in the area of the law of the sea; it was there-

fore possible to see in unilateral legal acts a subsidiary source of international law.

4. The third point related to the need to review, in the context of the topic, the principle of estoppel.

5. On the fourth point, concerning how the Commission should proceed, he endorsed the idea of undertaking an expository study in the initial stage.

6. The Declaration made by the Government of Egypt on the Suez Canal in 1957<sup>2</sup> which had been referred to a number of times in the course of the debate, had been made in conformity with Article 36 of the Statute of ICJ and deposited with the Secretary-General in accordance with the provisions of paragraph 4 of that Article. Its objective had been to accept the jurisdiction of the Court with regard to the application of the Constantinople Convention of 1888, exclusively to the extent that it related to the operation of the Suez Canal and solely with reference to the original parties to the Convention and the successor States.

7. Mr. GALICKI said that he agreed with the Special Rapporteur's approach of eliminating at the beginning such acts which did not fulfil the condition formulated in paragraph 57 of the first report; that led him, in paragraph 170, to a more elaborated definition of so-called strictly unilateral acts. In so doing, he more or less precisely established the limits of the Commission's future work. However, excluding certain categories of act from the scope of the study might give rise to a problem in relation, for example, to the formation of custom, since some unilateral acts originally conceived solely for the purpose of creating international obligations might, in the final analysis, contribute to the formation of customary law.

8. He expressed his appreciation to the Special Rapporteur for his efforts to identify criteria for determining the strictly unilateral nature of international legal acts of States and he endorsed the distinction made, in paragraph 168 of the first report, between substantive acts and formal unilateral acts in the context of an attempt at codification and progressive development.

9. However, the practical realization of the Special Rapporteur's proposed plan of action for the future might give rise to a number of problems and difficulties. First of all, the Special Rapporteur did not say anything about the final form of the work undertaken by the Commission. Secondly, it would be desirable to maintain greater continuity between the outline on the topic prepared by the Commission at its forty-ninth session<sup>3</sup> and the Special Rapporteur's work, unless he was of the opinion that it was impossible or inappropriate to deal with certain points.

10. Moreover, despite the necessarily very general nature of the first report, various specific points had been raised in the course of the debate which, far from constituting criticism, might help the Special Rapporteur in his future work. One such point concerned the revocability of obligations which were created by unilateral acts of States

<sup>1</sup> Reproduced in *Yearbook* . . . 1998, vol. II (Part One).

<sup>2</sup> See 2524th meeting, footnote 17.

<sup>3</sup> See 2526th meeting, footnote 22.

and gave rise to corresponding rights for other States. Although, in the case of a purely unilateral act, acceptance by the beneficiary third State was not necessary for the formal establishment of the obligation, the subsequent direct or indirect acceptance of the corresponding right was probable; hence the question of a possible unilateral revocation of the initial obligation by the author State. Although he did not wish to challenge the distinction which the Special Rapporteur rightly drew between the domain of the law of treaties and that of unilateral acts, he thought that it should be possible to find a solution analogous to those provided for in articles 36 and 37 of the 1969 Vienna Convention for the problem of revocation in the case of unilateral acts. It was up to the Special Rapporteur and the working group that was to be re-established to study that question.

11. Mr. THIAM said that he agreed with the approach taken by the Special Rapporteur, who, in dealing with a particularly difficult topic, had begun by clearing the ground, excluding from the scope of the study a number of acts and, for the time being, maintaining only the unilateral declaration, which was at the core of the subject. That wise attitude would not prevent him from subsequently considering whether other acts might also be regarded as unilateral legal acts.

12. Mr. HERDOCIA SACASA said that the first report opened an important chapter in the Commission's work because, in international law, which was accustomed to dialogue and a wide range of protagonists, it introduced the monologue of the unilateral act that produced legal effects. The Commission must work towards progressive development and codification in that area. In its judgments in the *Nuclear Tests*, *Frontier Dispute* and *Military and Paramilitary Activities in and against Nicaragua* cases, for example, ICJ had established criteria which were fundamental for the study of the subject, namely, the clearly expressed intention of producing legal effects and the expression of will by means of an oral or written declaration. There was, however, also the criterion of autonomy, which typified the "pure" unilateral act, without any compensation which guaranteed its validity, as well as that of publicity with respect to the addressees of the act or *erga omnes*. The Special Rapporteur had made the necessary delimitation effort by pruning away falsely unilateral acts, thereby enabling the Commission to do its work, which was to provide means of ensuring legal certainty and stability in international relations by leaving less room for interpretation and allowing States to know precisely under what circumstances their acts might commit them.

13. Unlike some members who favoured extending the scope of the study, the Special Rapporteur confined himself to purely unilateral acts, mainly on the basis of the criterion of autonomy and of the fact that the other acts were already the subject of regulation. In order to achieve the necessary balance, the real question to ask was not whether a unilateral act was autonomous or not, but whether such an act, autonomous or otherwise, already fell within an existing legal framework. There were non-autonomous acts which still had no such framework. Many unilateral acts derived from customary norms that had yet to be codified. If he approached the topic from that standpoint, the Special Rapporteur would take

account of the view of those who supported a broader study and would perhaps manage to achieve a general regime based not on autonomy alone, but also on the unilateral character and the lack of any framework that had already been codified.

14. A few comments were called for at the preliminary stage of the consideration of the topic. There was, first, the question of the relationship between unilateral acts and internal law. Treaty-based acts derived their great force from legislative approval, but, in the case of unilateral acts, which most often issued from the executive, there was often the obstacle of very strict limits in the matter of competence which derived from the principle of the separation of powers. There was also the question, which had been raised expressly in the Sixth Committee, whether unilateral acts were not only international obligations, but also sources of international law. Admittedly, Article 38 of the Statute of ICJ did not refer to unilateral acts, but, on a number of occasions, the Court itself had opined that that Article was not exhaustive so far as the bases for its judgments were concerned. Then there was the question of the dual function of a unilateral act, namely, as the creator of a legal obligation and, at the same time, as evidence of a fact or a situation. In the *Military and Paramilitary Activities in and against Nicaragua* case, the Court had taken the view that declarations issuing from high-ranking political persons had special probative value and bound those who made them (see paragraph 64). It had also concluded that it was up to the Court to form its own opinion on the meaning and scope which the author of a declaration had intended to give to it (see paragraph 65). The question which then arose was not only what was the author's intention, but also how the declaration was interpreted and by whom. Accordingly, the Special Rapporteur should analyse the latter aspect of a unilateral act more carefully and always with a view to limiting the margin of interpretation in the matter. Lastly, if a universal norm had to be found as the basis for the binding legal effect of all unilateral acts, then it must be sought in the area of State sovereignty.

15. Mr. BROWNLIE said that the criterion of publicity to which Mr. Herdocia Sacasa had referred was certainly relevant in terms of evidence and of the identification of those to whom the act was addressed. It was not, however, a necessary condition for the act to produce legal effects. Many declarations, for instance, between ministers for foreign affairs, were made in camera, but were nonetheless binding on their authors.

16. Mr. KABATSI, noting that the Special Rapporteur had performed the task entrusted to him perfectly, said that his report, like any first report, called for a few preliminary comments. Although some members would prefer not to exclude an open approach to the topic completely, it would be more prudent to keep its scope within very strict even if not absolutely watertight limits. It was always difficult, of course, to isolate the strictly legal—as opposed to political—aspect of acts, but the task should not be impossible and the matter should be studied further. There was no question that the acts of international organizations should be excluded from the scope of the study, but care must be taken to detect acts of that kind which were in reality acts of States. As for the possibility that unilateral acts of States could be a source

of international law, the Special Rapporteur had already provided some information that clarified the matter. The question of the revocation of unilateral acts was linked to the criterion of the precise intention of the author State, but, even in the absence of intention, revocation must be possible in the event of change of circumstances or where the interests of the author State so required. It seemed a priori that silence should not come within the scope of the topic, but, insofar as it could nonetheless amount to a reaction to the position of another State, the question should be examined further. Lastly, regarding the form of the draft to be prepared, draft articles seemed to be the most useful solution and the one most likely to assist States.

17. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), summing up the discussion on his first report on unilateral acts of States, said that, given its preliminary nature, the report was bound to be of limited scope. The main point was to try to compile a list of the elements in the definition of a unilateral act. As a result of the discussion, the Commission was currently better able to make out the path it should follow in its further work.

18. Most members recognized, as did international jurisprudence and State practice, that there were unilateral acts of States which could give rise, under international law, to legal obligations. The most discussed question in that connection was the delimitation of the topic, namely, which unilateral acts of States could be the subject of specific rules. The topic had required some pruning and many helpful comments had been made in that respect. Thus, the general view was that unilateral acts of international organizations should not be studied in the context of the topic under consideration, in particular because of the differences between those acts, in terms of their formation and force, and unilateral acts of States. It had also been noted that their study did not come within the mandate which the General Assembly had given to the Commission and that the States which had made comments on the matter in the Sixth Committee had also not been in favour of it. On the other hand, it had been concluded that the acts in question could very well be the subject of a separate study.

19. With regard to political acts, most members had taken the view that they should be studied only insofar as they had legal elements. In that connection, it had been said that the intention of the State from which the act had issued was fundamental. Furthermore, the general view was that all unilateral acts linked to treaties or to pre-existing rules should also be excluded from the study, since, to a certain extent, they fell within the conventional field. As for estoppel, the Commission had apparently concluded that it should be studied not as a procedural mechanism, but from the standpoint of legal unilateral acts that could enable a State to rely on estoppel.

20. It had further been noted that certain unilateral acts of States could come within the field of international responsibility and that care should be taken not to encroach on that subject, which was already under consideration under the topics of State responsibility and of international liability for injurious consequences arising out of acts not prohibited by international law.

21. The majority of members appeared to favour the distinction made in the first report between substantive unilateral acts and formal unilateral acts and had agreed with the idea that only the latter could be studied since the former, given their extremely varied nature, were extremely difficult to make subject to standard rules. Each of them should be studied, but, for the purposes of a work of codification, the general view seemed to be that the work should focus mainly on formal legal acts, starting with unilateral declarations. He trusted, in that connection, that the definition he proposed in paragraph 170 of his report would provide a good basis for drafting a definitive definition of unilateral acts. Such a definition should be clear and not too broad. So far as the form the work could take, draft articles together with commentaries, which would not necessarily be designed to result in codification, would certainly help to facilitate the Commission's task. He therefore proposed that a working group representing the various doctrinal trends should be re-established with a view to achieving a balanced result and one that was also realistic from the political standpoint.

22. The CHAIRMAN said that, if he heard no objection, he would take it that the members agreed to re-establish a working group with the task of assisting the Special Rapporteur in the study of unilateral acts of States and that Mr. Candioti would be ready, as at the forty-ninth session, to act as chairman of an open-ended working group.

*It was so agreed.*

**International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (A/CN.4/483, sect. D, A/CN.4/487 and Add.1,<sup>4</sup> A/CN.4/L.556, A/CN.4/L.568)**

[Agenda item 3]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

23. Mr. Sreenivasa RAO (Special Rapporteur), after reminding members that at the forty-fourth session, in 1992, the Commission had taken a decision to deal with the topic of prevention first under the topic of international liability for injurious consequences arising out of acts not prohibited by international law and then proceed to remedial measures to be taken after damage had occurred,<sup>5</sup> said he had thought it best to deal first with the scope and content of the topic, which, as had been noted by the Working Group on international liability for injurious consequences arising out of activities not prohibited by international law established by the Commission at its forty-ninth session,<sup>6</sup> were not always clear.<sup>7</sup> For that reason and in view of the questions raised during the debate that had taken place in the Sixth Committee on the report of the Commission on the work of its forty-ninth session,

<sup>4</sup> Reproduced in *Yearbook* . . . 1998, vol. II (Part One).

<sup>5</sup> *Yearbook* . . . 1992, vol. II (Part Two), p. 51, document A/47/10, paras. 344-346.

<sup>6</sup> See *Yearbook* . . . 1997, vol. II (Part Two), p. 59, para. 162.

<sup>7</sup> *Ibid.*, para. 165.

he had decided that it would be profitable to review the work done thus far so as to be in a position to respond to those questions and at the same time clarify the scope and content of the topic. The review was essentially aimed at identifying the various elements of the concept of prevention hitherto developed by the Commission.

24. The Commission's work on the topic of prevention of transboundary damage from hazardous activities should first be placed in the context of sustainable development. It was in that broader context that the concept of prevention had recently assumed great significance and topicality. The objective of prevention of transboundary damage arising from hazardous activities had been emphasized in principle 2 of the Rio Declaration on Environment and Development (Rio Declaration),<sup>8</sup> and confirmed by ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* as forming a part of the corpus of international law (see paragraph 29).

25. Prevention should be a preferred policy because, in the event of harm, compensation often could not restore the situation that had prevailed prior to the event or accident. Discharge of the duty of prevention or due diligence was all the more necessary as knowledge regarding the operation of hazardous activities, materials used, the process of managing them and the risks involved was growing steadily. From a legal angle, the enhanced ability to trace the chain of causation, that is to say, the physical link between the cause (the activity) and the effect (the harm), even when several intervening links existed in that chain, also made it imperative for operators of hazardous activities to take all necessary steps to prevent harm. It was well known that prevention was better than cure. It was particularly noteworthy that the European Commission, which had drawn up several sophisticated schemes for prevention of transboundary damage, had emphasized that a growing economy was a necessary precondition for sustainability, in that it created the resources needed for ecological development, the reparation of environmental damage and the prevention of future harm.

26. During the Commission's consideration of the topic of international liability for injurious consequences arising out of activities not prohibited by international law, repeated references had been made to the need to consider the duty of prevention as an obligation of conduct and to develop new rules concerning lawful acts of States that carried the risk of causing serious damage. Accordingly, it had been considered that obligations of reparation could not displace obligations of prevention. The debate on that issue was summarized in paragraphs 35 to 39 of the first report (A/CN.4/487 and Add.1).

27. The first Special Rapporteur on the topic of international liability for injurious consequences arising out of activities not prohibited by international law, Mr. Quentin-Baxter, had dealt with the concepts of prevention and reparation as a continuum rather than as two mutually exclusive options. He had projected liability as a system involving different shades of prohibition and as an appeal

to self-regulation by the source State.<sup>9</sup> Distinguishing obligations that arose respectively from wrongful acts and from acts not prohibited by international law, Mr. Quentin-Baxter had intended to develop draft articles the primary aim of which was to promote the construction of regimes to regulate, without recourse to prohibition, the conduct of any particular activity which is perceived to entail actual or potential dangers of a substantial nature and to have transnational effects.<sup>10</sup> Most of the principles he had intended to isolate in that regard would, in Mr. Quentin-Baxter's view, belong to the category of primary rules of international law, as, without them, there was no obligation of reparation in respect of harm arising from acts not expressly prohibited. As noted in paragraph 43 of the first report, the Commission had endorsed that approach. In addition, according to Mr. Quentin-Baxter, the duty of prevention would also involve the existence and reconciliation of legitimate interests and multiple factors.<sup>11</sup>

28. Mr. Quentin-Baxter's main contribution to the study of the topic had of course been the presentation of a schematic outline, the main purpose of which had been

to reflect and encourage the growing practice of States to regulate these matters in advance, so that precise rules of prohibition tailored to the needs of particular situations—including, if appropriate, precise rules of strict liability—will take the place of the general obligations treated in this topic.<sup>12</sup>

Section 2, paragraphs 1, 5 and 6, of the schematic outline<sup>13</sup> dealt with the obligation of prevention. They provided for the duty to inform and to cooperate in good faith to reach agreement, if necessary, upon the establishment of a non-binding fact-finding procedure. Section 6 dealt with various factors that States could take into consideration with a view to achieving mutual accommodation and balancing of interests. While the schematic outline proposed by Mr. Quentin-Baxter had found general acceptance in the Sixth Committee, some members of the Sixth Committee had felt that it should be reinforced to give better guarantees that the duties of prevention would be discharged. There had also been a few sceptics, as mentioned in paragraph 48 of the first report.

29. Mr. Barboza, who had followed Mr. Quentin-Baxter as Special Rapporteur, had retained the latter's basic approach, indicating that the duty of prevention should continue to be treated as an obligation of conduct and not as one of result. He had, however, recommended that the schematic outline should be slightly modified by deleting the first sentence of section 2, paragraph 8, and section 3, paragraph 4, in order to emphasize that failure to fulfil the obligations contained in those two paragraphs would entail certain adverse procedural consequences for the acting State. Mr. Barboza had also made it clear that, while a State had an obligation to notify, it was not

<sup>9</sup> *Yearbook . . . 1983*, vol. II (Part One), p. 214, document A/CN.4/373, para. 44.

<sup>10</sup> *Yearbook . . . 1980*, vol. II (Part One), p. 250, document A/CN.4/334 and Add.1 and 2, para. 9.

<sup>11</sup> *Ibid.*, p. 258, para. 38.

<sup>12</sup> *Yearbook . . . 1983*, vol. II (Part One), p. 216, document A/CN.4/373, para. 50.

<sup>13</sup> Reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109. Subsequent changes are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

<sup>8</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

required to obtain the prior consent of the States likely to be affected by the hazardous activities it initiated in its territory. Six different requirements of prevention had been identified by Mr. Barboza<sup>14</sup> and were set out in detail in paragraph 55 of the first report: prior authorization, risk assessment, information and notification, consultations, unilateral preventive measures and a standard of due diligence proportional to the degree of risk of transboundary harm in a particular case.

30. The first report went on to deal with the draft articles provisionally adopted by the Commission at its forty-sixth and forty-seventh sessions<sup>15</sup> and the draft articles proposed by the Working Group at the forty-eighth session.<sup>16</sup> An important question that had arisen in that context was whether measures aimed at preventing further harm—including any measures to be taken to restore the situation that had existed prior to the incidence of harm caused by an accident, that is to say, prevention *ex post*—should be regarded as a part of the duty of prevention. While there had been much disagreement and debate on that point, at the forty-eighth session, the Working Group had endorsed the earlier view of the Commission, taken at its forty-seventh session, that the concept of prevention should include measures of prevention *ex ante* and measures *ex post*.<sup>17</sup> That view was also supported in the resolution on Responsibility and Liability under International Law for Environmental Damage, adopted by the Institute of International Law at the 1997 session, held at Strasbourg, which had recommended the adoption of additional mechanisms, such as contingency plans, emergency plans and restoration (safety) measures to prevent further damage and to control, reduce and eliminate damage once it had been caused, as part of the concept of prevention.

31. Articles 4 and 6 provided the basic foundation for the remaining articles on prevention, which would thus extend to taking appropriate measures to identify activities creating a risk of causing significant transboundary harm. That was an obligation of a continuing character. The obligation of prevention was further designed to oblige a State to take unilateral measures to prevent or minimize the risk of significant transboundary harm by having recourse to available scientific knowledge and technology, as well as its own economic capacity.

32. Turning to chapter III of his first report devoted to the scope of the draft articles, he said that the Commission had attacked that problem from the outset. Its members had been able to agree on certain broad criteria: the transboundary element, the element of physical consequence and the need for physical events to have social repercussions, thus excluding harm caused by State policies in

monetary, socio-economic or similar fields. Resisting attempts to expand the scope of the topic in that direction, Mr. Barboza had confined it to those activities with physical consequences where a cause-and-effect relationship between the activity and the injury could easily be established. The Commission had been unable to arrive at any final conclusion on the type of activities to be encompassed by the topic. At its forty-seventh session, the Commission had established a Working Group on the identification of dangerous activities.<sup>18</sup> The Working Group had taken the view that the work of the Commission could proceed without a precise definition of the activities in question, but taking into consideration the activities listed in various conventions dealing with the protection of the environment. The Commission had accepted those conclusions.<sup>19</sup>

33. Another question that had engaged the Commission's attention was the question of a threshold, which was fundamental to the concept of significant harm. Mr. Barboza had generally agreed with Mr. Quentin-Baxter and had felt that, with respect to activities involving a risk of causing transboundary harm, injury was the consequence of lawful activities and had to be determined by reference to a number of factors. There was general agreement within the Commission and in the Sixth Committee that the concept of danger was relative and that it was for States to identify the levels at which it could be regarded as substantial. Others would have preferred a clearer indication of the threshold by reference to specific types of dangerous but lawful activities or substances. At its forty-sixth session, the Commission had defined "risk of causing significant transboundary harm" as encompassing a low probability of causing disastrous harm and high probability of causing other significant harm.<sup>20</sup> That formulation treated threshold as the combined effect of risk and harm which must reach a level deemed significant. The Working Group had approved that formulation at the forty-eighth session.

34. As pointed out in paragraph 97 of the first report, the concept of significant harm had been further clarified to mean something more than detectable or appreciable, but not necessarily serious or substantial. According to that understanding, the harm must lead to real detrimental effects on human health, industry, property, environment or agriculture in other States which could be measured by factual and objective standards. It had also been suggested that, considering that the activities involved were not prohibited by international law, the threshold of intolerance of harm could not be placed below "significant". The term "significant" thus denoted factual and objective criteria and involved a value judgement which depended on the circumstances of a particular case and the period in which such determination was made. In other words, a deprivation which was considered to be significant at one time might not be so regarded later.

35. The criterion of transboundary harm involved the concepts of territory, control and jurisdiction. Those concepts had been defined in article 2, paragraph 1, proposed

<sup>14</sup> J. Barboza, "International liability for the injurious consequences of acts not prohibited by international law and protection of the environment", *Collected Courses of the Hague Academy of International Law, 1994-III* (Dordrecht/Boston/London, Sijthoff, 1995), vol. 247, pp. 291-406.

<sup>15</sup> For the texts of the articles, see *Yearbook . . . 1994*, vol. II (Part Two), pp. 158 et seq. and *Yearbook . . . 1995*, vol. II (Part Two), pp. 89 et seq.

<sup>16</sup> For the texts of the articles and the commentaries thereto, see the report of the Working Group (*Yearbook . . . 1996*, vol. II (Part Two), pp. 101 et seq., document A/51/10, annex I).

<sup>17</sup> See *Yearbook . . . 1995*, vol. II (Part Two), p. 87, para. 389.

<sup>18</sup> *Yearbook . . . 1995*, vol. II (Part Two), p. 89, paras. 405-406.

<sup>19</sup> *Ibid.*, para. 408.

<sup>20</sup> *Yearbook . . . 1994*, vol. II (Part Two), p. 164, art. 2, subpara. (a).

by Mr. Quentin-Baxter in his fifth report.<sup>21</sup> According to the former Special Rapporteur, territory included the land territory, the maritime zones, the airspace and the territorial sea over which a State enjoyed sovereignty, sovereign rights or exclusive jurisdiction. It also took into account the jurisdiction of a flag State over ships, aircraft and space objects when they operated on the high seas or in the airspace. Thus defined, the scope of the topic was concerned with effects felt within the territory or under the control of a State, but arising as a consequence of an activity or situation occurring, wholly or partly, within the territory or under the control of another State or States.

36. Mr. Barboza had adopted the same approach<sup>22</sup> and had extended the concept of control to the situation referred to by ICJ in the *Namibia* case, when the Court had said that it was physical control of a territory, and not sovereignty or legitimacy of title, that was the basis of State liability for acts affecting other States (see paragraph 118).

37. Consequently, the draft articles provisionally adopted by the Commission at its forty-sixth session had limited the scope to activities carried out in the territory or otherwise under the jurisdiction or control of a State (art. 1) and had further defined transboundary harm as harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border (art. 2, subpara. (b)). Even though the expression “jurisdiction or control of a State” was more commonly used, the Commission had found it useful to mention also the concept of territory in order to emphasize the territorial link, when such a link existed between activities under the articles and a State.

38. In his sixth report,<sup>23</sup> Mr. Barboza had dealt as a separate matter with the question of extending the scope of the topic to activities which harmed the global commons per se. According to him, a review of State practice seemed to indicate that harm to the global commons had been dealt with through identification of certain harmful substances or areas of the commons. In his view, that trend indicated that the problem was better dealt with under the topic of State responsibility. Several members of the Commission had taken the view that the subject of harm to the global commons raised difficulties in determining the State or States of origin and in the assessment and determination of harm. In addition, the right to compensation and the obligation of prevention of harm were difficult to implement if no single State could be identified as the affected State or the source State. Some members had felt that the subject could be dealt with separately under the Commission’s long-term programme of work, while others had thought that the topic was not ripe enough to be considered. The first group had felt that the subject required priority consideration. According to them, the principles of common concern of mankind and of the protection of inter-generational equities being developed within the context of sustainable development

and environmental law provided the necessary content for the concept of harm to the global commons. As a result, article 2, subparagraph (b), provisionally adopted by the Commission at its forty-sixth session, excluded activities which caused harm only in the territory of the State within which they had been undertaken or activities which harmed the global commons per se without any harm to any other State.

39. Introducing chapter IV of the first report, which set out his recommendations for the scope of the draft articles, he noted that article 1, subparagraph (a), and article 2, as proposed by the Working Group at the forty-eighth session, could be endorsed without further amendment. Article 1, subparagraph (b), dealing with activities which actually caused harm, would have to be deleted, however. That provision had in any case been placed within square brackets and, as the review of the matter in the report appeared to indicate, those activities might be better dealt with under the regime of State responsibility and not within the scope of the current topic. His recommendations represented the opinion of a wide majority of members of the Commission and of delegations in the Sixth Committee. If the Commission adopted them, they offered a realistic chance of achieving consensus, if not complete agreement, on the scope of the topic.

40. Mr. ROSENSTOCK thanked the Special Rapporteur for his exceptionally lucid and concise introduction. He congratulated him on having placed a difficult topic in a historical perspective with the greatest possible precision. The members of the Commission were currently fully informed of the stage reached in the thinking on the topic.

41. Mr. PELLET, referring to paragraph 111 (d) of the first report, said that the statement that only (*seulement* in the French version) significant harm or damage was required to be prevented by States was most inappropriate. It was unlikely that it reflected what the Special Rapporteur had had in mind.

42. Mr. SIMMA, Mr. ECONOMIDES and Mr. PAMBOU-TCHIVOUNDA said that the Commission’s work would be facilitated if the secretariat prepared a compendium of all the texts that had already been drafted on the topic, including the schematic outline and the articles already adopted, which were scattered throughout various reports. It would also be useful to have the text of the resolution of the Institute of International Law referred to by the Special Rapporteur (see paragraph 30 above).

43. Mr. Sreenivasa RAO (Special Rapporteur), replying to a request by Mr. SIMMA, explained that Part Two of his first report, which the Commission would consider shortly, dealt with the scope of the draft articles and with their content. It was those aspects that the Working Group at the forty-ninth session had thought required clarification. The discussion would therefore focus on the main principles which formed the basis of the duty of prevention, that is to say, good faith, consultation, non-discrimination, the obligation to carry out environmental impact assessments and the polluter-pays principle. All those aspects would be reviewed and placed in their proper context on the basis of writings of commentators. On reading those commentators, moreover, it could be concluded that

<sup>21</sup> *Yearbook* . . . 1984, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

<sup>22</sup> *Yearbook* . . . 1987, vol. II (Part Two), p. 45, para. 163.

<sup>23</sup> *Yearbook* . . . 1990, vol. II (Part One), p. 83, document A/CN.4/428 and Add.1.

the subject matter offered an opportunity for the progressive development of the law rather than for codification.

*The meeting rose at 12.55 p.m.*

## 2528th MEETING

*Tuesday, 12 May 1998, at 10.05 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

### **Tribute to the memory of Endre Ustor, former member of the Commission**

1. The CHAIRMAN said it was his sad duty to inform the Commission that Mr. Endre Ustor, of Hungary, had passed away on 25 April 1998. Mr. Ustor had been a distinguished member of the Commission from 1967 to 1976 and had served as its Special Rapporteur on the most-favoured-nation clause. He was sure that he was expressing the feelings of all members of the Commission in conveying to Mr. Ustor's family their deepest condolences.

*At the invitation of the Chairman, the members of the Commission observed a minute of silence.*

### **International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (continued) (A/CN.4/483, sect. D, A/CN.4/487 and Add.1,<sup>1</sup> A/CN.4/L.556, A/CN.4/L.568)**

[Agenda item 3]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

2. The CHAIRMAN welcomed the participants in the International Law Seminar, a highly qualified group of young lawyers and he invited the Special Rapporteur to introduce Part Two of his first report on prevention of

transboundary damage from hazardous activities (A/CN.4/487 and Add.1)

3. Mr. LEE (Secretary of the Commission), responding to a comment by Mr. HAFNER, apologized for the late issuance of Part Two of the report.

4. Mr. Sreenivasa RAO (Special Rapporteur) said that, in view of the currency and complexity of the topic, he had sought in Part Two of his first report to raise ideas that would help the Commission focus on the content of the concept of prevention. The report accordingly identified principles of both procedure and substance which interacted and were essential in order to clarify the concept. Principles of procedure might include those of prior authorization, environmental impact assessment, notification, consultation and negotiation; dispute prevention or avoidance and settlement; and non-discrimination. All of them constituted means of achieving specific purposes. Principles of content might include those of precaution, the polluter pays, equity, capacity-building and good governance. An attempt had been made to identify the various sources of each of those principles and to indicate their constituent elements. In almost all cases, States were experimenting with their incorporation in national legislation and were exhibiting flexibility in implementing them.

5. The requirement of prior authorization of an activity that involved a risk of causing significant transboundary harm implied that the granting of such authorization was subject to the fulfilment of certain conditions to ensure that the risk was properly assessed, managed and contained. The requirement also obliged States to put in place appropriate monitoring machinery to make sure that the risk-bearing activity was conducted within the prescribed limits and conditions. It had been endorsed by the Working Group on international liability for injurious consequences arising out of activities not prohibited by international law established by the Commission at its forty-eighth session, in article 9 of the draft articles,<sup>2</sup> under which prior authorization would also be required in case a "major change" was planned, one which might transform an activity into one creating a significant risk of transboundary harm. The term "major change" had remained undefined, but some examples were given in paragraph 118 of his report.

6. States were tending more and more to fulfil their duty to prevent significant transboundary harm through the use of a statement on environmental impact assessment (EIA) to determine whether a particular activity actually had the potential to cause significant harm. Various aspects of national EIA legislation were noted in paragraph 123. National legislation had traditionally been weak in providing for follow-up to an EIA, but penalties for failure to follow up were nevertheless envisaged. Examples of typical actionable offences were noted in paragraph 125.

7. Once a significant risk of transboundary harm had been identified, it triggered an obligation for the State of origin to notify States likely to be affected and to provide them with all available information, including the results of any assessment made. States likely to be affected had the right to know what investigations had been carried out

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>2</sup> See 2527th meeting, footnote 16.

and what their results had been; to propose additional or different investigations; and to verify for themselves the results. Such an assessment must precede any decision to go ahead with the activity in question and it obligated parties to conduct a prior investigation of risks and not an evaluation of the effects of an activity after an event. In respect of shared resources, States were encouraged to undertake joint action or to make simultaneous efforts to provide the necessary inputs for finalizing the EIA.

8. Cases in which an EIA was required could not always be predetermined by objective criteria: an element of judgement was always present. A list of activities subject to an EIA could be prepared by using criteria like location and size of the activity, the nature of its impact, the degree of risk, public interest and environmental values. Certain substances were cited in some conventions as dangerous or hazardous, and their use in any activity could itself be an indication that the activity might cause significant transboundary harm and hence require an EIA. The content of the risk assessment could vary, depending on a number of factors, some of which were noted in paragraphs 131 and 132.

9. Paragraph 133 noted several issues relating to implementation of the risk assessment requirement by an EIA statement and the duty to notify the risk to the States concerned: time limits for notification and submission of information; content of the notification; responsibility for the procedural steps aimed at participation of the public, particularly that of the affected State, in the EIA procedures of the State of origin; and responsibility for the cost involved. Experience with EIA in a transboundary context was diverse and so far no uniform approach to transboundary information exchange had been followed. According to one observer who had reviewed the Antarctic Treaty system and general rules of environmental law, adoption of environmental assessment at the current time could not be considered to be more than a progressive trend of international law.

10. Chapter V, section C, dealt with the principles of cooperation, exchange of information, notification, consultation and negotiation in good faith, all of which had been studied extensively by the Commission before, including in its work on the topic of the law of the non-navigational uses of international watercourses.

11. Greater reliance on the principle of cooperation was significant in emphasizing, positive and more integrated interaction among States to achieve common ends, while imposing on States positive obligations of commission. Cooperation could involve standard-setting and institution-building as well as action undertaken in a spirit of reasonable consideration of the interests of other States and for the achievement of common goals. At the procedural level, cooperation included a duty to notify potentially affected States and to engage such States in consultation. Other elements of the duty of cooperation were noted in paragraphs 141 to 145. Paragraph 146 pointed out, however, that at the normative level it was difficult to conclude that there was an obligation in customary international law to cooperate generally.

12. The objective of consultation was to reconcile conflicting interests and to arrive at solutions that were mutu-

ally beneficial or satisfactory, a point that had been stressed in the *Lake Lanoux* case<sup>3</sup> and the case concerning *Territorial Jurisdiction of the International Commission of the River Oder*.<sup>4</sup> It was well established, however, that the obligation to negotiate did not include an obligation to reach an agreement. Paragraphs 150 to 151 stated that the obligation to consult and negotiate in good faith did not amount to prior consent from or a right of veto of the State with which consultations were to be held.

13. The principle of dispute avoidance or prevention was also suggested as one of the components of prevention, with emphasis on the need to anticipate and prevent environmental problems. Unlike other illegal acts, environmental damage had to be prevented as far as possible *ab initio*. Dispute avoidance comprised techniques like seeking good offices, mediation and conciliation, as well as fact-finding missions and the preventive diplomacy recently deployed by the Secretary-General. Those techniques were outlined in paragraphs 157 to 164.

14. Paragraph 166 referred to a number of recommendations made by an expert group on enhancing compliance with and implementation of international obligations, including reporting on a broad range of activities.

15. The principle of non-discrimination or equal right of access, recognized by OECD<sup>5</sup> and allowing recourse to the same administrative or legal procedures as were available in the country of origin of the pollution, afforded an opportunity for persons affected by transboundary pollution, irrespective of their place of residence or nationality, to avail themselves of such procedures and to defend their interests at both the preventive stage, before the pollution had occurred, and at the curative stage thereafter. The principle was intended primarily to deal with environmental problems among neighbouring States, as opposed to long-distance pollution. Successful operation of the principle required similarities in the legal systems of the neighbouring States and in their policies for the protection of the rights of persons, property and the environment. Problems regarding application arose where there were drastic differences between the substantive remedies provided in different States. The differences between the environmental laws of the United States of America and Mexico and between the western and eastern European States were cases in point. One difficulty experienced within the OECD countries was attributable to the fact that in some of them administrative courts had no jurisdiction to hear cases concerning the extraterritorial effects of administrative decisions. A second difficulty arose when sole jurisdiction was conferred on the courts of the place where the damage had occurred.

16. The situation of potential victims could be distinguished from that of actual victims in the application of

<sup>3</sup> Award of 16 November 1957, original French text in United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; and *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 et seq., document A/5409, paras. 1055-1068.

<sup>4</sup> *Judgment No. 16, 1929, P.C.I.J., Series A, No. 23.*

<sup>5</sup> See OECD Council Recommendation C(77)28(Final) on implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution, adopted on 17 May 1977 (OECD, *OECD and the Environment* (Paris, 1986), p. 150).

the principle of non-discrimination. The first situation fell into the category of prevention: potential victims were first protected by their own State, the affected State, to which the State of origin owed a duty of notification, consultation and negotiation. Under the evolving EIA requirement public participation could be extended to participation by potential foreign victims.

17. The principle of non-discrimination had been incorporated in article 29 (Jurisdiction of national courts) of the draft articles proposed by the previous Special Rapporteur, Mr. Julio Barboza in his sixth report.<sup>6</sup> At the forty-eighth session, the Working Group had included an article on non-discrimination, namely article 20, in chapter III, concerning compensation or other relief.

18. As to the principles of content, the principle of precaution (paras. 174-185) stated that a lack of full scientific certainty about the causes and effects of environmental harm should not be used as a reason for postponing prevention measures. The traditional approach had required the party wishing to adopt a measure to prove a case for action based on sufficient scientific evidence, which might be difficult to obtain. The more modern approach reversed the situation and urged action to prevent, mitigate or eliminate grave and imminent harm.

19. The 1990 Bergen Ministerial Declaration on Sustainable Development in the ECE Region<sup>7</sup> had been the first international instrument to treat the principle as one of general application and link it to sustainable development. The UNEP Governing Council had recommended the principle in connection with marine pollution and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of All Forms of Hazardous Wastes within Africa (Bamako Convention) had adopted it as a means of preventing pollution by the use of clean production methods. The Bamako Convention had also lowered the threshold at which scientific evidence might require action, by not applying such terms as "serious" or "irreversible" to the harm in question. The Convention on Biological Diversity referred to the principle only in its preamble and the United Nations Framework Convention on Climate Change had established the limits of its application by requiring a threat of "serious or irreversible damage" and referring to measures which were cost-effective. Thus, the various international instruments did not yield a uniform content or understanding of the principle of precaution. According to one commentator, its legal status was still evolving and the consequences of its application would be influenced by the specific circumstances.

20. The polluter-pays principle<sup>8</sup> had first been enunciated by the OECD Council as an economic principle and the most efficient means of allocating the costs of pollution prevention and control measures; its application would involve both preventive and remedial measures. The principle was adopted as principle 16 of the Rio Dec-

laration,<sup>9</sup> which dealt with both pollution costs and environmental costs; other costs to be taken into account were noted in paragraph 192 of the report.

21. Application of the principle had not been easy, for States had found ways of justifying subsidy schemes by interpreting the principle according to their convenience. The OECD dispute settlement mechanism was mentioned in paragraph 194, but no case of excessive subsidy had been brought to the attention of OECD or the European Court of Justice. The application of the principle in a transboundary context could also give rise to problems. The OECD practice showed that States rarely paid for transboundary damage because it was the responsibility of the polluter to compensate the victims. With some exceptions, States generally implemented pollution control measures without financial support from other countries. The principle had been introduced in many international agreements as a guiding or a binding principle, but even in the latter case its content had been left vague. Commentators had variously described it as a principle of economic guidance and not a legal principle, as failing to achieve the broad support accorded to the principle of preventive action, or as difficult to translate easily into the principle of liability between States.

22. The principles of equity, capacity-building and good governance were dealt with in chapter VI, section C, of the report. The priority to be attached to the interests and limitations of developing countries had been given specific consideration in the development of international environmental law at the United Nations Conference on Environment and Development. Barring miracles, the priority for the Governments of the developing countries would still be to meet the basic needs of their increasingly large and poor populations. Furthermore, the means of production and the technologies available to the developing countries would remain environmentally unfriendly. The first question in the promotion of sustainable development was how to bridge the gap between developed and developing countries and between rich and poor people within a country. The latter problem was a matter of good governance, while the former should be addressed in the context of equity, particularly intra-generational equity.

23. With regard to intra-generational equity, the important thing was to prevent economic development occurring on the environmental backs of the poor communities. One observer had noted that increased emphasis was being placed on the effects of the interconnected issues of economic development, human rights and environmental protection/resource management on sustainable development in the developing countries. There was also greater realization of the duty to assist the developing countries in meeting their international obligations and realizing higher standards of human rights.

24. The principle of inter-generational equity had originated in the Experts Group on Environmental Law of the World Commission on Environment and Development<sup>10</sup> and had been stated as principle 3 of the Rio Declaration. Ways of clarifying the content of the principle were noted

<sup>6</sup> See 2527th meeting, footnote 23.

<sup>7</sup> Document A/CONF.151/PC/10, annex I.

<sup>8</sup> See OECD Council Recommendation C(72)128 on guiding principles concerning international economic aspects of environmental policies, adopted on 26 May 1972 (OECD, *OECD and the Environment* (Paris, 1986), p. 23).

<sup>9</sup> See 2527th meeting, footnote 8.

<sup>10</sup> See *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London/Dordrecht/Boston, Graham and Trotman/Martinus Nijhoff, 1987).

in paragraph 210 of the report. The pollution prevention approach reflected a growing willingness to relate the present to the future in the formulation of legal norms.

25. Compliance with international environmental obligations meant that a State must develop appropriate standards, introduce environmentally friendly technologies and possess the resources to manage and monitor the activities in question. A spirit of global partnership including financial support, transfer of appropriate technology, and training and technical assistance was recommended to help developing countries and countries in transition to fulfil their environmental obligations. Paragraphs 213 and 214 of the report discussed that matter.

26. Several of the requirements for enhancing the capacity of States to fulfil their prevention obligations culminated in the need for good governance, which meant the need for a State to take the necessary measures of implementation, as was noted in the commentary to article 7 of the draft articles contained in the report of the Working Group at the forty-eighth session. Paragraphs 218 to 220 dealt with the legislative approaches available to States, while paragraphs 221 to 223 discussed the need to encourage public participation. Some conclusions on the entire topic were set out in paragraphs 224 to 233 for further consideration and guidance by the Commission.

27. Mr. LUKASHUK said he joined in the congratulations addressed by Mr. Rosenstock to the Special Rapporteur on an excellent first report. The topic was one of exceptional importance and adoption of the draft articles would represent a step towards the solution of a central issue of modern times which had implications for the very survival of mankind.

28. The obligation to prevent transboundary harm could not as yet be said to represent a standard of positive international law. The work of the Commission on the topic of prevention of transboundary damage from hazardous activities would seem to fall under the heading of progressive development, rather than codification, of international law.

29. The report reflected a number of novel aspects of contemporary international law, foremost among them the question of environmental protection. Referring in that connection to the statement in paragraph 15 of the report that implementation of the due diligence obligation should be made directly proportional to the scientific, technical and economic capacities of States, he said that the underlying idea echoed the concept of sustainable development, which formed the basis of modern law in the ecological sphere. Another novel aspect was the concept of prevention itself, arising as it did from the increasingly rapid rate of current-day historical development. Like the concept of preventive diplomacy, that of prevention of environmental damage deserved to be adopted by the United Nations.

30. The shift of emphasis from liability to prevention would undoubtedly give rise to some difficult problems in connection with the monitoring of compliance by States with their obligations in that regard. Those problems would doubtless receive due attention at a future codification stage. One aspect of environmental law that was open

to doubt was the idea of the tradability of emission rights; the fact that one State had not used up its full quota of emissions should surely not enable another State to exceed its own quota.

31. The report served to confirm the necessity for the Commission to embark on an in-depth analysis of the subject of harm to the global commons, which, as stated in paragraph 111 of the report, was excluded from the scope of the current exercise. In conclusion, he welcomed the Special Rapporteur's intention to complete his work within the next two years, and wished him every success in that undertaking.

32. Mr. Sreenivasa RAO (Special Rapporteur), replying to the point raised in connection with tradable emission rights, referred to paragraph 192 of his report, where those rights were mentioned in connection with the costs of pollution charges or equivalent economic instruments. In view of the limited time available to him, he had felt it desirable, while keeping the broader concepts in mind, to focus as far as possible on the transboundary context, placing less emphasis on issues which related essentially to the global commons aspect. He was, of course, at the service of the Commission should it wish to study one or more of those concepts in their application to transboundary damage.

33. Mr. MIKULKA, after congratulating the Special Rapporteur on a brilliant first report and a clear introduction, said he wished to ask a preliminary question. It had been gratifying to hear in the presentation of Part One of the report that the conclusions being recommended for endorsement were in line with those of the Working Group at the forty-eighth session. Today, however, he had been somewhat surprised by the emphasis placed by the Special Rapporteur on the environmental protection aspect of the topic. The Working Group proposed that the draft articles should be limited to activities which involved a risk of causing significant transboundary harm through their physical consequences in general, not only in the environmental context. He would appreciate clarification of the relationship between the topic before the Commission and the issue of environmental protection as such.

34. Mr. Sreenivasa RAO (Special Rapporteur) said he was grateful to Mr. Mikulka for raising that point. In dealing with the scope of the articles in Part One of the report, he had concentrated on the transboundary context and had refrained from referring to the environment as such. In Part Two, which dealt with the content of the principle of prevention, he had tried to bring in a number of ideas which were currently circulating and which, in his opinion, would be helpful to members in defining the broad parameters of the principle of prevention. The subject the Commission was invited to consider remained that of transboundary damage from hazardous activities; it did not include such issues as creeping pollution or the global commons.

35. Mr. HAFNER, referring to Mr. Lukashuk's comment on tradable emission rights, said he agreed with the Special Rapporteur that the matter fell outside the scope

of the topic as defined by the Commission at its forty-ninth session.

36. Mr. FERRARI BRAVO recalled that, at the forty-ninth session, he had questioned the possibility of excluding environmental considerations from a study on the prevention of transboundary damage from hazardous activities. The problem was extremely serious, especially in the case of smaller countries where no point of the territory was far enough removed from the frontier to preclude the possibility of transboundary damage; for island countries or those with a very large territory, it might be less acute. He hoped that the articles to be drafted by the Special Rapporteur would come to grips with such matters, and reiterate the view that placing the question of the global commons outside the scope of the topic might prove injudicious.

37. Mr. Sreenivasa RAO (Special Rapporteur) said he agreed that the point just raised was an important one. As stated in the conclusions of Part One (paras. 111-113) of the report, harm caused to the global commons per se was indeed excluded from the scope of the exercise, but to his own mind such harm was comparable to harm caused to the high seas that affected the enjoyment of the high seas by other States. Where cause and effect could not be linked, it was difficult to see how harm caused to the global commons could be considered within the current framework. However, other ways and means of dealing with the issue could no doubt be found and he looked to the Commission for guidance.

38. Mr. PELLET said he appreciated the point made by Mr. Ferrari Bravo that the Commission could not fail to take account of damage to the environment but also he agreed with Mr. Mikulka and thought that undue emphasis on the environmental aspect should be avoided. Referring, for example, to paragraph 153 of the report he remarked that the word "environmental", which occurred three times, could perfectly well have been omitted. For example, in the case of a dam which caused significant transboundary damage, the damage would also be economic and financial. It would not be exclusively environmental, which was but one element of transboundary damage from hazardous activities. It would be wise to keep that in mind in the Commission's discussions, in the drafting of the articles and, if he might venture to ask, in the Special Rapporteur's presentations, which were too environmentalist and gave in too much to fashion.

39. Mr. HAFNER, referring to Mr. Pellet's comments on the environment, said that transboundary damage could take at least three forms, namely: loss of life and impairment of health, damage to property, and damage to the environment of other States. Thus, the Commission must inevitably deal with the question of the environment, even though that was not the primary goal of its activity. In international doctrine, practice and even custom, the expression "environmental impact assessment" went beyond the narrower definition of the environment, to encompass questions such as prevention of loss of life. It was in that broader sense that he had understood the references to "the environment" in the Special Rapporteur's first report.

40. Mr. CRAWFORD said that, in paragraph 225 of the conclusions, the Special Rapporteur stated that the standard of due diligence could vary from State to State, from region to region and from one point in time to another. Due diligence standards were more flexible than obligations of result and it was reasonable to take into account factors such as the facilities available to the State concerned. Nonetheless, that must not result in a system of double standards, or rather, in an absence of standards. Having regard to the damage that could arise from some of those situations, to the costs of constructing major projects and the amount of scientific work they required, compliance with the due diligence standard was not unreasonable. Thus, while the Commission could accept that the notion of due diligence involved some level of flexibility, he hoped it did not accept that that notion involved any form of regional or particularist exemption.

41. In paragraph 226, the Special Rapporteur stated that failure to perform the duties of prevention would not give rise to any legal consequences. The Commission had, of course, agreed to consider the question of prevention separately from that of liability. It would be somewhat odd, however, to emphasize the importance of prevention with a view to separating it from liability and then to state in the context of a study on prevention that obligations of prevention carried no legal consequences. He could accept that a mere failure—perhaps a failure to notify, or to provide certain information—did not of itself entail liability for consequences which might flow from the project in respect of which that failure occurred. The failure to notify or provide information might in any case have no special causal link with the damage which had in fact occurred, or it might be that the damage would have occurred anyway. However, it was a contradiction to say that an obligation existed, while at the same time saying that that obligation carried no legal consequences. It was possible to create a *lex specialis*. But that *lex specialis* must at the very least entail some obligation of cessation; otherwise there was no obligation at all. While he understood the concern that the various procedural obligations being developed in that field should not entail such drastic consequences in terms of substantive liability that States would reject them, the Commission should guard against going to the opposite extreme.

42. Mr. MIKULKA, referring to Mr. Hafner's comment that it would be unjustifiable to exclude damage caused to the environment from the scope of the Commission's study, said that no one had proposed any such course of action. The danger was that the Commission would go to the opposite extreme, by concentrating on damage to the environment to the exclusion of other types of damage.

43. As to the remarks by Mr. Ferrari Bravo and Mr. Crawford, the Special Rapporteur had discharged his mandate, which was to produce a report, not on liability, but on prevention. The long process whereby the original topic had been transformed was familiar to all. Prevention fell within the sphere of primary rules, and there would of course be consequences if States failed to abide by those rules. But those consequences led the Commission into the sphere of State responsibility for acts prohibited by international law, and away from the sphere of international liability originally envisaged when Mr. Quentin-

Baxter had been appointed Special Rapporteur for the topic at its thirtieth session, in 1978.<sup>11</sup> In contrast, the current Special Rapporteur had no mandate to deal with that topic.

44. There was also another scenario: that all the rules of prevention were observed, the State discharged all its obligations, and significant damage nonetheless occurred. In such cases the State would have discharged all its obligations in compliance with international law, and hence one could not say that elimination of the damage was a question of State responsibility. There, once again, one entered the sphere of liability. That question remained to be considered at some time in the future, but, he again stressed, it did not form part of the mandate of the current Special Rapporteur.

45. Mr. SIMMA, taking up the remarks by Mr. Ferrari Bravo, said it was probably too much of a generalization to say that large States were in a better position than smaller States in the matter of prevention of transboundary damage. Much would depend on the concrete circumstances of each case. What could be asserted was that in small and large States alike there was a tendency to place industrial, nuclear and power-generating installations in border areas, for two reasons. First, rivers often formed national boundaries, and such installations required large quantities of water for cooling and other purposes. Secondly, areas close to national boundaries were often among a country's poorer regions and consequently benefited from special programmes to foster industrial development.

46. On the question of the distinction between damage to the environment on the one hand and damage to life, health and property on the other, he doubted that it was possible to distinguish between the various forms of damage that would result from a nuclear accident in a border area. Environmental damage would inevitably involve damage to life, health and property, and it would be wrong to give the impression that environmental damage was what remained once damage to life, health and property had been discounted.

47. As for the due diligence standard, as was stressed in article 3 of the resolution on Responsibility and Liability under International Law for Environmental Damage, adopted by the Institute of International Law at the 1997 session, held at Strasbourg, the concept needed to be measured in accordance with objective standards relating to the conduct to be expected of a good Government. It was a concept whereby subjective notions of responsibility such as fault were objectivized. To state, as the Special Rapporteur did in paragraph 225, that the standard of due diligence could vary from State to State, from region to region and from one point in time to another, was to deprive the concept of about 99 per cent of its value as a means of assessing whether a duty of prevention had been implemented.

<sup>11</sup> At that session the Commission had established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group see *Yearbook . . . 1978*, vol. II (Part Two), pp. 150-152.

48. Lastly, with regard to obligations, if—as was his first impression—the Special Rapporteur was really claiming that failure to perform duties of prevention would not lead to legal consequences, he was establishing a new sort of soft law, by detaching a whole branch of international law from the apparatus of sanctions and responsibility that would otherwise attach to it. Of course, Mr. Crawford had rightly drawn the Commission's attention to the possibility that such regimes created their own machinery for implementation and their own legal consequences in the event of a breach. But if that was so, the Commission should pay attention to what specific legal consequences would arise if those duties of prevention were not performed.

49. Mr. PELLET said he was pleased to see Mr. Simma adopt a unitarist approach to international law, rather than seek to compartmentalize it according to subject matter.

50. With regard to the comments by Mr. Crawford concerning paragraph 226, he endorsed the essence of Mr. Mikulka's remarks but would add a further comment. Rules relating to prevention were indeed primary rules, and violations thereof gave rise to responsibility. Like Mr. Crawford, but for somewhat different reasons, he most emphatically could not subscribe to the Special Rapporteur's statement that failure to perform the duties of prevention would not give rise to any legal consequences. Violation of any rule of law necessarily led to a legal consequence, known as responsibility. Once responsibility was established, the question arose of what consequences flowed from that situation of responsibility resulting from the violation. There might or might not be consequences, depending on whether damage had or had not been caused.

51. Accordingly, as violation of the rules relating to duties of prevention always had a legal consequence, namely, the responsibility of the State that had violated the rules—including, *inter alia*, the requirement to notify—he therefore failed to understand what Mr. Crawford meant in claiming that failure to notify had no legal consequence: the consequence was that the State was responsible. If it subsequently transpired that damage had resulted from that violation, a State would have to make appropriate reparation. Probably the causal link between the non-notification and the damage would be hard to establish. Yet to claim, as did the Special Rapporteur in paragraph 226, that failure to perform the duties of prevention would not give rise to any legal consequences, was not right. It confused reparation with the legal consequences of the violation of a rule of law.

52. Mr. Sreenivasa RAO (Special Rapporteur) said he welcomed the important comments that had been made in the latter part of the debate. He wished, however, to correct one misapprehension. The conclusion set out in paragraph 225 did not represent his own view as Special Rapporteur, but the conclusion the Commission had itself reached over the years. Previous special rapporteurs on the topic had posited that obligations of conduct did not have legal consequences unless damage had actually occurred, and that only then would the consequences of non-compliance with duties of due diligence also come

into play. The schematic outline<sup>12</sup> mentioned that particular aspect of the matter in section 5, paragraph 4.

53. In the subsequent paragraphs, he had begun to look into the difficult question of consequences. Should the opportunity be given to him at the fifty-first session, he was unsure whether it would be advisable for him to embark on a full-scale study of the legal consequences of failure to perform a duty whose content was not clearly established. The duty of prevention led to a variety of procedural steps. For example, a State was supposed to have national legislation in place prescribing prior authorization, procedures for environmental impact assessment, and so forth. However, few States had yet enacted comprehensive legislation in that regard, and such legislation as existed was not yet well established or uniform. That being so, what consequences were to be drawn from non-compliance? That was the problem that troubled him.

54. However, he readily agreed that if the Commission posited a legal duty, non-compliance therewith must have legal consequences. Those consequences could vary. As Mr. Crawford had pointed out, there could be no exemptions, but neither could one prescribe the same type of standards as one would for substantive violations, particularly when procedural violations had not yet yielded a situation in which two claimants were in contention. He sought the Commission's guidance in that very delicate area and hoped that, at the next session, he would have some further thoughts to contribute on the question of consequences, always provided that doing so would not divert the Commission from the completion of its task. The various draft articles that had already come before the Commission incorporated many of the ideas to which he had referred, but none of the drafts prepared by the various working groups contained an article on the consequences of failure to comply with a duty of prevention. A new article would therefore have to be formulated. The question was whether the Commission should study non-compliance from the broader standpoint of State responsibility or in the context of a special topic of liability. A choice could be made at a later stage.

55. To recapitulate, he had two clarifications to make at the outset. First, paragraph 225 was not his own comment, but his report on the situation that had arisen in the course of the Commission's work thus far. As was pointed out in paragraph 228, the Commission, having separated the regime of prevention from that of liability, no longer had an excuse not to consider the question of consequences. If the Commission decided that it did not wish to consider liability as an extension of the current topic at any stage, then it would be compelled to consider the consequences of non-compliance with duties of prevention. If, however, the current topic was subsequently to be linked with liability in some way, the opportunity would then arise to deal with consequences in that context.

56. Secondly, paragraphs 224 to 227 of the conclusions set out to describe developments thus far, and paragraphs 228 et seq. attempted to report on what currently needed to be done. In paragraphs 229 and 230 he had clearly pointed out that non-compliance with duties of

prevention could have consequences both at the State level and at the operator's level. It would be possible to elaborate on those ideas.

57. He was not emphatically claiming that duties of prevention, once posited properly, should have no legal consequences and should be left to the good judgement of the parties concerned. But he would welcome members' assistance in the task—a task he would hope to be able to undertake himself—of identifying what those consequences were.

58. Mr. ROSENSTOCK said that the Commission must be careful to keep the notions of responsibility and liability separate. In the other working languages that distinction was apparently somewhat artificial, but it was an important distinction, and he was not convinced that it was fully appreciated in the paragraphs under discussion. If there was a failure of an obligation of prevention it might be hard to measure the damage, but—unless the Commission was to undo what it had more or less achieved in the area of State responsibility—there was no doubt that there were indeed consequences. The much more difficult question of what happened if all possible steps were taken and harm occurred anyway need not be dealt with at the current stage in the Commission's work. Nevertheless, the Commission should be aware of its existence as a separate question.

59. Mr. PAMBOU-TCHIVOUNDA said he simply wished to pay tribute to Mr. Mikulka, whose comments had enabled the Commission to narrow down the scope of its proposed study of the topic of prevention of transboundary damage from hazardous activities.

*The meeting rose at 1.05 p.m.*

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## 2529th MEETING

*Wednesday, 13 May 1998, at 10.10 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Khasawneh, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

<sup>12</sup> *Yearbook* . . . 1982, vol. II (Part One), pp. 62-63, document A/CN.4/360.

**International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (continued) (A/CN.4/483, sect. D, A/CN.4/487 and Add.1,<sup>1</sup> A/CN.4/L.556, A/CN.4/L.568)**

[Agenda item 3]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. HAFNER said that if, as the philosopher Albert Camus had suggested, the twentieth century was the century of fear, and that such fear could result from the likelihood of harm beyond one's own control, that demonstrated beyond any doubt the importance of the prevention of transboundary harm. Mention had already been made of the political implications of the issue insofar as a duty of prevention could be more difficult for small countries to respect and could become an obstacle to development. There were, however, concrete issues involved as well and he wished to refer to some of them.

2. In dealing with the new topic, the Commission had before it various documents that it had already prepared, including the draft articles submitted by the Working Group on international liability for injurious consequences arising out of activities not prohibited by international law established at its forty-eighth session<sup>2</sup> and the Convention on the Law of the Non-navigational Uses of International Watercourses, certain provisions of which also dealt with prevention. The Commission could therefore ask itself how far those instruments coincided or differed, especially as the Convention had already been adopted by the international community.<sup>3</sup> It might be useful to compare draft articles 4, 10, 11 and 12 proposed by the Working Group with articles 7, 21 and 28 of the Convention, but it must also not be forgotten that there were quite a number of other universal treaties and instruments dealing with various aspects of the topic.

3. As to substance, there was no doubt that existing international law placed an obligation on States to ensure that activities within their jurisdiction respected the environment of other States and the global commons, as stated by ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. That obligation formed the basis of the duty of prevention which the Commission currently had to discuss. A consequence of that way of looking at the matter was that environment must be understood not just as environment in the narrow sense, but also as persons and property under the jurisdiction of other States. It did not seem plausible to base the duty not to damage property or persons under foreign jurisdiction on a different principle. Of course, the definition of territory, control and jurisdiction would be a separate issue.

4. Proceeding from that basis, it was clear that the Commission was dealing with primary rules of law, non-compliance with which would entail certain legal consequences in the field of responsibility. There was no need to embark on the question of liability, however, and

particularly not as had been done so far. If that was to be discussed, then it should be only in the sense of civil liability, which corresponded to actual practice. State liability in the strict sense was a way without exit, with only one example being found in international treaty practice. The priority of the concept of State responsibility was made very clear in article 7, paragraph 1, of the Convention on the Law of the Non-navigational Uses of International Watercourses, which imposed on States the obligation to take all appropriate measures to prevent significant harm to other watercourse States. Article 7, paragraph 2, indicated that, only where significant harm was nevertheless caused, the State should provide compensation, even if it had fully respected its obligations. If the State had not respected its obligations, it had to assume responsibility within the usual meaning of the term.

5. Of course, it could be discussed whether more emphasis should be placed on the regulation of preventive measures than on the consequences of damage. That two-fold approach corresponded to the divergences of national legal systems, some of which relied more on the obligation to provide compensation, and others on regulation. At the international level, the regulatory approach was better equipped to conform to the particular features of international law, where no universally competent institution to decide on the cases yet existed and the different sizes and powers of States had a significant impact on the enforcement of the law. Clear rules on preventive measures would help to establish responsibility when damage occurred. The Commission would therefore have to formulate more concrete rules on preventive measures which States would have to respect: it could not expect that a vague principle would satisfy the needs of the modern-day world.

6. The question had been raised by Mr. Mikulka (2528th meeting) as to the need to distinguish between the general duty to protect the environment and the particular one of preventing transboundary damage. That distinction was interesting in connection with what was sometimes called "differentiated responsibility". Article 194 of the United Nations Convention on the Law of the Sea made a clear distinction between the duty to take measures to reduce pollution of the marine environment and the duty to take measures to ensure that activities did not cause damage to other States and their environment. A similar distinction could be found in principles 2 and 7 of the Rio Declaration.<sup>4</sup> In both cases some sort of differentiated responsibility applied only to the first kind of duty. However, that differentiation did not save the Commission from discussing the scope and nature of due diligence, one of the core issues in the duty of prevention. The problem could be envisaged in two ways: either the duty of prevention had a specific scope so that the primary rule already included some differentiation; or such differentiation could be left to the secondary rules concerning the general determination of an obligation, such as the *ultra posse nemo tenetur* principle.

7. The starting point of the discussion must be the definition of what was to be understood as harm. In most international instruments, the concept had three main

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>2</sup> See 2527th meeting, footnote 16.

<sup>3</sup> See General Assembly resolution 51/229.

<sup>4</sup> See 2527th meeting, footnote 8.

components: damage to individuals (impairment of health, injury or loss of life); damage to property; and alteration of the environment. A definition of the environment was therefore required in order to lay out the scope of a prevention regime. Some documents, particularly European texts, expressly included the effect on landscape, historical monuments, cultural heritage or socioeconomic conditions. It would also be necessary to clarify the concept of threshold, on which the Commission had already held extensive discussions and which it would have to discuss still further. As to the definition of activities covered by the regime, it had been argued that it would be necessary to include those covered in article 1, subparagraph (b), of the draft articles proposed by the Working Group at the forty-eighth session of the Commission, namely, other activities not prohibited by international law which did not involve a risk referred to in subparagraph (a), but nonetheless caused significant transboundary harm through their physical consequences. However, that category of activities seemed not to fall within the topic of prevention. The Commission should, therefore, include activities that were risky, but not other activities.

8. The Special Rapporteur seemed not to have dealt sufficiently with a problem that was closely connected with the principle of equality of States: when taking preventive measures, was a State of origin required to respect the standard adopted by the possibly affected State or was it obliged to respect only its own standards with regard to the other State as well? That was the problem of different standards of protection granted by States to their populations. It could be argued that it was the affected State that decided the threshold by which the State of origin would have to abide, since the State decided the amount of protection of its population. In contrast, it could be argued that no State could be obliged to provide a higher standard of protection for the population of a foreign State than that which it applied to its own population. A number of other principles of international law—equality, territorial integrity, sovereignty—could be invoked to support one or the other view. Since a clear-cut solution to the problem by a substantive provision seemed unachievable, emphasis had to be placed on the procedure through which the States concerned could reach a solution acceptable to them.

9. Instead of reiterating what had been stated many times in the Commission, members should work to formulate relevant rules as expeditiously as possible. That could best be achieved by taking the draft articles proposed by the Working Group at the forty-eighth session of the Commission and examining them for their relevance to the topic. They could then be analysed as to whether they still corresponded to the existing views on the subject and whether they needed any amendment or addition. That analysis should be done in the light of other instruments, particularly the Convention on the Law of the Non-navigational Uses of International Watercourses, in order to avoid adding to the existing fragmentation of international law.

10. Mr. Sreenivasa RAO (Special Rapporteur) said that he had wanted to give an account in his first report (A/CN.4/487 and Add.1) of the progress made in the Commission's work, without necessarily sharing the theoretic

cal positions which it had adopted. For example, he did not think that the failure to respect due diligence should not have legal consequences. It was with a view to moving ahead with the question that he had suggested, in paragraph 229, that the Commission should shift the matter of consequences into the field of State responsibility. As pointed out by Mr. Hafner, the work could focus either on the area of international liability, a topic for which case law offered only a single precedent, or on State responsibility.

11. With regard to delimiting the scope and nature of due diligence, the principles referred to in the report (precaution, environmental impact assessment, prior authorization, legislative framework and ensuring that violations were detected early) helped provide a much broader definition by taking account of developments brought about by the adoption of various conventions. It might also be necessary to include in the debate the notion of tort or quasi-delict, which had been considered in depth at the domestic level and might also shed light on similar examples in international law.

12. Mr. MELESCANU said he thought that the Special Rapporteur was right to ask whether the topic under consideration must be addressed in the framework of State responsibility or whether the Commission must invent a State civil liability of sorts. In any case, the Commission must try to understand that, first, there could be State responsibility even if the State did not commit a wrongful act because it failed to comply with the fundamental obligation of prevention and, secondly, that there was an obligation of solidarity between States, which must ensure the protection of their citizens. Just as the civil code provided for the case of no-fault liability (for example, in Roman law, the liability of parents for the acts of their children and the liability of the owners of buildings), the Commission must attempt to define State liability for very dangerous or high-risk activities or ones which might cause damage beyond the State's borders. That notion of liability was already accepted in certain very special areas, for example, in the nuclear field. Almost all the conventions in force at the European (Euratom) or international (IAEA) level provided for limited liability in three categories: liability of the plant operator, with a fixed ceiling; liability of the State, which stood in for the operator over and above the amount in question; and liability of all States parties, which were bound to compensate any damage.

13. In his view, it was in that direction that the Commission should seek a solution to the problem of the regime of the prevention of transboundary damage from hazardous activities; that would entail defining the specific conditions in which the State could be held liable for damage originating in its territory.

14. Mr. BROWNIE said that he was concerned that the work of codifying the topic under consideration failed to give enough attention to the progressive development of what might be called environmental law. It was well known that the Special Rapporteur had been put in charge of a rescue operation because the topic of international liability for injurious consequences arising out of acts not prohibited by international law had run aground and the

Commission had not wished to lose the draft articles already formulated.

15. In his view, it was essential to remove the question of transboundary damage from the topic of international liability. At issue was, rather, an aspect of State responsibility, which had never been confined to the injurious consequences of acts which were *per se* prohibited by international law. If the Commission codified the principles of prevention on the basis that they were separate from those governing State responsibility, it risked derogating from the existing principles in the latter area. It was also well known that the principles of State responsibility were very versatile and changeable and could not be codified in detail; the perfect example of that was due diligence.

16. If the Commission were to venture into the area of environmental law as such, it might start putting into print the principle that the State did not have to seek prior authorization from its neighbour before engaging in a particular economic activity. But that had nothing to do with State responsibility. However, he was pleased to address the subject which the Special Rapporteur had just presented as an example of the progressive development of a certain area of State responsibility, namely, that of transboundary damage, rather than separating it from international liability while continuing to discuss it on a theoretical level as though it were still a part thereof.

17. In closing, he said that he had never understood very well the distinction which was being made between State responsibility and international liability.

18. Mr. PAMBOU-TCHIVOUNDA said that he endorsed the idea of taking a concrete approach to the problem by relying on the existing draft articles, which must be the basis of work. He agreed with the appeal that sight should not be lost of the fact that the topic under consideration and the topic of State responsibility were closely related; that might justify inserting at some point—either at the beginning of the draft articles or at the junction between the regime of prevention and its consequences—a set of provisions to “bridge” the two topics. That would make the Commission’s overall approach to the question of responsibility more credible. Lastly, regardless of how the Commission decided to deal with prevention, it would have to come up with an idea right away to see, at the level of consequences, how to reflect the distinctive nature of the topic; the example of other areas, such as that of the law of the sea, might help it move ahead in that regard.

19. Mr. HE said that, unlike liability in the strict sense, the topic of prevention was already ripe for codification and the Commission had therefore done well to decide to consider it separately on the basis of the complete set of draft articles proposed by the Working Group at the forty-eighth session of the Commission and contained in its report to the General Assembly on the work of its forty-eighth session. However, in the view of a number of delegations to the Sixth Committee, prevention was only an introduction to the crux of the topic, namely, the consequences of the acts in question. Where there was harm, there must be compensation. Moreover, State responsibility could arise if the State failed to implement the obliga-

tions resulting from the draft articles on prevention, as could international civil liability, if the State fulfilled its obligations and harm still occurred. Therefore, as soon as the Commission completed its work on prevention, it should begin its consideration of liability.

20. The scope of the topic of prevention was properly defined in article 1, subparagraph (a), of the draft articles proposed by the Working Group at the forty-eighth session of the Commission, whereas article 1, subparagraph (b), should be deleted.

21. He endorsed the proposals by the Special Rapporteur in Part Two of his report concerning the principles of procedure and the principles of content, with the exception of the “polluter-pays” principle, which should be better placed in the draft articles on liability.

22. He was pleased that the Special Rapporteur had remedied the omission of his predecessor concerning the developing countries and, in the spirit of the Rio Declaration, had stressed the importance of focusing on the needs, particularities and interests of those countries in the framework of a prevention regime. Stressing that the definition of article 1, subparagraph (a), must be understood as naturally covering harm to persons or property, as well as to the environment, he noted that compliance with international environmental obligations, in general, and obligations concerning the prevention of transboundary harm, in particular, presupposed the capacity of a State to develop appropriate standards to bring more environmentally friendly technologies into the production process, as well as to obtain the necessary financial, material and human resources to manage the process of the development, production and monitoring of activities. Hence the interest of a spirit of global cooperation which would enable developing countries and countries in transition to fulfil the obligations associated with the prevention of transboundary harm in their own interest and in that of the international community.

23. Mr. HAFNER pointed out that, pursuant to a number of instruments, for example in the European context, the polluter must bear the costs of prevention measures; that justified dealing with the “polluter-pays” principle in the framework of the prevention regime.

24. Mr. Sreenivasa RAO (Special Rapporteur) said that, as indicated in paragraphs 73 to 86 of his report, the two aspects of compensation and prevention clearly emerged from a study of the existing documentation on the “polluter-pays” principle.

25. Mr. ROSENSTOCK said that Part One of the report provided a wonderful basis for future progress. In the first place, he appreciated the recommendation in paragraph 112 to delete article 1, subparagraph (b), of the draft articles which had been proposed by the Working Group at the forty-eighth session of the Commission and which, in his view, was the key to moving the focus away from the very difficult topic of liability towards responsibility and prevention. On the other hand, the reference to the global commons *per se* in paragraph 111 (g) could complicate the task of the Commission; it would therefore be better advised to rely on paragraph 111 (h), which did not refer to the matter. With those reservations, his only regret was that the Special Rapporteur had not added a

detailed analysis to Part One of the 20 remaining principles in the draft articles proposed by the Working Group, together with proposals, as that would have provided the Commission with every opportunity to conclude its work at the fifty-first session.

26. In Part Two of the report, the principles of procedure set forth in chapter V seemed at first sight to be acceptable; they were very similar to chapter II of the draft articles and the commentaries thereto proposed by the Working Group at the forty-eighth session.

27. The principles of content, although no less interesting, were somewhat more problematical and some of them seemed excessive. The discussion of the principle of precaution was both thorough and well balanced and paragraphs 184 and 185 were substantially in accord with the relevant parts of the Working Group's draft. The discussion of the "polluter-pays" principle was useful and balanced. It was also encouraging to note that it ended with a quotation from Edith Brown Weiss to the effect that the polluter-pays principle "does not translate easily into a principle of liability between States",<sup>5</sup> although, in the context of prevention, it was an entirely different matter.

28. In chapter VI, section C, the Special Rapporteur seemed to leave the province of law to grapple with material that was more appropriate for a political declaration and that came within the field of competence of other bodies. Even if it could be argued that there was an interconnection to all things, the Commission could not consider everything, particularly in view of the time allotted to it. In particular, the principle of good governance meant a great deal more than the capacity to implement a duty of prevention and, even if the Commission were to limit itself to telling Governments how to develop their national law in the fields of concern to it, it would be exceeding its mandate and lower the focus of the topic without any likelihood of results.

29. Commenting on the conclusions to the report, he said that those in paragraph 224 seemed to be generally acceptable. In paragraph 225, the Special Rapporteur correctly identified due diligence as the requisite standard for measuring the obligation to prevent—an obligation of conduct, not result. In that connection, if the Commission were to decide to look more deeply into the idea, then, despite the hesitation of some members, including himself, it should take account of article 3 of the resolution on Responsibility and Liability under International Law for Environmental Damage, adopted by the Institute of International Law at the 1997 session, held at Strasbourg, according to which due diligence was to be measured on the basis of objective standards.

30. The statement in paragraph 226 that failure to perform the duties of prevention, as envisaged, and non-compliance with obligations of conduct would not give rise to any legal consequences seemed to be a complete misreading of the law of State responsibility. The problem of harm suffered in spite of compliance with the obligation

to exercise due diligence to prevent it would be quite another matter.

31. Paragraph 229 was not clear and made sense only if it referred to the case where, notwithstanding compliance with the duties of prevention, harm to another State occurred anyway. Paragraph 230, though not wrong, seemed to come out of the blue. Paragraph 232 called for the same comments as those on chapter VI, section C.

32. He could not endorse the approach the Special Rapporteur proposed to the Commission in paragraph 233, since it presupposed that the Commission would approve a general orientation and analysis of the report before it reviewed the recommendations made by the Working Group at the forty-eighth session of the Commission. Rather, given the time limit it had imposed on itself, the Commission should focus immediately on that review.

33. Mr. Sreenivasa RAO (Special Rapporteur) said that his intention, in paragraph 233 of the report, had been to obtain guidance from the Commission for the possible formulation of a few additional articles, having regard to his efforts to fill what he had perceived as gaps in his predecessor's work, particularly in chapter VI, section C, and to examine further certain notions such as the polluter-pays principle.

34. Mr. LUKASHUK said that Part Two of the first report appeared to be a charter of principles relating to environmental protection, but principles far removed from positive law—for example, good governance, good neighbourliness, prevention of disputes and equity. At the same time, in paragraph 146, the Special Rapporteur stated that at the normative level, it is difficult to conclude that there was an obligation in customary international law to cooperate generally. Yet that principle of cooperation was expressly stated in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.<sup>6</sup> It was, however, a principle that existed as a general idea, in other words, not as an obligation to cooperate, but as an obligation to settle disputes in a spirit of cooperation. The other principles, such as, information, notification and consultation, actually only went to explain the principle of cooperation. Furthermore, the attempts to codify the principle of peaceful coexistence made at the initiative of the former socialist countries showed that the principle of cooperation lay at the heart of the principle of coexistence and that there was therefore no contradiction between the two principles. Lastly, the charter of principles introduced different levels of legal obligation, for, as noted in the resolution on Responsibility and Liability under International Law for Environmental Damage, adopted by the Institute of International Law at the 1997 session, held at Strasbourg, setting both rules in the field of environment, international environmental law had evolved significantly and was composed of a considerable number and variety of principles, and rules with different degrees of legal value. The draft articles on the topic should therefore reflect the spirit of those principles without necessarily referring to them expressly.

<sup>5</sup> "Environmental equity: The imperative for the 21st century", *Sustainable Development and International Law* (London/Dordrecht/Boston, Graham and Trotman/Martinus Nijhoff, 1995), p. 21.

<sup>6</sup> General Assembly resolution 2625(XXV), annex.

35. Mr. Sreenivasa RAO (Special Rapporteur) said that, at the normative level, there was no duty on a State A to cooperate with a State B continually and in all areas, but, where State A and State B were engaged in a contentious relationship or were in any other way jointly responsible for achieving certain ends, there was a duty to cooperate. It was in that context that he had considered both the principle of cooperation and the way in which it worked in more detail. So far as the relationship between cooperation and peaceful coexistence was concerned, while it was true that they went hand in hand, the coexistence was that of sovereign States which could be brought together only by necessity. It was therefore simply a matter of replacing a certain passiveness on the part of the law by a more deliberate interdependence. Indeed, there was hardly any major disagreement in the Commission on all those points.

36. If the Commission was to complete its work on the topic by the next session, it must insofar as possible avoid a discussion on the liability/State responsibility duo. Then it must focus on the conclusions set out at the end of the report and, more specifically, on the consequences aspect, where the Commission had a duty to go further. While prevention could, of course, be isolated from liability for the time being, consideration of the question of consequences could no longer be deferred. If one opted for the solution of laying down a few primary principles and referring any difficulty to the field of State responsibility, one came up against the problem of State responsibility in the event that an operator incurred liability. There had already been very definite disagreement in the Commission on the question of when the responsibility of the latter would pass to the former. That was why he had concluded in his report that the responsibility or liability of the State must be separated from that of the operator. But he would, of course, take account of the majority view in the Commission.

37. Mr. SIMMA said that Part One of the first report afforded a useful tool in summarizing the work carried out by the Commission on the topic of liability, which had found expression in concrete and viable proposals at the forty-eighth session of the Commission. The Commission must currently follow up that work if it wished to complete the draft articles on prevention and he fully supported the proposals made in Part One. Part Two represented both a collection and a synthesis of everything that had been written, proposed and agreed in the field of prevention in the very wide meaning of the term. But Part Two went further than the draft articles proposed by the Working Group at the forty-eighth session of the Commission and introduced so much controversial material that the Commission might be prevented from completing its work on the topic on time. It might perhaps be advisable to leave that material aside and take it up at a later stage in the context of consideration of liability proper.

38. As for the content of Part Two of the report, it could be seen from the state of the law relating to environmental protection, including prevention, that there were certain principles which were undeniably binding in law (such as *sic utere tuo* or principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)),<sup>7</sup> but, because of their universal

character, those principles were truly self-executing only if followed up by further more specific agreements. For example, the principle laid down in article 1, proposed by the Working Group at the forty-eighth session of the Commission, could be implemented in concrete terms only if there was agreement or a consensus on the precise meaning of the expression "significant harm". In environmental law, genuine progress could be achieved only via the conclusion of treaties in an ever-increasing number of fields. And within that body of treaties, the same dualism was to be found between framework treaties, which set forth primary principles and remained more or less the same over time, and instruments which set forth secondary rules, gave expression to general principles and changed more over time. Outside the treaty field, a huge body of normative statements and proclamations were to be found in environmental law, including prevention, ranging, at best, from soft law to, at worst, a tendency towards wishful thinking. In all those declarations and proclamations, legal arguments proper found themselves in an uneasy relationship with considerations of another kind. That kind of unstable balance was mirrored to some extent in Part Two of the report. In point of fact, it was prevention, in the modest, matter-of-fact technical sense of the term, that should constitute the hard core of international environmental law and the fundamental principles that should figure in that hard core had already been further developed in numerous bilateral treaties and instruments of soft law, which were nonetheless of considerable authority and had been drawn up in the context, *inter alia*, of OECD and UNEP.

39. From the legal point of view, the principles set forth in Part Two of the report fell into two categories. It was pertinent to ask in the case of the first category—information, notification, consultation and perhaps precaution—whether they belonged under the heading of customary international law and to note that the Commission was in a position to contribute to the law-making process in respect of those principles. The second category—dispute avoidance, equity, capacity-building, good governance—carried the concept of prevention into an area of political and legal controversy where it would find itself in an ambivalent relationship comparable to that which might be considered to exist between human rights and the right to development. To claim that principles such as those set forth in paragraphs 205 and 223 of the report had the status of customary international law or even legal obligations was in reality an attempt to confer juridical legitimacy on political arguments. In the case of the first category of principles, on the other hand, it was legitimate to ask whether the existence of a considerable number of more or less similar provisions justified the conclusion that a rule of customary international law existed. It was a question that could also legitimately be asked in the case of extradition treaties or air service agreements. At all events, by formulating solid draft articles on the subject, the Commission would make an important contribution to the establishment of an *opinio juris*.

40. He also had problems with some of the points made in the Special Rapporteur's conclusions (paras. 224 et

<sup>7</sup> *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

seq.). First, if the standard of due diligence was held to be variable from State to State, from region to region and from one point in time to another (para. 225), the standard was *ipso facto* rendered inoperative. Secondly, paragraphs 226 and 229 seemed to establish a sort of self-contained regime of prevention under which failure to perform a duty of prevention would not constitute a breach of the law. It was extremely important not to sever the connection between prevention and State responsibility, but instead to devise a convincing interface between the two, bearing in mind two main considerations. The first was that the principles governing prevention must be viewed as primary legal rules, the violation of which, where damage ensued, would entail all the consequences attached to internationally wrongful acts as defined in the draft articles on State responsibility.<sup>8</sup> Secondly, as provision must also be made for cases in which no damage occurred, the legal consequences of internationally wrongful acts consisting in non-performance of duties of prevention must be further developed. Such an approach was in conformity with the spirit of the draft articles, that of objective liability, which meant that it was the internationally wrongful act itself that engaged responsibility even in the absence of damage, unless, of course, the element of damage was contained in the primary rule. In that connection, he noted that no thought had been given in the draft articles on State responsibility to the legal consequences of internationally wrongful acts consisting of omissions and suggested that the Special Rapporteur on that topic should bend his mind to the question.

41. With regard to terminology, the expression “prevention *ex post*” was logically unsound and ought to be replaced by another term, provided, of course, that it conveyed the same idea.

42. Noting that the Special Rapporteur’s task was facilitated by the considerable work already accomplished in the field under consideration by the Commission, he urged the Special Rapporteur to follow the course clearly mapped out from the forty-sixth to forty-eighth sessions of the Commission and to be guided by the draft articles that had already been prepared.

43. Mr. ECONOMIDES, referring to Mr. Simma’s comment on the use of the term “significant” to describe damage, said he felt that, while the term was necessary in the area of responsibility, it might no longer be necessary when dealing with prevention. Neither the Stockholm Declaration nor the advisory opinion of ICJ on the *Legality of the Threat or Use of Nuclear Weapons* qualified the idea of damage and the Commission might do well to be more ambitious and refer to the prevention of all kinds of damage.

44. With regard to the duty to cooperate, he regretted that the Special Rapporteur had not taken more account of the principles of good neighbourliness. Transboundary damage was almost by definition damage inflicted on neighbouring countries and the question arose whether, in the light of the principles of good neighbourliness, the duty to cooperate should not, in such cases, be a strict duty.

45. Mr. HAFNER said that neither principle 21 of the Stockholm Declaration nor the advisory opinion of ICJ on the *Legality of the Threat or Use of Nuclear Weapons* supported the idea that no harm whatsoever was acceptable. So long as the harm had not attained a certain threshold, it must be tolerated. Otherwise all forms of industrial development would become impossible, for either technical or financial reasons.

46. Mr. FERRARI BRAVO, referring to the resolution on Responsibility and Liability under International Law for Environmental Damage, adopted by the Institute of International Law at the 1997 session, held at Strasbourg, said that a whole series of rules were applicable prior to the occurrence of damage, the idea being to prevent its occurrence because it would often prove unacceptable. One need only think of the harm that would be inflicted by the use of nuclear weapons. It was from that angle that the subject of prevention should be approached, from a standpoint upstream from the damage caused.

47. Mr. BROWNLIE, referring to a comment by Mr. Simma, cautioned against unduly detailed codification of certain concepts of international law which were flexible and very useful in their current form. The notions of due diligence, significant harm and threshold of harm were cases in point. The meaning of significant, for example, was related to the context in which the word was used. The concepts were liable to be impaired by any attempt to codify them.

48. Mr. PELLET said that the French version of reports containing the words “responsibility” and “liability” should translate the latter word as “*responsabilité* (liability)”; otherwise, a report such as the Special Rapporteur’s first report was virtually incomprehensible for a French-speaking reader.

49. A question that needed to be considered was the moment at which a State incurred responsibility for failure to fulfil its obligations of prevention. In that connection, he reminded the Commission that, in the draft articles on State responsibility, the obligation to prevent was dealt with in articles 23 and 26, but, contrary to the obligation of due diligence provided for in the context of prevention, the obligation related to a result, namely, prevention of a given event. The State’s responsibility was engaged only if the event occurred, but then almost “retroactively”, since article 26 stipulated that the breach of an international obligation requiring a State to prevent a given event occurred when the event began. While, in one case, the obligation related to the result and, in the other, to conduct, there were undoubtedly common features which might, on analysis, shed light on the question of the moment at which liability was engaged in the event of failure to fulfil the obligation to prevent in the context of prevention currently under consideration. Likewise, in the area of State responsibility, the Special Rapporteur could usefully reflect on particular situations in which there was an obligation in respect of conduct rather than result.

50. Mr. ROSENSTOCK said he saw little benefit in drawing comparisons between the obligation of conduct and the obligation of result as set forth in the draft articles on State responsibility in order to determine the point of

<sup>8</sup> See 2520th meeting, footnote 8.

time at which an obligation to exercise due diligence was breached. While the moment was difficult to determine in practice, it was not in theory: it was the moment when it could be established that due diligence had not been exercised so that another State was exposed to a risk that it should not have to tolerate.

51. Mr. ELARABY said that Mr. Pellet's comment on the use of the word "*responsabilité*" in French was also applicable to Arabic.

52. There had been major developments in environmental law during the past 30 years, a fact that should spur the Commission to engage in a process of progressive development with respect to prevention. On the subject of the legal consequences of failure to fulfil the obligation of prevention, it should be noted that the Special Rapporteur had not ruled out any solution and had actually solicited the views of the members of the Commission. Although the obligation of due diligence was an obligation of conduct, given the serious consequences that could sometimes result from non-fulfilment, it should perhaps be approached from a different angle, for example by associating it with a dispute settlement procedure. Lastly, he took the view that the principles embodied in chapter VI, section C, of the report did not belong under the heading of prevention.

53. Referring to Mr. Brownlie's comments on the use of the term "significant", Mr. AL-KHASAWNEH said he agreed that the threshold of harm must be assessed in context, but wondered whether it might not include an objective element, valid in all contexts, namely, the reparable or non-reparable character of the harm inflicted.

54. Mr. Sreenivasa RAO (Special Rapporteur), referring to Mr. Simma's criticism of the last sentence of paragraph 225 of his report, said that it could almost be described as a truism, since the threshold of harm to be taken into consideration would obviously be affected, *inter alia*, by experience and technical progress. He drew attention in that connection to the explanations contained in the footnote to paragraph 111 (e).

*The meeting rose at 1.10 p.m.*

## 2530th MEETING

*Thursday, 14 May 1998, at 10.15 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Khasawneh, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Lukashuk,

Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

### International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (*continued*) (A/CN.4/483, sect. D, A/CN.4/487 and Add.1,<sup>1</sup> A/CN.4/L.556, A/CN.4/L.568)

[Agenda item 3]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. YAMADA said that time constraints had prevented him from fully digesting the Special Rapporteur's first report on prevention of transboundary damage from hazardous activities (A/CN.4/487 and Add.1), which was thoroughly researched, rich in analysis and full of useful footnotes. However, he wished to offer a few comments, in the hope that they would encourage the Commission to make an early start on drafting articles on the topic.

2. Part One of the report provided an accurate account of the Commission's protracted struggle with the topic of international liability for injurious consequences arising out of acts not prohibited by international law. After almost 20 years, at its forty-ninth session, in 1997, the Commission had decided, that for the time being it should limit the subject to prevention of transboundary damage from hazardous activities, without prejudging the question of its future work on other aspects of the broader topic of international liability for injurious consequences arising out of acts not prohibited by international law.<sup>2</sup> The Commission should thus refrain from engaging in conceptual debate outside the scope of the sub-topic mandated to the Special Rapporteur.

3. He fully endorsed the conclusions set out in paragraphs 111 to 113, on the matter of the scope of the draft articles. In accordance with its mandate, the Commission should deal only with transboundary damage and activities carrying a risk of causing such damage. The broader issue of creeping pollution and the global commons should be excluded, at least at the current stage.

4. In his opinion, as soon as the general debate was concluded, the Commission should take a procedural decision to take note of the two draft articles mentioned by the Special Rapporteur in paragraph 112 and to refer them to the Drafting Committee, which was eager to embark on its task. He hoped that the Drafting Committee would be allocated sufficient time to enable it to complete the work on those two articles at the current session in Geneva.

5. He did not expect the two articles to give rise to many difficulties. One question that might arise was the concept

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>2</sup> See *Yearbook . . . 1997*, vol. II (Part Two), p. 59, para. 168 (a).

of significant harm, raised by Mr. Economides (2529th meeting). On that point, he shared the views expressed by Mr. Hafner (*ibid.*): the Commission must qualify the concept of harm by establishing a threshold of tolerance. As Mr. Al-Khasawneh had recalled (*ibid.*), the Commission had debated that point extensively when formulating the draft articles on the law of the non-navigational uses of international watercourses. During negotiation of the Convention on the Law of the Non-navigational Uses of International Watercourses in the Sixth Committee convening as the Working Group of the Whole, some delegations had objected to the concept of significant harm.<sup>3</sup> Finally, however, article 7 on the obligation not to cause significant harm had been widely accepted. Clearly, significant harm was the criterion that currently commanded the widest acceptance in the international community. Paragraphs (2) to (7) of the commentary to article 2 formulated by the Working Group at the forty-eighth session of the Commission,<sup>4</sup> which virtually reproduced the commentaries, on significant harm, to the draft articles on the law of the non-navigational uses of international watercourses,<sup>5</sup> would also serve to clarify the concept.

6. From Part Two of the report, he gained the impression that some of its contents fell outside the scope of the Special Rapporteur's mandate. However, he was satisfied with the Special Rapporteur's assurances that he was abiding strictly by that mandate, and took it that the intention was to draw the Commission's attention to the fact that its work on prevention would inevitably have a bearing on other matters outside the scope of the current mandate.

7. He had no quarrel with the contents of chapter VI, section C, on the principles of equity, capacity-building and good governance. However, those principles had highly political, social and economic aspects, and he shared Mr. Rosenstock's apprehensions (*ibid.*) that to take account of those factors might unduly complicate the Commission's task.

8. Paragraph 225, on the standard of due diligence, had provoked some comment. As defended by the Special Rapporteur, that paragraph reflected the true state of affairs. It would be difficult to define an objective standard, and an abstract definition might be useless. Members would recall that draft article 7 of the draft convention on the law of the non-navigational uses of international watercourses had incorporated the concept of due diligence, a concept that had run up against strong resistance during the negotiations in the Sixth Committee convening as the Working Group of the Whole, particularly from some European countries. Consequently, that concept had had to be replaced by the concept of taking "all appropriate measures" to prevent significant harm to other watercourse States. He personally saw no great difference between the two concepts, and preferred "due diligence", which was the established legal concept. However, the Special Rapporteur should take that recent experience into account when formulating the draft articles.

<sup>3</sup> See *Official Records of the General Assembly, Fifty-first Session, Sixth Committee*, 51st to 62nd meetings.

<sup>4</sup> See 2527th meeting, footnote 16.

<sup>5</sup> For the draft articles and commentaries thereto, see *Yearbook . . . 1994*, vol. II (Part Two), p. 89, para. 222.

9. Paragraph 226, on the question of non-compliance, had also provoked various comments. Non-compliance with duties of prevention would of course entail some consequences. However, the question whether it should be dealt with under the general regime of State responsibility, under the international liability regime or by means of *lex specialis*, could be set aside until the Commission completed its work on prevention.

10. He took it that the Special Rapporteur wished the Commission to approve the general orientation of his first report and his analysis of the content of the concept of prevention. It would be easier for the Commission to do so on the basis of concrete proposals for draft articles on the principles of procedure and the contents of prevention. Accordingly, he would ask the Special Rapporteur to provide the Commission with draft articles as quickly as possible, on the basis of the articles in chapters I and II of the draft proposed by the Working Group at the forty-eighth session of the Commission, possibly with assistance from other members in the context of the Working Group. In any case, it was to be hoped that the draft articles at the current time could be referred to the Drafting Committee in Geneva, so that they could be subsequently further developed when the Drafting Committee met in New York in July 1998.

11. Mr. PAMBOU-TCHIVOUNDA expressed his consternation at the fact that, in an attempt to escape from the impasse into which its study of the topic of international liability for injurious consequences arising out of acts not prohibited by international law had led it, the Commission had decided to adopt the strategy of focusing on the question of prevention of transboundary damage from hazardous activities. Its work had thus taken a new turn that was tantamount to a complete reorientation. It would be necessary to find a new framework for the content and the consequences of the duty of prevention that the regime to be formulated would impose upon States.

12. In such a regime, would not the duty of prevention change in nature, ceasing to be an obligation of conduct and becoming instead an obligation of result? In such a regime, could one avoid the need for a definition or a non-restrictive enumeration of "hazardous activities"? Would such a regime leave open the questions of the inherent consequences of a breach of the obligation of prevention and of the extent of their determination and thus of their cessation? He would be highly gratified if those questions were to find their place in the logic of the subject bequeathed to the Commission by the previous Special Rapporteurs, Mr. Quentin-Baxter and Mr. Barboza, for otherwise the Special Rapporteur would be unable to ignore the calls by Mr. Ferrari Bravo and Mr. Simma for a strict *ex ante* notion of prevention, and by Mr. Economides for a global approach to damage.

13. Alas, the Special Rapporteur's task was far from being completed, for he had treated what was, regrettably, an entirely different topic in the spirit of the previous topic. The Special Rapporteur must go back to the basic sources if his treatment of prevention in the wake of the work of the previous Special Rapporteur, Mr. Barboza, was to receive the endorsement that he sought from the Commission, more particularly in paragraphs 112 and 113 of the report.

14. His own reservations concerned not only the interpretation of the subject matter and the method of approaching it, but also its very substance. There was nothing to prevent the Commission from distancing itself from its work with a view to detecting ways of improving it, albeit without striving obsessively for perfection. In that spirit, he expressed doubts as to the possibility of formulating a homogeneous approach that would not conceal the disparities that existed between States—disparities in their levels of development, of access to and application of scientific know-how. If it proved possible to formulate a homogeneous system, he feared that it would exhibit all the charm of the abstractions and generalities that had characterized international law more than two centuries ago but which had no bearing on modern-day realities and could not assuage the hunger for international law that those realities inspired. In any case, such an approach would do little to enhance the value of the “principle of equity” set forth in chapter VI, section C, of the report. Rather, if the regime were to acquire a lustre of originality, it would derive from the topicality and plurality of the rules of which it was composed.

15. The system still taking shape bizarrely viewed the impact assessment regime as totally outside the sphere of international law, whether general or regional. Yet, if one could conceive that determination of the type of impact assessment appropriate for the activity that might lead to damage was to be left to the discretion of States, it seemed not unreasonable to subject the validity of such impact assessments to international law. Development of a minimum standard for States in the framework of the regime to be elaborated by the Commission would enhance the credibility of that regime in the eyes of the international community, and would have a knock-on effect on internal law.

16. The Special Rapporteur had conferred an ambiguous role on damage in his report. Damage appeared in a twofold guise. The first was that of “unreality”, which should serve as the basis for the construction of a regime of prevention. In that guise, damage was perceived as being so terrifying as not to bear contemplating, and everything possible must be done to prevent it. Could such damage be subject to gradation a priori? Could one limit a priori the number of States committed to combatting it *ex ante*?

17. The second guise in which damage appeared was that of “quantifiability” in terms of the critical threshold. There was no longer any question of preventing such damage, as its victims could be numbered in the thousands. Yet he was struck to read in paragraph 87 that it was admitted that a certain level of harm was inevitable in the normal course of pursuing various developmental and other beneficial activities where such activities had a risk of causing transboundary harm. However, it was equally admitted that substantial transboundary harm was to be avoided or prevented by taking all measures practicable and reasonable under the circumstances. Under such circumstances, prevention would play a daunting role: to identify the “normal course” of an activity, for by definition an activity could be carried out only if it fulfilled the prevention requirements. Prevention and harm were thus mutually exclusive: the normal course of an activity obviated the need for prevention, just as prevention had the

power to “purify” harm. The situation would be deemed never to have occurred, even though the number of victims was in the thousands. If the harm did not exist, that was true not only for the State but also for the operator, as long as the activity was carried out in conformity with the prevention requirements. Was that the kind of system the Commission wished to establish? If so, what would be the consequences of a prevention regime based on the notion of “significant harm” if the regime was to serve the cause of the victims, the most vulnerable? That was the question that needed to be kept in mind in writing the law of liability.

18. Mr. Sreenivasa RAO (Special Rapporteur) said Mr. Yamada had pointed out a way of expediting the work on the topic and, if the Commission approved, he would try to prepare draft articles for submission to the Working Group. Given the extensive discussion that had already taken place, it should be possible to finalize as many articles as possible on the content of prevention. He was also of the impression from members’ comments that there would be no difficulty in reaching agreement on the two articles proposed on scope. The exact number of articles that could be approved by the Commission would depend on its work schedule.

19. As to Mr. Pambou-Tchivounda’s excellent analysis, he shared the concern about the new turn taken by the topic. The orientation that had guided the Commission’s work for 20 years had been narrowed, but that had been done by a considered decision and after extensive debate. There was little to be gained by revisiting the question. By eliminating certain matters from his analysis, he was in no way precluding the possibility that they might be taken up separately, as appropriate, and in accordance with the Commission’s wishes.

20. There was truth to the argument that the threshold for damage—significant harm—was too high, and that at the prevention stage the emphasis should be on avoiding any and all damage that might arise out of the activities of States. When significant harm had occurred, it might be too late to deal with some of the disastrous effects. He disagreed with Mr. Pambou-Tchivounda’s reading of paragraph 87 of his report, however. He had been trying to show that a legal obligation could give rise to considerable contention and a number of claims if the threshold of significant harm was exceeded. At the prevention stage, the only thing happening was that certain steps were being taken. Attempts must be made to keep activities, particularly hazardous activities like the operation of an atomic reactor or chemical plant, as “clean” as possible. That was the thrust of the Rules on Water Pollution in an International Drainage Basin (Montreal Rules), adopted by ILA in 1982.<sup>6</sup>

21. Mr. Al-Khasawneh had mentioned the possibility of reducing the threshold from “significant” to “appreciable” harm. Mr. Yamada, drawing on his intimate knowledge of the elaboration of the Convention on the Law of the Non-navigational Uses of International Watercourses, had recalled that much of the field had already been ploughed, and any deviation from those lines would send

<sup>6</sup> ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 13 and 535 et seq.

the wrong signals. His own response was that, where lawful activities were concerned, lowering the threshold to the level of avoidance of every possible type of harm would be unacceptable to a broad spectrum of public opinion.

22. Mr. Pambou-Tchivounda's comment that including the concept of equity would militate against a homogeneous construct recalled statements by other members, but it had also been pointed out that a variety of considerations were relevant and many were interconnected. He would look into all the comments made and attempt to take them into account at the next stage in the drafting.

23. He would also try to respond to the concerns expressed by both Mr. Pambou-Tchivounda and Mr. Simma concerning the *ex ante* as opposed to the *ex post* approach. That the emphasis was on *ex ante* was not open to doubt; perhaps Mr. Simma, as Chairman of the Drafting Committee, would be able to find a better formulation than *ex post*. The term was meant to refer to contingency measures to be put in place by States and operators as part of prevention techniques, but which were to be used only after the event. An example could be taken from the fire prevention technique of installing sprinklers, which operated only after the damage occurred, not before. The previous Special Rapporteur, Mr. Barboza, had proposed measures designed to contain damage after the fact, which could be defined as remedial measures.

24. Mr. PAMBOU-TCHIVOUNDA said that in keeping with the Commission's current practice, he had not addressed compliments to the Special Rapporteur on the report. He nonetheless found it impressive for its sharp analysis and audacious proposals, though the sheer size of the document was something of a disadvantage. The Special Rapporteur's proposals on the principle of equity were welcome. He himself did not advocate exclusion of that principle, which took account of the range of differences between countries in levels of development, access to scientific know-how and ability to put it to use. Rather, he wondered what method could be used to incorporate it into the draft articles, so as to ensure that all countries were equally served by them.

25. Mr. ECONOMIDES thanked the Special Rapporteur for a first report, that was brilliant on every count. Paragraph 28 indicated that principle 21 of the Stockholm Declaration<sup>7</sup> had become a rule of customary international law. ICJ had made that clear in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, which said that States had the general obligation to ensure that activities within their jurisdiction and control respected the environment of other States. Hence there was a legal requirement of vigilance to prevent environmental harm at the international level. In view of the similarities between transboundary damage and environmental harm, the same requirement of vigilance should apply to transboundary damage, in line with the reasoning from the *Corfu Channel* case (see page 23), cited in paragraph 43, that every State had an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States. It was up to the Commission to ana-

lyse the rule of vigilance and adapt it to the problem of transboundary harm.

26. He agreed with the Special Rapporteur that the Commission should deal only with the prevention of transboundary damage, not with liability for it. Mr. Mikulka (2528th meeting) had clearly stated the reasons: an offence against a system of prevention directly entailed the international responsibility of States, a topic being treated separately by the Commission. In his view, the practical usefulness of the concept of liability was extremely limited, not to say nil. Harm done to another State was nearly always a result of gross negligence or of a major failure to fulfil the obligation of vigilance, and that once again led back to the domain of international responsibility. He therefore concurred with Mr. Yamada that conceptual aspects should be left aside and prevention should be dealt with only in practical and specific terms.

27. He did not agree with the conclusions set out in paragraph 111, subparagraphs (a) to (e), of the report. Because the Commission was dealing only with prevention, it could set lower goals and try to cover prevention of all transboundary damage, not just significant damage—damage arising from any type of activity whatsoever, lawful or unlawful, hazardous or not.

28. It had been contended that such an approach would do a disservice to States by obstructing their industrial development. It might well do so. However, clear priority must be given to environmental protection over industrial development. Money could always be found, but irreparable damage to the environment could not be reversed. He therefore believed that draft article 1, subparagraph (a), and draft article 2, subparagraph (a), should undergo a major revision. Indeed, as Mr. Pambou-Tchivounda had pointed out, the entire draft might have to be revisited and, perhaps, rewritten, in the light of the new and important emphasis on prevention and the advisory opinion by ICJ on the *Legality of the Threat or Use of Nuclear Weapons* that he had mentioned earlier.

29. With reference to Part Two of the report, he agreed with all the principles of procedure and of content, which were admirably described. Equity, capacity-building and good governance, however, though relevant, should be looked at from the standpoint of the long term. The principles should fully and seamlessly regulate prevention. But the draft must offer a solution where consultations and negotiation failed to result in an agreement between the parties and there was a corresponding risk of serious transboundary damage. It should therefore provide for compulsory recourse to impartial investigation, drawing on article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses. The draft should also expressly provide for a general obligation to cooperate, similar to that in article 8 of that Convention.

30. As to the conclusions to the first report, he thought with respect to paragraph 224 that it should not be possible to undertake the disputed activity until the preliminary investigation procedure was completed. A further stage should be added before unilateral action was allowed. With regard to paragraph 225, it should be made

<sup>7</sup> See 2529th meeting, footnote 7.

clear that the State was acting unilaterally, but by virtue of an international obligation of diligence, which should be fulfilled in as uniform a manner as possible. That should be the Commission's goal. He had serious doubts about the correctness of paragraph 226 from the legal standpoint, but had no difficulty at all in rejecting it from the standpoint of its appropriateness. He fully agreed with the content of paragraph 228, but with respect to paragraph 229 he thought that responsibility and its consequences should not form part of the Commission's study.

31. Mr. HAFNER said that he was not sure what the principle of a duty to cooperate referred to by Mr. Economides would mean in practice. Might the principle impose on the affected State a duty involving costs when only the State originating the activity benefited from it? If so, the affected State would have to assume a financial burden without any counterbalancing benefit. Another possibility was that the principle should only be interpreted as reflecting something which could also be expressed in terms of good faith, that is to say, that the affected State also had to act in good faith. He doubted whether the principle as understood in a very broad sense should apply.

32. Mr. Sreenivasa RAO (Special Rapporteur) said that he had noted the points made by Mr. Economides and had already responded to his central theme of the reorientation of the concept of prevention. He would welcome comments from other members of the Commission on that question.

33. He agreed with Mr. Economides that ICJ had at the current time included the concept of security in the corpus of environmental law. But the Court had not gone into the details of what the concept meant. The various aspects of what was a very complex issue would need further discussion in the context of the Commission's draft articles. Many of the points currently being raised had been examined in the past, during the drafting of the articles on the law of the non-navigational uses of international watercourses, for example. The Commission had achieved a level of understanding as to ways of solving the problems. The question was whether it should go further than that. In connection with prevention, for example, why not consider all kinds of damage and not just transboundary damage?

34. He had clearly received the message that other members would have written Part Two of the report quite differently. He had proceeded by asking himself what the implications of the prevention principle and the polluter-pays principle were in practice for an operator—and he had given answers in terms of the broad concepts set out in the report. Prevention was a many-layered concept, and he did not claim that his report constituted a comprehensive analysis. However, it was an attempt to present the issues that would come up in practice in terms of legal situations and their consequences.

35. The optimum would be to prevent all damage, but that was impossible. Accordingly, the basis of the Commission's approach should consist of criteria triggering a legal engagement when something went wrong, that is to say, the point at which legal consequences came into play. The alternative approach was that legal consequences could be triggered even when no damage had yet

occurred. For example, sanctions might need to be imposed on a State which had not adopted national legislation on prevention. Or some States might need assistance or the "encouragement" of sanctions in order to improve their legislation.

36. Mr. ECONOMIDES said that he could not go as far as Mr. Hafner. The obligation to cooperate in good faith should be interpreted within the context of good neighbourly relations. The costs of any action were a matter for the two parties concerned. He disagreed with the Special Rapporteur on the role of ICJ. The Court did not develop international law. It simply applied it. It was for the Commission to develop international law if it thought benefits would ensue.

37. Since damage would always occur, the Special Rapporteur was suggesting that there should be a threshold of damage beyond which a reaction was triggered. That was a bad policy. The aim, even if it was utopian, should be to prevent all damage.

38. Mr. HAFNER said that the Special Rapporteur had raised an important point which had never before been clarified: did legal consequences arise only when damage had occurred or could they arise from non-compliance with the obligation of prevention? The Special Rapporteur took the former position. But a State which did not comply with the obligation of prevention automatically increased the risk of damage and must assume responsibility for it. The Commission must seek to resolve that issue.

39. Mr. BROWNLIE said that in trying to define prevention the Special Rapporteur might be creating a rod for his own back. What was clear was that the obligation of prevention was a policy datum and that Part One of the report provided the mechanics for pursuing that policy.

40. On the point raised by Mr. Hafner, it was his own assumption that the package of draft articles had its own logic and constituted a specific addition to the existing legal apparatus as part of progressive development of the topic of State responsibility. He could not see how the Commission could helpfully connect the draft articles to all the other possible legal consequences of some threat to a neighbouring State, because different areas of international law—the law of treaties and of State responsibility, for example—might apply in different sets of circumstances and might also overlap. The Drafting Committee should not seek to anticipate that situation in drafting its particular set of articles with its own modest economy.

41. Mr. HAFNER said that several approaches were possible. The Commission might regard its more detailed rules of prevention as *leges imperfectae*, but that was not really its purpose. Alternatively, it might regard them as a self-contained regime with its own consequences, but that would complicate the task. In the case of State responsibility, the consequences of a wrongful act were too flexible, so that they might also be triggered by non-compliance with the obligation of prevention. Things should be left as they were for the time being. Otherwise, the Commission would have to discuss matters lying far beyond its remit.

42. Mr. SIMMA said that there was clearly a difference in the philosophies of Mr. Brownlie and Mr. Hafner: Mr. Brownlie's very pragmatic attitude versus Mr. Hafner's systematic way of thinking, to which the Commission was to some extent tied. There was no reason why the Commission should not ask whether, given the existence of a duty of prevention, it should be attached to legal consequences irrespective of the damage or only when the damage occurred. In other words, the question of the way in which the international legal obligation of prevention should be linked to State responsibility did fall within the Commission's mandate.

43. Mr. Sreenivasa RAO (Special Rapporteur) said that, unless the Commission understood what prevention was all about, it could not properly define "due diligence" and so could not really discuss the consequences of non-compliance with the obligation of prevention. He too would prefer Mr. Brownlie's approach: to leave some of the details to the States concerned in specific activities, each of which would have its own self-contained regime, as was already the case for nuclear reactors, watercourses and chemical plants, for example. As new activities emerged, rules on how to manage them would be developed, perhaps on the basis of a schematic outline such as the one devised by Mr. Quentin-Baxter<sup>8</sup> or one the Commission would work out. In fact, throughout the study of the topic all of the Special Rapporteurs had stressed that no a priori principles could be laid down for all situations. All that could be done was to urge States to come together and agree on arrangements for such matters as costs, compensation, and so on.

44. Paragraph 226 stopped at that point. In the event of non-compliance with the procedures set out in the draft articles, the States concerned might or might not reach agreement on how to proceed. It was in that context that Mr. Economides had suggested a dispute settlement procedure and that unilateral measures of prevention should be allowed to come into play only on exhaustion of that procedure. A situation might arise in which, without any damage having occurred, certain consequences—notification, consultation, negotiation and dispute settlement had already been engaged. Conduct of those procedures was itself an obligation. Any further sanctions which might be required after that point were discussed in paragraphs 229 and 230 of his report. In paragraph 231 he had stressed that the various duties of prevention were duties which States were expected to undertake willingly and voluntarily. Few hazardous activities would be deliberately intended to harm another State; most were development activities hazardous to the originating State itself. In inter-State relations, States had in fact shown pragmatism in producing the right implementation mix.

45. He had drawn attention in paragraph 232 to the case of States which were capable of showing sensitivity to the established obligations but did not do so. That case must also be examined in connection with the question of legal consequences, a conclusion which had been reached by the UNEP Expert Group Workshop.

46. It was important to remember that, in the matter of State responsibility, the responsibility incurred was that

of the State and not of the individual. The steps the State could take vis-à-vis its own operators, before a neighbouring State was involved, to make sure that its standards were observed also constituted part of the legal consequences. It was a very difficult area, and further discussion in the Commission was essential.

47. Mr. BROWNLIE said that the general question of the precise legal consequences of violations of the obligations under consideration led on to the question of the status of the document the Commission was proposing to draw up. His own assumption so far had been that, because the principles in question fell within the scope of progressive development, the Commission would simply include them in a declaration to be submitted for the approval of the General Assembly, in the hope that, through a process of gradual acceptance, they would eventually acquire the status of principles of customary law. Another possibility would be to draft something in the nature of a self-contained regime with built-in dispute settlement provisions, but given the controversy around the subject of dispute settlement in the context of State responsibility, that might not be advisable in the current instance. What kind of a vehicle did the Special Rapporteur have in mind?

48. Mr. ROSENSTOCK said that the question of responsibility of one form or another in the event of a breach of an obligation was a separate question from whether or not there was an obligation. The document the Drafting Committee was to produce would deal with the latter issue. Clearly, a breach of an obligation entailed legal consequences. As to the sentence in paragraph 232 cited by the Special Rapporteur, namely that the case of States which were capable of showing sensitivity to the obligations established or undertaken but did not do so, the wording was singularly infelicitous because of the excessive prominence it gave to subjective factors. It could certainly be said that the obligation was not to prevent damage but, rather, an obligation of conduct. The formulation should not move towards a subjective perception of the issue.

49. Mr. HAFNER said the idea that responsibility arose only in the presence of actual damage was inconsistent with practice in respect, for instance, of nuclear power plants operated without proper safety measures. There had been considerable diplomatic activity concerning such issues in recent years, resulting, *inter alia*, in the elaboration by IAEA of the Convention on Supplementary Compensation for Nuclear Damage. He could not imagine that, in the event of no damage, a breach of the convention would not entail responsibility or would not entail legal consequences under the law of treaties.

50. Mr. SIMMA commented that there were a number of issues before the Commission. One was the question of the legal consequences that would attach to a breach of the primary duty of prevention. Like Mr. Hafner, he thought the question needed to be raised, although he recognized that it lay outside the Special Rapporteur's current mandate. Another, separate, issue was that of self-contained regimes. In his opinion, breaking international law up into independent segments would not be conducive to its integrity and effectiveness.

<sup>8</sup> See 2528th meeting, footnote 12.

51. Mr. Sreenivasa RAO (Special Rapporteur) said that at a later stage the Commission would certainly have to go into the question of the legal consequences, if any, that would arise if a State failed to perform its duties of prevention or to comply with its obligations of conduct.

52. Mr. ECONOMIDES said that the legal consequences which arose where there was no occurrence of harm but a breach of an obligation would vary from case to case, depending on the precise nature of the international undertaking entered into by the State concerned. In his view, the draft on prevention of transboundary damage from hazardous activities should include a *lex specialis* provision making it clear that all self-contained regimes which might have a bearing on a particular case would continue to operate. As to the point made by the Special Rapporteur, transboundary damage was a very serious issue and prevention too was a very delicate matter. Accordingly, every precaution should be taken to give a broad meaning to the term "damage" and the consequences, which must be included in the draft, would need to be discussed later.

53. Mr. BROWNLIE said that, unfortunately, he was still speculating about the final form of the document the Commission was to produce. Was it to be a declaration containing a number of standard-setting yet procedural principles designed to supplement the existing law of State responsibility relating to transboundary risks and damage, or a convention, with or without a dispute settlement apparatus, setting out obligations of conduct? In the latter case, a State acting in breach of those obligations would clearly incur treaty-based State responsibility. In the event of transboundary disaster, a breach of the duty-of-prevention treaty would be supplementary to some claim based on customary law made by the injured State. The question of the final form could not, in his view, be divorced from the current debate.

54. Mr. HAFNER said that the consequences of failure to comply with a duty depended on the nature of that duty. The problem was that the conclusions to the first report could be interpreted as applying even to cases where a legal obligation already existed. That impression should be removed.

55. Mr. BROWNLIE said he agreed that the Commission should take care not to prejudice the possibilities available in general international law by what it said under the heading of progressive development.

56. Mr. DUGARD congratulated the Special Rapporteur on a thorough study that would enable the Commission to proceed positively in its search for consensus on the subject of the prevention of transboundary damage from hazardous activities. Some members had criticized paragraph 232 of the conclusions to the first report as being too political. Admittedly, the report dealt with the issues mentioned in that paragraph in a political context, but it did so in a frank and open manner and the issues in question could not, in his view, have been sidestepped.

57. The developing countries' commitment to environmental protection was evidenced by such documents as the African Charter on Human and Peoples' Rights. At the same time, a conflict between the interests of environmental protection and the right to development was bound

to arise in poorer countries. The question of potential transboundary damage caused by the activities of foreign companies and the consequences of the North/South divide in that respect had to be taken into account. In paragraphs 205 and 207 of the report, the Special Rapporteur referred to those problems and to the relevant principles of the Rio Declaration,<sup>9</sup> while paragraph 210 suggested various steps that might be taken. Pointing out that ideas of that kind had not featured prominently in the past work of the Commission, he asked whether the Special Rapporteur intended to draw on the principles referred to in chapter VI, section C, and paragraph 232 in the body of the draft articles or to leave them to the commentary. Mr. Brownlie's question about the future form of the draft articles was very much to the point in that connection. Personally, he doubted whether principles that could be set forth in a declaration would be acceptable in a multi-lateral treaty.

58. Mr. Sreenivasa RAO (Special Rapporteur) said that the ideas referred to by Mr. Dugard were being debated in other forums and, as Mr. Rosenstock had pointed out, did not fall within the Commission's mandate in connection with the current topic. So far as the future form of the draft articles was concerned, he had no clear-cut proposal to make, but awaited guidance from the Chairman of the Drafting Committee and from other members. A flexible approach would undoubtedly achieve the best results.

59. Mr. PAMBOU-TCHIVOUNDA said that he saw no need to emphasize the distinction between principles of procedure, on the one hand, and principles of content, on the other; there was a considerable amount of overlap between the two areas, especially in terms of precaution and good governance. The principle of equity was perhaps the only one that represented a completely new departure from the work of the previous Special Rapporteurs. On the subject of the future form of the proposed instrument, he did not think it urgent to reach a decision since the intention was not, in any case, to produce a catalogue of principles.

#### Organization of work of the session (*continued*)\*

[Agenda item 1]

60. The CHAIRMAN announced that the Working Group on nationality in relation to the succession of States was composed of the following: Mr. Mikulka (Chairman; Special Rapporteur), Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. Rosenstock; and Mr. Dugard would be an *ex officio* member.

*The meeting rose at 1.05 p.m.*

\* Resumed from the 2519th meeting.

<sup>9</sup> See 2527th meeting, footnote 8.

## 2531st MEETING

Friday, 15 May 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Khasawneh, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

### International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (*continued*) (A/CN.4/483, sect. D, A/CN.4/487 and Add.1,<sup>1</sup> A/CN.4/L.556, A/CN.4/L.568)

[Agenda item 3]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. ADDO said that he endorsed the conclusions reached by the Special Rapporteur in his first report (A/CN.4/487 and Add.1) and agreed in particular that the draft articles proposed by the Working Group at the forty-eighth session of the Commission<sup>2</sup> should be referred to the Drafting Committee for consideration. The provisions of draft articles 4, 5, 10 and 13 would require States generally to prevent, mitigate or repair harm, to compensate the injured State and to notify other States of the risks involved in the proposed activities. As Mr. Hafner had said, harm must be defined and the Special Rapporteur would do well to give the matter some thought. "Harm" and "risk" were key concepts that did not lend themselves to simple and precise definition. A wide and very diverse range of situations had been identified as constituting transboundary environmental harm, but no general definition had emerged as authoritative. It seemed safe to say, however, that not every detrimental effect resulting from transboundary environmental factors fell within the concept and that four conditions had to be met.

2. The first condition was that the harm must result from human activity and not from *force majeure* or an act of God. Detrimental effects due to environmental factors without some reasonably proximate causal relationship to human conduct would also be excluded. The second was that the harm must result from a physical consequence of the human activity. The third was that the physical effects must cross a national boundary. The fourth was that the harm must be significant or substantial. The last condition

left room, however, for subjective judgement and had therefore drawn criticism. It was nevertheless especially important, in his view, to establish a threshold in order to define legally significant harm because acts detrimental to the environment were so pervasive and numerous.

3. In addition, non-compliance with prevention rules should entail State responsibility. Pursuant to the principles of State responsibility, States were accountable for breaches of international law. Such breaches of treaty or customary international law enabled the injured State to file a claim against the violating State either by diplomatic action or by recourse to international mechanisms where they existed. As a violation of international law, non-compliance with prevention rules must entail State responsibility, even in the absence of harm.

4. A persistent problem was the situation in which the transboundary environmental injury was caused not by the State itself, but by a private operator such as a transnational corporation. Perhaps that was a case for applying the polluter-pays principle, but he would welcome any light that the Special Rapporteur could shed on the issue.

5. There was certainly a world of difference between international liability and State responsibility. The latter depended on a prior breach of international law, whereas international liability reflected an attempt to develop a branch of law in which a State might be liable for harmful consequences of an activity that was not in itself contrary to international law. It was doubtful whether rules of prevention could be subsumed under that rubric.

6. With regard to paragraph 229 of the report, failure to comply with duties of prevention must entail State responsibility. That was the only way of ensuring that States which had assumed such duties would take them seriously. With regard to paragraph 230, the Special Rapporteur concluded that failure of the operator to comply with duties of prevention would and should attract the necessary consequences prescribed in national legislation under which authorization had been given. What would happen, he wondered, if national legislation prescribed no civil penalty or was silent on the consequences?

7. In conclusion, he endorsed the recommendations made by the Working Group in paragraphs 4 and 5 of its report at the forty-eighth session of the Commission and urged the Special Rapporteur to prepare draft articles based on those proposed by the Working Group as soon as possible.

8. Mr. AL-KHASAWNEH, recalling the words of the late Quentin-Baxter, said that legal reasoning admitted of only two active principles of obligation: responsibility for fault and responsibility for harm in the absence of fault. The latter principle ultimately rested on the equitable notion that an innocent victim should not be left to bear his loss alone. That principle had been gradually developed in national societies, especially industrialized ones, to meet the exigencies of modern life, when the carrying out of many indispensable activities could result in harm. The success of the principle depended on the existence of an exclusive and well-funded system of insurance and reinsurance. Such a system did not exist in international life, but there was no reason why appropriate regulations should not be developed on the basis of the progressive

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>2</sup> See 2527th meeting, footnote 16.

development of the law, although there should be no illusions about the fact that a greater infusion of progressive development than most States were accustomed to was needed for that purpose.

9. The topic had first been encountered when the Commission had come across circumstances precluding wrongfulness in its study of State responsibility, but those circumstances covered environmental damage arising out of lawful activities and other non-material damage. A classic example was when a State, acting under the United Nations Convention on the Law of the Sea, inspected the cargo of a ship it suspected of carrying drugs and contraband—clearly a situation when wrongfulness was precluded even if no such prohibited cargo was found, but harm was nevertheless caused. That was why narrowing the scope of the draft to exclude such activities, as the Special Rapporteur suggested in paragraph 111 of his report, threatened to undermine the draft's unity of purpose.

10. He was perplexed as to how a topic that had been meant to fill a lacuna in the system of obligations contemplated in State responsibility could undergo such a metamorphosis that it became an environmental topic: prevention of transboundary damage from hazardous activities. Presumably the rationale was that prevention was better than cure, a statement with which no one could disagree, although, in real life, people were more dogged in litigation after the event than cautious at the outset of an activity. That was why prevention *ex post*, self-contradictory as it might seem, still corresponded best to practical realities. At any rate, the centre of the topic was the occurrence of harm, and not prevention, and it was in defining the consequences of harm that the Commission could play its proper role.

11. As to prevention, the Special Rapporteur listed a number of principles of both procedure and content. The principles were presented in fairly general terms, presumably because the idea was to balance the right to sustainable development against the right to a clean environment. Different rules could of course be distilled from those principles, but, if the rationale for singling out protection was because it was better than cure, the Commission should aim at developing a regime to contemplate areas where the obligation of prevention was one of result and not of conduct. A standard of due diligence was very important, but it should not be forgotten that the scope of the topic had already been narrowed a number of times: first, by excluding physical activities; secondly, by confining the topic to ultra-hazardous activities; and, thirdly, by limiting the operation of State responsibility to thresholds beyond which any damage that occurred would be nearly impossible to repair. In other words, the Commission was dealing with the weakest possible formulation of the maxim *sic utere tuo ut alienum non laedas*. Lastly, the idea that failure to perform an obligation of prevention should not give rise to legal consequences, as suggested in paragraph 226 of the report, was difficult to accept.

12. Mr. HAFNER said he agreed that an obligation of result could be provided for in some areas, but he wondered which areas those would be. With regard to the great many activities undertaken by private operators, he wondered whether it was not going too far to make a State

responsible for damage that might be caused by such activities. That was an important matter from the economic standpoint.

13. Mr. AL-KHASAWNEH said that the answer would depend on the relative weight given to development, on the one hand, and prevention of damage, on the other. The era of development at any cost seemed to have come to an end. Islamic law considered that preventing damage took priority over acquiring advantages. In the situations under consideration, damage would be difficult to repair, especially because more and more dangerous activities were being carried out by private operators as a result of privatization. That was an important matter if the prevention regime was to be truly effective.

14. Mr. BROWNLIE said that it was important to take care, when drafting rules on prevention, not to adopt standards that were well below the existing principles of responsibility with which States must already comply in various contexts. Without going so far as to include a saving clause in the draft stating that the standards indicated should not be seen to be less than those already applicable in international customary law, the Commission must be cautious and bear in mind that, in many situations, the State already had responsibility for controlling the activities of the private operator. Concerning the law of tort, he was surprised that Quentin-Baxter had thought that no-fault liability was to be taken literally because, in common law, there was simply a switching of the burden of proof, that is to say, the respondent had the burden of exculpation and of proving that he or she had not committed a fault.

15. Mr. Sreenivasa RAO (Special Rapporteur), drawing the conclusions of the debate, said that it would appear that his attempt to summarize the very many concepts pertaining to the subject under consideration had given rise to some confusion. That was entirely understandable, particularly inasmuch as Part Two of the report covered an area which, although examined in many bodies, was far from enjoying a consensus. In any event, some of the ideas formulated had been very valuable and must certainly be presented to the international community by the Commission in the framework of the progressive development of the topic.

16. The question dealt with in Part One of the report which had been most commented on during the discussion was that of the threshold of harm. In that context, it was important to dispel a misunderstanding: the threshold was devised not to stop States from taking the necessary measures to prevent all harm, but to create a legal relationship between the States involved. In that generally accepted context, it would seem that there must be a reasonable threshold and, in the case under consideration, the adjective "significant" had already been largely commented on in the report of the Working Group at the forty-eighth session of the Commission, to which it might be useful for the members of the Commission to refer. He did not think that it was necessary to pursue the discussion on that point.

17. As to the other questions raised in connection with the scope of application of the draft articles, he was encouraged by the virtual unanimity on the idea of refer-

ring draft article 1, subparagraph (a), (and not article 1, subparagraph (b)) and draft article 2 proposed by the Working Group at the forty-eighth session to the Drafting Committee. That would enable the Commission to express its view without delay, especially as the subject had attained a degree of maturity.

18. In respect of the concept of prevention itself, he was pleased that chapter VI of the report had given rise to so little criticism.

19. With regard to chapter V, it had emerged clearly from the discussions that the duties of prevention were best reflected in the principles of prior authorization, environmental impact assessment and, if necessary, notification, consultation and negotiation.

20. The question of the standard with which due diligence must comply had attracted the most comments. It must be understood that it was pointless to try to state abstractly what could be defined only in a specific context. However, the discussions had had the dual merit, first, of stressing that due diligence covered all reasonable and prudent precautions which a Government must take and hence included the obligation to set up a legal and administrative framework and monitoring mechanisms for dangerous activities; and, secondly, of making it clear that the manner in which that obligation was fulfilled could be assessed only in a real situation. Instead of seeking to introduce a rigid structure, the Commission should essentially leave the assessment to the States concerned.

21. Reference had been made to the consequences of failure to comply with due diligence, a question which was particularly acute when the States concerned did not agree. After due consideration, it appeared that the question boiled down to ascertaining to what extent it was possible to hold responsible a State which had taken all reasonable measures and to what extent a private operator could incur the obligation to pay compensation. He was not certain that the legislative and judicial systems of countries offered the best possibility of dealing with cases of failure to comply. State responsibility as it related to the operator's liability raised a very interesting question, but would have to be analysed further in the light of current-day realities. It would probably be better for the Commission to return to that at a later stage of its work. For the time being, its objective was to define the content of due diligence. As pointed out in paragraph 219 of the report, the Commission might consider failure of duties of prevention at the level of State responsibility. There was no question that States would have major responsibility in prevention because they would have to legislate, exercise control and introduce protection measures of other States.

22. One member had also raised the question whether the State could continue the dangerous activity if it had been unable to agree with its neighbours on risk management. It had been proposed that a compulsory dispute settlement system should be established. Article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses provided for a limited system of fact-finding missions. That article had been the subject of a fairly lively discussion but the majority of representatives in the Sixth Committee appeared to have approved it. However, if the whole problem of non-compliance

with the obligation of due diligence and of evaluation of conformity with a rule of conduct was left to the realm of State responsibility, in other words, if it were placed within the context of the topic of State responsibility, a compulsory settlement regime might not be at all suitable.

23. At all events, the duty of prevention would always be favourably regarded by States, which would never see it as a duty that was excessive. It served them because it protected their own people, as well as the people of other States, and was also part of what contemporary civil society demanded of Governments. So whatever procedures the Commission proposed and whatever principles it identified, States would pay heed to its conclusions. They would do their utmost to place those procedures and principles at the service of their own interests because respect for international law was known to be no more than the implementation of a clearly understood national egoism.

24. Mr. ECONOMIDES, commenting on the concept of "threshold", namely, on the level of harm a State was supposed to prevent, said that the Commission seemed to be hesitating between two possibilities: between setting the threshold at "significant harm", an option that found favour with the majority of members, and sticking to the idea, which he himself had upheld, that the State should endeavour to prevent "any" harm. The question also arose whether there was not an intermediate solution and whether the Commission could not identify a new criterion, for example, that of "minimum harm", since what was involved was prevention, not actual harm. For his own part, he continued to think that the aim of the State should be to cause no damage, as required by the general principle of "prudent management".

25. Mr. AL-KHASAWNEH said that, in his view, it was impossible to define "significant harm". That word was used in the Convention on the Law of the Non-navigational Uses of International Watercourses, but it should be regarded as a kind of legal presumption, like the "reasonable man" concept. As Mr. Economides had suggested, an absolute rule ("any damage") might be preferable to the solutions offered by a graduated system ranging from the minimal to the massive through the reasonable, the appreciable, the significant and so on. At all events, the Commission should not rush into a decision.

26. Mr. ROSENSTOCK said that he would advise the Commission to refer for guidance to the way the commentary to the articles on the law of the non-navigational uses of international watercourses<sup>3</sup> explained the term "significant", which applied to damage that was more than minimal and less than substantial. Its authors had dropped the word "appreciable" because they feared that it would not cover everything that would be scientifically detectable. The Commission could perhaps adopt the same approach: in other words, with regard to prevention, it could lay down a relative threshold which it would analyse in the commentary to the relevant article.

*The meeting rose at 11.15 a.m.*

<sup>3</sup> See 2530th meeting, footnote 5.

## 2532nd MEETING

Tuesday, 19 May 1998, at 10.05 a.m.

Chairman: Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Khasawneh, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

**State responsibility<sup>1</sup> (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>2</sup> A/CN.4/490 and Add.1-7,<sup>3</sup> A/CN.4/L.565, A/CN.4/L.569)**

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPOURTEUR

1. The CHAIRMAN invited the Special Rapporteur on the topic of State responsibility to introduce the introduction to his first report (A/CN.4/490 and Add.1-7).

2. Mr. CRAWFORD (Special Rapporteur) paid tribute to previous Special Rapporteurs for their work on a difficult topic, expressed gratitude to the Commission for entrusting the second reading of the draft to him and said his comments would first focus on the introductory issues dealt with in his first report. When the debate on those issues was concluded, he would introduce the parts of the report on international crimes. A provisional bibliography had been circulated for the information of members; he would be grateful for any suggestions for additional items for the bibliography, especially in languages other than English.

3. The report before the Commission, which contained a brief outline of the history of the Commission's work on State responsibility, discussed certain general issues. The first concerned the distinction between primary and secondary rules of State responsibility, a distinction that had formed the basis of the work on the topic since 1963. A former Special Rapporteur, Mr. Roberto Ago, had stated that secondary rules concerned

the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility

<sup>1</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>2</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>3</sup> *Ibid.*

and that

it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequence of the violation. Only the second aspect of the matter comes within the sphere of responsibility proper.<sup>4</sup>

That distinction was absolutely essential for the completion of the Commission's task.

4. The purpose of the secondary rules, as represented by and large in the draft articles on State responsibility, was to lay down the framework within which the primary rules would have effect in situations involving a breach. It was a coherent distinction, even though it might be difficult to draw in particular cases and even though some of the draft articles might be thought to stray slightly into the realm of primary obligations. It was important to note in that regard that article 37 (*Lex specialis*), of part two of the draft articles, did allow for the possibility that the general rules would be derogated from or subject to some special regime. Leaving questions of *jus cogens* to one side, that seemed to him to be equally true of the rules stated in part one. In a sense, therefore, the draft articles operated as a residual set of rules.

5. In his view, any lengthy general debate on the distinction between primary and secondary rules would not be helpful but it was important to keep the distinction in mind in looking at particular articles. It would, however, be possible to assess whether the Commission had been able to develop a coherent distinction only when it had considered the draft articles as a whole. There were one or two that appeared to transgress the limit—article 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act) for one—but there might well be good reasons for including it notwithstanding the fact that it appeared to lay down, at least in part, a primary rule. Nevertheless, the Commission's aim should be the one set out at its fifteenth session, in 1963, namely, to lay down the general framework within which the primary, positive, substantive rules of international law would operate in the context of responsibility.<sup>5</sup>

6. The second general issue was whether the draft was sufficiently broad in scope. The comments and observations received from Governments on State responsibility (A/CN.4/488 and Add.1-3) so far focused more on things which the draft articles did deal with and should not, rather than on things which they did not deal with. Comparatively few suggestions had been made on the actual question of scope. One was that the articles on reparation, in particular with respect to the payment of interest, required further development. There was certainly something in that suggestion and the matter should be taken up at the next session.

7. Two matters in particular probably required further elaboration. The first was obligations *erga omnes*, to which the Government of Germany had referred in the comments and observations received from Governments. At the current time, the draft dealt with the concept rather inadequately, in particular in article 40 (Meaning of

<sup>4</sup> *Yearbook . . . 1970*, vol. II, p. 178, document A/CN.4/233, para. 7.

<sup>5</sup> *Yearbook . . . 1963*, vol. II, p. 228, document A/5509, annex I, para. 6.

injured State), paragraph 3. It was certainly a point to which the Commission must revert. The second matter related to the so-called joint action of States or to what was known in some legal systems as joint and several liability. Although some of the articles did deal with the issue, they did so rather haphazardly; the question would certainly have to be reviewed in the light of developments. However, with the exception of the provisions on State crimes, part one of the draft represented a marvellous achievement for its time. Some of the provisions were over-refined or might be seen on close scrutiny to be unnecessary, but the main purpose of the second reading of part one was to ensure that the many developments since the 1970s were properly taken into account.

8. The next issue of a general character concerned the relationship between the draft articles and other rules of international law. One of the suggestions made by a number of Governments was that article 37 should be made into a general principle and that the draft articles as they stood did not fully reflect the notion that they operated in a residual way. The proposal seemed in principle to be valid, except possibly as to issues of responsibility arising out of obligations of a *jus cogens* character. The Commission might therefore wish to discuss the draft articles throughout, on the assumption that, where other rules of international law, such as specific treaty regimes, provided their own framework for responsibility, that framework would ordinarily prevail.

9. Two areas of the draft had been singled out as debatable in the comments and observations received from Governments: the detailed provisions on countermeasures and those on dispute settlement. He mentioned the matter, first, to record that the issues involved were still very much alive but also to urge the Commission to adhere to the timetable it had laid down at its forty-seventh session for completion of its consideration of the draft.<sup>6</sup> In that regard, he would point out that the working group had conducted an initial review of the whole of part one, save for article 19 (International crimes and international delicts), and Mr. Simma would give a brief account of the working group's work before he himself introduced chapter II, sections A and B, of the report. According to its timetable, the Commission was to give detailed consideration to countermeasures in a working group at the fifty-first session at which time it would inevitably have to consider carefully the form the draft articles would take. He therefore trusted that it would not spend an excessive amount of time on the form of the draft articles at the current session and that it would not spend any time at all on the questions of countermeasures and dispute settlement.

10. The last general issue concerned the eventual form of the draft articles. The Commission did not generally decide on that until it had completed consideration of the draft, though, admittedly, in some contexts, such as reservations to treaties and nationality in relation to the succession of States, the decision had been made earlier. The draft on State responsibility had, however, been drafted as a neutral set of articles, designed neither to be a convention nor even a declaration but simply as an attempt to strike a balance between codification and progressive development in the field of secondary rules. His own pref-

erence would be to maintain that position for another year at least. He accepted that it would be necessary for the Commission to take a position on the ultimate form of the draft articles when the issue of dispute settlement was decided.

11. It might well be possible to decide on questions of dispute settlement as they related to countermeasures when the Commission took up the matter of countermeasures at the fifty-first session, independently of the question of the form of the draft articles. One might well take the position that, if dispute settlement procedures were attached specifically to the taking of countermeasures, such a course would not work for a number of reasons. But one might also take the opposite position, when a more general decision would arise. It certainly would arise in the context of part three, because the provisions on dispute settlement could not stand in a declaration. They could only do so in a convention, and the Commission would have to take a firm view in that regard. Again, a convention on State responsibility, without any provision for dispute settlement, might be favoured, or the issue of dispute settlement could be left to a subsequent diplomatic conference. He would prefer to leave the matter aside at the current session, as it would take up a lot of time. A number of comments and observations received from Governments and other sources which advocated a non-convention form for the draft were clearly influenced by the substance of the existing articles with which the authors of those comments disagreed, often strongly. Only after the Commission had reviewed substance and made decisions on key questions would it be possible to approach the question objectively. As had been seen with the draft statute for an international criminal court,<sup>7</sup> there had been a very significant change in State attitudes to the idea of a criminal court as it became clear that at least some progress had been made.

12. A further reason for not taking a decision at the current time was that it might have the undesirable tendency of detracting from the importance of the Commission's debate on the substance of the draft articles. The Commission should make the draft articles as good and generally acceptable as possible, without adopting the "soft option" of a declaration, although in the end and for reasons pointed out by some Governments, the wisest course might be to opt for a declaration or some other non-treaty form. It was interesting to recall that, at one stage in the development of the 1969 Vienna Convention, it had been argued that the law of treaties should take the form not of a convention but of a restatement of the law or of a declaration.<sup>8</sup> Yet history had shown that Waldock's view on the subject had been wiser than Fitzmaurice's, for the inclusion of the draft articles on the law of treaties as a convention had done more to clarify and consolidate the rules on the law of treaties than any declaration could have.

13. True, the climate of the 1990s differed from that of the 1960s, but the Commission should nonetheless wait until the general attitude of States to the subject—a subject as vital in its way as that of the law of treaties—had become clear and until the Commission's own approach

<sup>6</sup> See *Yearbook . . . 1997*, vol. II (Part Two), p. 58, para. 161.

<sup>7</sup> See *Yearbook . . . 1994*, vol. II (Part Two), p. 26, para. 91.

<sup>8</sup> See *Yearbook . . . 1959*, vol. II, p. 91, document A/4169, para. 18.

to some of the controversial issues had been clarified. In that regard, the Government of Austria's proposal contained in the comments and observations received from Governments for a bifurcated text, in the sense of a draft declaration of principles for more immediate adoption, followed by a more detailed draft convention, was certainly a possibility, although he feared that the Governments which opposed a convention would still oppose it even under a bifurcated approach. On the other hand, in other fields draft declarations had certainly been adopted as precursors of conventions, so the idea was not to be ruled out. He would, however, ask that, for the current session at least, the Commission should proceed on the basis of the single text in part one, seeking to develop it and making any necessary excisions, and that it should approach the question of the form of the text possibly at the fifty-first session, in a working group in which the various options could be thrashed out. There was a great risk at the second reading stage of talking about generalities rather than about specifics.

14. The time had however come to get the draft articles in part one into good shape. He was not implying they were in bad shape, but it had to be acknowledged that they had been adopted in the very different legal and political environment of the late 1960s and of the 1970s, since when there had been a great deal of development in the field of State responsibility proper and in other areas such as international criminal law. A rethinking of some of the draft articles was obviously required. The Commission had never engaged in such a rethinking, as it had adopted the deliberate policy of not reopening any part of part one after its adoption at its thirty-second session, in 1980<sup>9</sup> which meant that close on 20 years had elapsed since the articles had last been considered. The time had come to focus on them. The Commission should concentrate on the specifics for the time being and the generalities would take care of themselves.

15. Mr. PELLET, commenting on the eventual form of the draft, said that he was not altogether persuaded by the Special Rapporteur's argument in favour of putting off until tomorrow what could be done today. That seemed to be a common theme throughout the first report. For instance, it was as though crimes should be placed in the freezer in the hope that the question would ripen into maturity; but, it was not by putting fruit or flowers in the freezer that one made them ripen or blossom. And the same applied to the final form of the draft articles, which the Special Rapporteur wanted to leave in cold storage but which would have to be dealt with one day.

16. The statement in the first sentence of paragraph 41 of the report was not entirely correct for, in point of fact, the Commission nearly always took a position, by way of a recommendation, on the form its drafts should take. Admittedly, it usually did so when it had concluded its consideration of a particular issue, but as it had already reflected on the question of State responsibility for some 30 years, it should surely have reached that stage by the current time. It also seemed a little odd to suggest that the Commission would be incapable of taking a position on the matter at the current session but that it might have a sudden flash of inspiration in the next year or two. That

did not mean he believed the Commission must at all costs take a decision on the form of a draft in advance but, in the current instance, he felt there was a fundamental reason which militated in favour of the Commission's taking an immediate interest in the matter.

17. Contrary to what was stated in section D.5 of the introduction to the report, he did not think that the problem of the form of the draft was linked to the question of dispute settlement. If provision for dispute settlement had to be made then obviously that could be done only by incorporating a suitable mechanism for the purpose in a draft conventional instrument. Such mechanism could, however, also be either the subject of a more general treaty on State responsibility or it could take the form of a protocol, perhaps optional, to a treaty on responsibility, or even of an autonomous instrument providing for dispute settlement in the matter of responsibility without any need for the main draft to be conventional in nature. It was quite conceivable to offer States a dispute settlement mechanism in the matter of State responsibility in order to apply customary law, with the assistance guided by the draft that would be adopted.

18. Clearly, therefore, it was not the problem of dispute settlement that concerned him. Rather, the question of the form of the draft articles seemed to be linked far more to another question raised by the Special Rapporteur, namely, that of the issues excluded from or insufficiently developed in the draft articles and more generally the varyingly precise and varyingly operational character of the draft adopted on first reading. At the fifty-second session of the General Assembly, he had been struck by the seeming contradictions in the statements made in the Sixth Committee: the draft articles had often been criticized, on the one hand, for being too short and not sufficiently precise, and on the other, for being unduly detailed and fussy. Both criticisms were justified to some extent and he shared the Special Rapporteur's analysis of the matter.

19. The Special Rapporteur should address himself to certain points in the draft. Leaving aside part three, which was no more than an exercise in style and devoid of any interest, in his view, part one of the draft was rather too detailed, particularly in relation to attribution and the various categories of obligations breached. Yet it remained silent on important issues, some of which had come to the fore after the first reading, such as responsibility deriving from joint action of States—or what the Anglo-Saxons termed joint and several liability. On that score, he agreed fully with the Special Rapporteur that there was a gap in the draft. Conversely, part two was unbelievably superficial. It completely ignored such essential, and technical, questions as the calculation of interest and was far too general to answer the needs of States. Again, he welcomed the Special Rapporteur's remarks in that connection.

20. One possible solution would be to restore the balance between the two parts by pruning back part one and giving more weight to the totally superficial part two. But, as the Special Rapporteur had recalled, Austria had put forward a proposal in the Sixth Committee,<sup>10</sup> one which he personally found very attractive, which should be given the most careful consideration, but which he did not

<sup>9</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 26-63.

interpret in quite the same way as did the Special Rapporteur. While he agreed that the core of the Austrian proposal was that not one but two instruments should be prepared, it seemed to him that neither of those instruments need necessarily take the form of a convention, though they would in any case take the form of draft articles. What was interesting about the proposal was that it might allow for the possibility of preparing a general declaration that restricted itself to setting forth the essential principles of the law of State responsibility, together with another instrument that would serve as the most detailed possible guide to practice, based on the enormous volume of work done by the Commission on the topic up until the end of the 1970s, and intended to meet the specific needs of States, and especially of the smaller and poorer States, that were often technically ill-equipped to deal with the complex problems posed by State responsibility.

21. The Austrian proposal was thus extremely interesting and called for a serious debate that should not be postponed. The Special Rapporteur's proposal that the Commission should consider the draft articles in part one at the current session but postpone consideration of the form they should take until the next session seemed to him illogical. For, if the Austrian proposal was taken up, the Commission would either have to review the drafting of the articles or else it would have to do its work twice over, first dealing with the draft articles, and then separating out the basic principles to be set forth in the declaration, before reverting thereafter to consideration of the more detailed aspects of the topic—an approach that was not practical. He had no doubt that to adopt a solution along the lines of the one proposed by Austria would involve a very considerable volume of work. Nonetheless, the Special Rapporteur was pre-eminently qualified to bring such work to a speedy and successful conclusion.

22. Mr. SIMMA asked whether Mr. Hafner was in a position to provide any hints as to the meaning of the Austrian proposal, which did not necessarily yield the interpretation that Mr. Pellet had just proposed.

23. Mr. HAFNER said he was not the author of the proposal in question, and was thus not in a position to make an authoritative interpretation of its meaning. He admitted that the wording of the proposal was not entirely clear, and it had been his intention to obtain further information, which he would then impart to the Commission, together with his own personal interpretation of the proposal. His own interpretation would have the same standing as that of any other member of the Commission.

24. Mr. PELLET said it was bad practice to call upon members of the Commission to provide orthodox interpretations of pronouncements by the States of which they were nationals. He thus welcomed Mr. Hafner's response to Mr. Simma's proposal. Regardless of whether his own interpretation of the Austrian proposal was the correct one, his position was that he wished the Commission to draw a distinction between a declaration of principles and a guide to practice.

25. Mr. KATEKA urged the Commission to heed the Special Rapporteur's wise appeal that it should refrain from entering into a debate on the form of the draft articles. Mr. Pellet had just made some very interesting proposals. However, the topic of State responsibility was so extensive that the Commission could ill afford to waste valuable time discussing the procedural question of what form the draft articles should take. In his view, it would in any case not be possible to settle that question in advance.

26. Mr. FERRARI BRAVO said he wondered how a former Special Rapporteur, Mr. Roberto Ago, who had first drafted the articles on State responsibility almost 30 years ago, would have reacted to the current debate. More than likely, with his acute sense of practicalities Mr. Ago would have accepted the need for the Commission to engage in the current debate before it proceeded further. Following Mr. Ago's departure, the Commission had struck out in different directions in its consideration of the topic over the years. It must therefore give careful consideration to its future course of action and, above all, seek the reactions of Governments in that regard. It must not wait another year before consulting with States, but must instead present them with options concerning the general scope of the draft; its possible outcome; the question of settlement of disputes (one on which he had always found the draft articles to be curiously deficient); and concerning the crucial question of crimes—to which the Commission would be reverting shortly. Whether one liked the fact or not, those questions existed—as was witnessed by the volumes produced in honour of Mr. Ago,<sup>11</sup> with their wealth of material concerning those problems, and by the copious bibliography contained in the annex to the first report of the Special Rapporteur. The highly influential draft articles of the former Special Rapporteur, Mr. Ago,<sup>12</sup> had already contributed enormously to the evolution of State practice on the question, and that influence should not be eliminated by a decision of some members of the Commission not to deal with the problem of crimes.

27. Mr. CRAWFORD (Special Rapporteur), speaking on a point of order, said he had not yet introduced the subject of crimes. The subject under debate was the form of the draft articles.

28. Mr. FERRARI BRAVO said he had referred to the question of crimes purely as an example. He supported some aspects of Mr. Pellet's proposal. The Commission should debate the scope of the draft articles and, taking account of the views of those Governments that had transmitted their comments and observations on the topic, should submit various options, including the option concerning crimes; it would be ridiculous to defer consideration of such an important aspect until the next session. The Commission also owed it to Mr. Ago's memory to hold a serious debate on the topic.

29. Mr. CRAWFORD (Special Rapporteur) said there seemed to be some confusion: he was certainly not in any way opposed to elaborating on the Austrian proposal, with the assistance of Mr. Hafner, who was at least a distant blood relative of a proposal whose paternity

<sup>10</sup> See *Official Records of the General Assembly, Fifty-second Session, Sixth Committee, 23rd meeting.*

<sup>11</sup> *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, vols. I-IV (Milan, Giuffrè, 1987).

<sup>12</sup> See *Yearbook . . . 1980*, vol. II (Part Two), p. 30, paras. 33-34.

remained unclear and which, for a moment, appeared to have been adopted by Mr. Pellet. Nor was he opposed to requesting the opinion of Governments on all questions, including the question of crimes, as the Commission would indeed be doing throughout the exercise. It was quite obvious that the Commission must take careful account of the views of Governments. Thus far, views on many of the issues had been received from 20 Governments, and were set forth in the comments and observations received from Governments.

30. If the Commission took account only of the views already received, very probably it would decide that the draft articles should take the form of a declaration rather than of a convention—although even the comments and observations received from Governments already included differing views. However, while bearing in mind Governments' views, the Commission must at the same time reach its own conclusion, if possible by consensus, as to what course should be taken. That conclusion should be submitted as a provisional view to the Sixth Committee, and the Commission should take very careful heed of the reactions thereto, with a view to coming up with a set of draft articles that would achieve all that Mr. Pellet, and indeed he himself, desired.

31. He was unsure of the precise meaning of the Austrian proposal. He had rather assumed that it advocated an initial draft declaration followed by a convention, which would perhaps go into more detail and include the option of dispute settlement provisions. He might, however, have misinterpreted its intention.

32. He had also been giving careful thought to the way in which the very rich material contained in the commentaries could be best displayed. One possible solution would be to prepare a two-tier commentary, consisting of a first, more general and explanatory part, and a second, more detailed part. Mr. Pellet had rightly pointed out the contrast between parts one and two, a contrast that was equally apparent in the commentaries. Important questions of form thus arose. But the Commission was not putting off—nor should it put off—the critical question, which affected the whole of the draft articles, of what should be done about multilateral obligations. That was precisely the issue that had to be resolved in the context of crimes and then developed. He did not see how any Government could sensibly think that the text might take the form of a convention until the Commission had reconsidered that issue, as he hoped it would do shortly. Thereafter, the Commission plainly needed to tell Governments its views, to listen to their views, and to respond accordingly.

33. As to the other questions of principle, the process during the current session would involve an assessment of the general principles in part one, whether or not the Austrian proposal was adopted; together with a detailed discussion of imputability (arts. 5 to 15), which raised important questions of principle. If the Commission managed to deal with those two tasks in plenary and in the Drafting Committee, it would have done well. Those questions would have to be contained in a statement of principle and also in a convention. There might be a need for some differentiation, but he saw no need to make that differentiation at the current session. He was perfectly

happy with the proposal he inferred from the statements by Mr. Pellet and Mr. Ferrari Bravo: that the Commission should specifically ask the Sixth Committee about the Austrian option once it had clarified the nature of that option, and that at the next session it should attend to any consensus that emerged, either from its own discussions or from those in the Sixth Committee. But he did not think the Commission needed to reach that decision at the current session.

34. Mr. PAMBOU-TCHIVOUNDA said he was surprised that the Special Rapporteur expected much input from a debate on a report consisting of four parts, of which he had presented only the introduction. That being the case, the Chairman should perhaps consider instructing members of the Commission to confine their remarks to the introduction, with a view to enhancing the subsequent debate on the questions of substance.

35. He fully endorsed Mr. Pellet's comment regarding the imbalance between parts one and two of the draft. That judgement could be seen as a reflection on the Commission as a whole, for its treatment in part two of the approach mapped out by the former Special Rapporteur, Mr. Ago, in part one was not salutary. Part two needed further development, to take account of the substantive achievements to be found in part one.

36. He also wondered whether the Commission could afford to defer consideration of the ultimate form of the draft articles. Nation States remained all-powerful, yet there was a discernible trend towards the integration of international society and he wondered whether a "form" that did not correspond to the traditional mode of law-making would be at the service of that trend, or whether it would instead have the opposite effect. Since the law of State responsibility was founded on the general international law and international customary law that the Commission was called upon to formalize, he feared that if it were to do so in an instrument whose nature, scope and authority were unclear, the result might be a weakening of that law, to the extent that it could no longer legitimately be called law.

37. The CHAIRMAN, responding to Mr. Pambou-Tchivounda's remark directed to the Chair, said that at the start of the meeting he had announced that the Commission would be considering the introduction to the report. It was currently engaged in a "mini-debate" on the statements by the Special Rapporteur and Mr. Pellet.

38. Mr. SIMMA said he did not share the view expressed by Mr. Ferrari Bravo. The mere fact that the draft articles had been before the Commission for 25 or 30 years did not mean that they were graven in stone, or that the Commission should eschew a fresh approach. To elaborate on Mr. Pellet's metaphors, one might say that some of the articles in part one—such as article 19—had not merely been placed in cold storage, but were laid out on a mortuary slab. During consideration of part one in the working group, the Special Rapporteur had drawn a careful distinction between the provisions that were and the provisions that were not hallowed by State practice. That was the correct approach. The Commission would create a problem for itself, were it to decide to eliminate provisions on which some international judgement or

arbitral award had already been based, but no lack of respect for the jurisprudence was detectable in anything the Special Rapporteur had written or said on the topic.

39. A problem arose with regard to Mr. Pellet's second point, concerning the final form of the draft articles. The first articles in part one, in particular, were currently formulated in a way that members schooled in the Anglo-Saxon system found extremely formalistic and empty, so much so that the literature tended to advocate focusing on the commentaries, where, it claimed, the substance of the articles was to be found. If, later in the session, the Drafting Committee decided to retain the current wording of the articles of part one, that course of action would prejudice the question of the final form. The Drafting Committee should thus keep that problem in mind. However, he agreed with the Special Rapporteur that a final decision on the form could be deferred until the fifty-first session, but not later than that.

40. Mr. ROSENSTOCK said he endorsed almost everything Mr. Simma had said. The Commission was not engaged in a *memento mori* exercise: it was considering in what ways, if at all, part one needed to be altered. The question thus arose whether a decision as to the form of the draft articles needed to be taken at the current juncture. Though in some respects the articles had obviously been drafted with a convention in mind, he did not think any issues would arise in connection with part one that would force the Commission to take such a decision at the current session. The next session would be an appropriate time to take a decision, and in the meantime Governments could be asked to comment on the question in writing and in the Sixth Committee.

41. His understanding of the Austrian proposal had been that the Commission should prepare two products and leave it to the General Assembly to choose between them. If that understanding was correct, the Commission might in some sense prejudice the outcome by not acting immediately. Notwithstanding, it should recognize that a decision needed to be taken at some point as to the final form the instrument should take, but that next year would probably be the most appropriate time to take such a decision. Meanwhile, it should get on with the task of working its way through the articles of part one.

42. Mr. MIKULKA said he agreed with Mr. Pellet that the proposal to develop two products in succession, first a declaration and then a convention, was attractive. Like Mr. Rosenstock, however, he did not think the question had to be resolved at the current time. The Commission could do the work it needed to do on part one on the understanding that, before taking a final decision on the form, it would ask Governments what they thought of the idea of a declaration, to be followed by a convention. It would not, in any case, be the first time such an approach had been used: for the same thing had been done with the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space,<sup>13</sup> which had rapidly been followed by the adoption of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the

Moon and other Celestial Bodies whose content was nearly identical.

43. When the Commission had begun work on the topic, the preparation of a convention had seemed the most logical course. Since then, however, experience had shown that other options might be equally viable, and the ratification of some conventions had dragged on for many years, casting doubt on the advisability of choosing that form of instrument. Due consideration should therefore be given to elaborating a document which, while not having binding force, was nonetheless authoritative—for example, because it had been adopted by the General Assembly.

44. Mr. AL-KHASAWNEH said that, while he shared Mr. Ferrari Bravo's deep respect for Mr. Ago's immense contribution to international law, he too could not help remembering the previous Special Rapporteur, Mr. Arangio-Ruiz, and his passion for justice. His own remembrances of things past, however, took him back to a situation with a strong resemblance to the work on State responsibility: the adoption of the 1969 Vienna Convention. Last-minute attempts to incorporate a minimalist approach that would have changed the content of the Convention had been countered by acts of leadership and foresight.

45. The Commission should heed the Special Rapporteur's advice and not take a decision about the final form of the draft articles. Such a decision would be premature, for substantive and policy reasons. The substantive reason was that choosing one of the options—a declaration or convention—in advance would automatically eliminate the other option. The policy reason was that the guidance given by Governments was by no means clear: too few comments and observations had been received in writing, and the debates in the Sixth Committee had by no means been conclusive. Hence there was ample room for the Commission to draw its own conclusions. The project was arguably the most important in the Commission's history and a decision on the final form should not be taken lightly.

46. Mr. HAFNER said that increased communication between the Commission and States was deemed desirable in order to enable the positions of States to be reflected accurately in the Commission's work. That was all the more true when no guidance seemed to be forthcoming from the comments and observations received from Governments, as in the current instance. He therefore suggested that, since the proposal made by Austria was the subject of some confusion, he should be given the task of addressing an official request for clarification to the Austrian authorities on behalf of the Commission.

47. The CHAIRMAN said the proposal was a good one, but he thought the request to the Austrian authorities should come from him.

48. Mr. MIKULKA said that, in fact, neither the Chairman nor any other member of the Commission was entitled to address questions directly to States: it was through the General Assembly that contact must be established.

<sup>13</sup> General Assembly resolution 1962 (XVIII).

49. Mr. LUKASHUK said he agreed with Mr. Mikulka. It was for the Commission itself, not the Austrian Government, to resolve the matter.

50. Mr. HE said the exchange of views on the final form of the work on part one had been very enlightening. Many possibilities were open and a number of interesting proposals had been made, especially the Austrian proposal, with the idea of drafting first a declaration and then a convention, as in the case of the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space. All the options should be considered in the light of the main problems still to be settled, including that of international crimes of States, which was the crux of State responsibility. It would be premature to make a decision at the current session: the question should be referred to States for their views and for clarification by Austria of its proposal.

51. Mr. CRAWFORD (Special Rapporteur) said Mr. Pambou-Tchivounda had been right to point out that his first report was preliminary in nature and that the substantive debate should be pursued. In particular, the debate on crimes should in no way be truncated: Mr. Ferrari Bravo could rest assured of that.

52. Mr. LUKASHUK said the Special Rapporteur had prepared a thorough report clearly outlining the main stages of the future work on State responsibility. He had thus discharged his task with responsibility. In that context the term meant “positive responsibility”, that is to say responsibility to fulfil a duty in good faith. Such responsibility is typical on moral grounds. For the law, “negative responsibility” is typical, that is to say responsibility for the breach of the law. It was the latter responsibility that the draft articles addressed.

53. In view of the many connotations of responsibility, the title of the topic was imprecise. It might have been acceptable in the early years of the Commission’s work, but at the current time a more juridically precise formulation should be found. The responsibility of States could arise under domestic or international law or on moral or political grounds, but the comments and observations received from Governments had emphasized that the special kind of responsibility involved is the subject matter, that is to say responsibility under international law. That should be reflected in the title of the topic, which should be: State responsibility under international law.

54. As to the ultimate form of the future instrument, he did not agree with those who advocated deciding the matter at a later date. The form would govern both its structure and its content. A declaration was crafted in one way, a convention in quite another. In view of the scepticism expressed by Governments about the likelihood of a convention being adopted in the near future, it might be better to adopt a compromise solution, something that was neither a convention nor a declaration: a code of State responsibility under international law. A code would resemble a declaration by the General Assembly in the extent to which it was binding, but would be like a convention in its content.

55. The fact that responsibility was not covered in international law had often been seen as a sign of the primitive state of international law. Yet the need for a law of State responsibility was so pressing that international courts

had already taken into consideration the draft articles as proof of the existence of rules of customary law. Many legal textbooks also referred to the law of State responsibility as being a distinct branch of international law, based on the Commission’s draft articles. Expediting the work on the draft articles was of the utmost importance in the formation of that new branch of the law and would have an impact on the work on other topics being considered by the Commission, including international liability and diplomatic protection. Georges Scelle, speaking before the Commission in 1949, had said essentially the same thing.<sup>14</sup>

56. More importantly, however, lacunae in the general law of responsibility meant that States, in establishing primary rules in specific fields, had been forced to accompany them with a whole set of specific secondary rules. The result was the creation of quasi-autonomous legal regimes on responsibility. Mr. Simma had drawn attention to that problem in 1985.<sup>15</sup> Special rules on responsibility had been established in such new fields as the law of outer space and environmental law. Those phenomena had been reflected in the practice of ICJ, which had stated, in its judgment in the case concerning *United States Diplomatic and Consular Staff in Tehran*, that “The rules of diplomatic law, in short, constitute a self-contained regime . . .” (see paragraph 86).

57. The problem thus arose of fragmentation in the law of international responsibility, and consequently, of the elimination of contradictions between the general law of responsibility and the special regimes. By no means did he regard the development of special regimes as a purely negative phenomenon; on the contrary, it was perfectly natural, but the challenge was to find them a place in the general law of international responsibility. The Commission had used the term “self-contained regime” in connection with draft article 37, but the previous Special Rapporteur, Mr. Arangio-Ruiz, in his relatively thorough analysis of the concept, had perhaps been unduly critical of such regimes.

58. Nowhere in the draft—neither in the articles nor in the commentary—was there a sufficiently precise definition of responsibility under international law, yet it was absolutely indispensable to the overall structure. He believed that such responsibility should be understood to be the secondary, protective legal relationship that automatically arose, irrespective of the will of the parties, whenever a breach of international law was committed. On the strength of such relationships, a party was entitled to demand an end to the breach and to request—and receive—compensation for any damage it had suffered. Countermeasures were not part of responsibility, but came into play if the offending party did not act in conformity with its responsibility. The element of will was present in countermeasures, whereas it was not present in responsibility: the State that was entitled to take countermeasures decided on its own whether to do so or not.

59. Many legal experts had a fairly vague notion of responsibility, construing it as the whole set of negative

<sup>14</sup> *Yearbook . . . 1949*, 6th meeting, pp. 49-50, para. 32.

<sup>15</sup> B. Simma, “Self-contained regimes”, *Netherlands Yearbook of International Law* (The Hague, Martinus Nijhoff, 1985), vol. XVI (1985), pp. 111 et seq.

consequences arising from breaches of the law, including countermeasures. The Austrian Foreign Minister, Mr. Marschik, in a recently published essay, stated that countermeasures were a cornerstone of State responsibility.<sup>16</sup> Yet countermeasures were a specific institution that was separate from, though closely linked to, responsibility, in that it was intended to ensure that responsibility was fulfilled. Countermeasures should therefore be treated in a separate chapter if they were to be covered in the draft.

60. Mr. CRAWFORD (Special Rapporteur), responding to those comments, said it was true that there was no general definitions clause in the draft articles, though implicit definitions, including that of responsibility, were craftily concealed in many places. The tables contained in chapter II of the report would address terminological questions. The word "responsibility" was at the current time too deeply entrenched in the draft and in the doctrine to be changed, but he agreed that it needed clarification, something that could perhaps be done in the commentary. Countermeasures were certainly a major issue and would be considered at the Commission's next session.

61. Lastly, the discussion of the introduction to his first report had pointed to the need for clarification of the Austrian proposal and, subsequently, for informal discussions on how to deal with it. The substance of the topic needed to be fleshed out at the current time, on the understanding that, for the next session, he would propose a procedure for addressing the form it would take.

62. Introducing chapter I of his first report, he said that, while many provisions of part one of the draft had to some extent become part of international law, having been referred to in decisions and in the literature, article 19 had not. It had given rise to a very contentious debate among jurists and neither they nor States agreed as to what should be done with it.

63. Moreover, there had been no case in practice of the application of article 19, which was quite unlike the situation with respect to article 5 (Attribution to the State of the conduct of its organs) or article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State) or many others in part one. Hence the need to review the question. Anyone who had participated in the debates during the last quinquennium on the consequences of crimes was only too well aware of that. The Commission had not had a full-scale debate on the subject for 20 years, and it was time that it did.

64. Article 19 had been included in the draft at the twenty-eighth session, in 1976, and had not been reconsidered since.<sup>17</sup> Some provisions of the article could be disposed of quite rapidly. Article 19, paragraph 1, was a statement to the effect that it did not matter what the subject matter of the obligation was: if there was a breach of the obligation, then that was a wrongful act. That was unquestioned and was already clear from article 1

(Responsibility of a State for its internationally wrongful acts). Article 19, paragraph 4, defined residually an international delict as anything that was not a crime. Its fate therefore depended on paragraphs 2 and 3.

65. Paragraph 2 defined an international crime as an internationally wrongful act which resulted from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach was recognized as a crime by that community as a whole. The definition was circular, but it had a good precedent for so being: article 53 of the 1969 Vienna Convention was too, although that had not been taken as a reason for deleting it. There were other ways of defining crimes, however, and there were great problems with the way of defining crimes chosen by article 19, paragraph 2. The difficulty had been manifest in the Commission's own attempt, in paragraph 3, to provide clarification. In his view, paragraph 3 was one of the worst paragraphs in part one. Not only did it fail to define crimes, but it wrapped the notion of crimes in so many qualifications and so much obscurity and contradicted paragraph 2 to such an extent that it brought the whole enterprise into disrepute. Paragraph 3 applied "subject to paragraph 2"; it applied only "on the basis of the rules of international law in force". On what other basis would it apply? It was purely indicative ("may result"); it was not exclusive (*inter alia*). But then it went on to provide a series of examples which, because of those qualifications, were not examples at all. It was simply not possible to know from paragraph 3 what, if anything, was a crime. Moreover, paragraph 3 introduced a new criterion for crimes that was not contained in paragraph 2. Paragraph 2 defined as a crime a breach of an international obligation that was essential for the protection of fundamental interests of the community, a definition that was extraordinarily general. But the paragraph proceeded to say "that its breach is recognized as a crime", thereby shifting the focus away from the obligation to the breach. The reference to recognition that a breach was a crime implied that the international community reserved the right, after a crime had been committed, to decide that the particular violation should be treated as a crime. That might not be the proper interpretation of paragraph 2 if it stood alone, but as soon as reference was made to paragraph 3, that interpretation became virtually compelling, because paragraph 3 said only that a crime "may result" from a serious breach of an international obligation, such as, in subparagraph (a), an aggression, if it was serious enough. How was it possible to know whether it was serious enough? The international community would have to wait and see. Consequently, article 19 did not offer a definition of crime, but a system for *ex post* labelling of breaches as serious. Obviously, only serious norms, norms which were fundamental to the community as a whole, could give rise to crimes, but it was quite a different matter to say that only serious breaches of those norms could give rise to crimes. In that respect, paragraph 3 contradicted paragraph 2 on a matter of fundamental importance.

66. The usual way in which legal systems defined crimes was to attach special consequences to them, which were described as criminal. The crime itself was labelled, the perpetrator was labelled, and the consequences were

<sup>16</sup> A. Marschik, "Too much order? The impact of special secondary norms on the unity and efficacy of the international legal system", *European Journal of International Law*, vol. 9 (1998), No. 1, pp. 212-239, at p. 221.

<sup>17</sup> For the text of article 19 adopted by the Commission at its twenty-eighth session and the commentary thereto, see *Yearbook . . . 1976*, vol. II (Part Two), pp. 95 et seq.

special. The draft articles failed entirely to attach distinctive consequences to crimes.

67. The Commission had been well aware, at its twenty-eighth session, in 1976, that the article was a controversial move, and it had sought to qualify what it had done in the commentary. The qualification had been built upon in a footnote to draft article 40, which said that the term “crime” was used for consistency with article 19 and that it had, however, been noted that alternative phrases such as “an international wrongful act of a serious nature” could be substituted for the term “crime”, thus avoiding the penal implication of the term. Consequently, the idea was expressed that when the draft articles spoke of crimes, the Commission was not actually talking about crimes in the ordinary meaning of that word, but in some special sense. It was as if the Commission said that delicts were everything that was not a crime, and crimes were everything that was not a delict. It might be true, but it was unhelpful.

68. The comments and observations received from Governments on what he would call, for simplicity’s sake, State crimes, because the term used in the draft articles, “international crimes”, currently had a well-established meaning that was quite different, were analysed in chapter I.B. Clearly, a number of Governments were vehemently opposed to the notion of crimes, regarding it as capable of destroying the draft as a whole. Other Governments took a more nuanced view. One of the more thoughtful attempts to resolve the problem was in a remark by the Czech Republic to the effect that there was a distinction made in international law in the seriousness of breaches. But that could be reflected in a number of ways, and the term “crime” might be inapposite. Other Governments, while supporting the distinction, argued that the draft articles were unsatisfactory because they made no difference out of the distinction, that having announced the distinction with much fanfare in article 19, there was then no procession, just a small cleaning-up operation at the end of part two. That justified criticism had been made by Mongolia with respect to the procedural implications of crime, by Mexico in a rather neutral fashion, by Italy and by Argentina. The significant thing about those comments, on which he had sought to draw some conclusions in paragraph 54, was that, as far as he could see, no Government commenting on article 19 found the draft satisfactory. They either wanted a much more developed distinction between crimes and delicts or no distinction at all. No Government was of the view that the Commission had struck a satisfactory balance. In that respect, he was in entire agreement.

69. Chapter I of his first report discussed the question of what existing international law had to say about the issue of crimes. Mr. Ferrari Bravo had wisely commented that, regardless of whether or not it liked particular provisions of the draft articles, the Commission should not change them if they had been incorporated into the structure and pattern of legal thinking and adopted in decisions or State practice. But, as he tried to explain in paragraphs 55 and the following, it was not the case that article 19 had been so adopted. It was true that in the period between the world wars, following the disastrous war-guilt clause in the Treaty of Versailles, which so far was the nearest the international community had come to the criminalization

of a State, a number of writers had sought to develop the notion of international crimes of State as a meaningful term. Hence, there had been a certain doctrinal tradition, albeit not very widespread. The orthodox view had been expressed at the Nürnberg Tribunal in the well-known statement that crimes “against international law are committed by men, not by abstract entities”.<sup>18</sup> The established view had been that only by punishing individuals who committed such crimes could the provisions of international law be enforced. It had been on that basis that a deliberate decision had been taken in 1945 at Nürnberg to punish individuals, or at least to punish persons for membership of certain organizations, but not to treat the defeated States as criminals. It had been a far-sighted decision which had stood in sharp contrast to the attempts made at the end of the First World War, and the world was a better place because that decision had been taken.

70. The position in 1976 had not changed. There had been considerable discussion of crimes in some of the literature, but even the step forward made at Nürnberg had been to some extent reversed in practice: there had been little or no development in the area of international criminal trials of individuals at the international level, but rather the diffusion of certain crimes which could be tried by State courts against individuals under systems essentially of judicial cooperation. The Convention on the Prevention and Punishment of the Crime of Genocide had of course been an important exception. At the level of principle, it envisaged the international trial of individuals for the crime of genocide, but not State crime. Article IX of the Convention, addressing State responsibility, had been expressly proposed on the understanding that it did not involve the criminal responsibility of States. Hence, despite the rhetoric of crime in relation to States and attempts made, with very little success, to define the crime of aggression, which, of all acts contrary to international law, had the greatest possibility of being described as the crime of a State at that time, since aggression could only be committed by a State, in 1976 there had simply been no significant practice in support of the notion of State crime. That was implicit in the commentary to article 19, which referred to three judicial authorities in favour of the proposition of crime. Two were decisions on countermeasures, which related to acts which were not crimes on any count, and one was the ICJ dictum in the *Barcelona Traction* case (see paragraph 33), in which it had been perfectly clear that the Court had not been making a distinction between crimes and delicts, but between obligations whose breach was of interest to the international community as a whole, and those which were not.

71. That distinction, that is to say, between obligations *erga omnes* and other obligations, had become part of international law. It passed Mr. Ferrari Bravo’s test: it had been repeatedly referred to by the Court in later decisions. But it was significant that ICJ, in dealing with obligations *erga omnes*, and whether or not one liked all the individual decisions in question, had sought to incorporate such obligations within the framework of general international law. It had done so, for example, on the issue of admissibility in the case concerning *East Timor (Portugal v.*

<sup>18</sup> *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946* (Nürnberg, 1948), vol. XXII, p. 466.

*Australia*),<sup>19</sup> and in the context of counter-claims in the recent order in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>20</sup> It had not treated those matters as a separate corpus. On the contrary, it had sought to make the notion of obligations *erga omnes* part of general international law. To his mind, that was the appropriate strategy. Whatever the Commission might say about the way in which the draft articles dealt with those obligations—and in his view they did so inadequately—they did not mark out a distinction between crimes and delicts. Many breaches of obligations *erga omnes* were not crimes as “defined” by article 19 or, indeed, anywhere else.

72. That had been the position in 1976. There had been no judicial authority or generally accepted practice in the post-war period in favour of the distinction. There had been a notion of crimes which had been used, at least at the level of labelling, in relation to aggression, but the Security Council had always been extremely reticent in applying that notion, nor did it need it under Chapter VII of the Charter of the United Nations.

73. As to decisions and practice since 1976, article 19 had given rise to enormous debate in the literature, yet academic literature by itself did not make international law. The question was what did the primary sources say, that is to say, treaties, decisions and State practice? He had analysed decisions in paragraph 57 of the report, including those which made it clear that the doctrine of punitive damages was not part of general international law. If that was the case, then there was no crime. It would be possible to envisage a broader use of punitive damages than simply in relation to crime. Some legal systems also applied punitive or exemplary damages in respect of egregious wrongs other than crimes. What it was not possible to conceive of was a system of crimes that did not allow for something like punitive damages, and especially one in which the notion of crimes was integrated into what might be described as a civil procedural model, which was the case with article 19. To exclude the possibility of punitive damages was to make crimes toothless, as indeed they were in the draft articles.

74. In the recent decision on the issue of a subpoena in the Appeals Chamber of the International Tribunal for the Former Yugoslavia, the Chamber had gone out of its way to make it clear that under current international law, States by definition could not be the subject of criminal sanctions akin to those provided for in national criminal justice systems.<sup>21</sup> It was true that the Appeals Chamber had been careful to add the qualifying words, but the substance of its decision had been to exclude the possibility of judicial penalties, properly so-called, in respect of State conduct. Admittedly, the issue in that case had been somewhat removed from the question of crimes: whether a Government could be required, under threat of some form of penalty, to produce evidence of the criminal con-

duct of its officials. But it had not been unrelated to the question of crimes. If its officials had, as part of a governmental scheme, engaged in the crime of genocide, one would then say that the State itself had engaged in the crime. Nonetheless, the Tribunal had gone to great lengths to rule out the possibility of what it had called criminal sanctions.

75. Hence, the position in terms of judicial practice since 1976 was that ICJ had sought to integrate the notion of obligations *erga omnes* into the framework of general international law, and it had certainly affirmed that concept on enough occasions to justify saying that it had definitively arrived. The Court had been much more reticent, incidentally, about *jus cogens*. It had said nothing whatsoever about crimes and it had given no credence to the notion that there was a separate category of crimes within the field of State responsibility, nor had any other tribunal.

76. Obviously, there had been an enormous number of changes in State practice since 1976, tied in especially with the increasing activity of the Security Council under Chapter VII of the Charter of the United Nations. Another important development, itself associated with the work of the Council, had been the extension of procedures for trying and punishing individuals for crimes under international law, which, it was to be hoped, would lead to a satisfactory statute for an international criminal court. However, those developments did not themselves support the entrenchment of article 19 in the draft articles. As for the Council, the first point to make was that it had never, as far as he knew, used the term “international crime” in relation to a State in the sense of article 19. It had certainly used the term on many occasions in relation to the acts of State officials or persons associated with States. It had continued to be extraordinarily reticent in using the term “aggression”. The second point was that, like it or not, the draft articles on State responsibility would never achieve the status of the Charter. The Commission was not in a position to affect the powers of the Council under Chapter VII textually, and it should not try to do so because it would bring the exercise into disrepute. The Commission must—in the only course open to it—engage in the codification and progressive development of the law of State responsibility, leaving the position of the Council to be decided by other means.

77. The third point to make about the Security Council’s practice was that the Council had been very uneven in its condemnation of conduct that would have been criminal if the concept of State crimes had existed. It had done nothing to combat the State-sponsored genocide in Cambodia. It had not appropriately condemned outright acts of aggression in that period. More recently, of course, it had taken much more vigorous action, in particular in relation to Kuwait and also, though after an unseemly pause, with regard to Rwanda. Nevertheless, there had been a considerable measure of uncertainty, and the international community had not addressed those situations by criminalizing the States concerned. To criminalize Cambodia for the genocide would have been to punish the victims, and that point had been very much present in the minds of those agonizing about what to do. Instead, the international community had chosen other, and hopefully

<sup>19</sup> *Judgment, I.C.J. Reports 1995*, p. 90, in particular, p. 102, para. 29.

<sup>20</sup> *Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 243, in particular, p. 258, para. 35.

<sup>21</sup> *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Prosecutor v. Tihomir Blaskic*, case No. IT-95-14-PT, Appeals Chamber, 29 October 1997, para. 25.

more constructive, means to restore the situation in that country after a period of time.

78. Thus, although there had been a substantial development of international criminal law in respect of individuals, there had been no development whatever of the notion of State crimes.

79. He had already referred to developments since 1976 in relation to peremptory norms of international law and obligations *erga omnes*. Whatever the position might have been before, the fact was that there currently was a hierarchy of substantive norms in international law; it was generally recognized that those concepts existed. The old bilateral forms of responsibility, while still present and important, were not the only ones. Indeed, one of the main criticisms to be levelled against the provisions on State crimes was that they distracted attention from the more important task of making sense of different categories of obligation within the framework of responsibility. For example, article 19 treated a State crime as more or less the only case of a breach of an obligation *erga omnes*. Yet the literature was unanimous in treating obligations *erga omnes* as a much broader category than State crimes, even assuming that the latter category existed.

80. Hence, significant development had taken place. To be sure, one or two Governments continued to oppose the notion of obligations *erga omnes*, but they were currently rather isolated and the Commission, having repeatedly endorsed that concept, could not change course at the current time. There were certain norms, perhaps few in number, that were non-derogable. There were other norms, a broader category, which gave rise to legitimate international concern. The Commission should seek to ensure that the consequences of those categories of norms were carefully spelled out in the draft articles. But that was not the same thing and, indeed, was almost the opposite, of adopting a distinction between crimes and delicts. It was possible and desirable to define more systematically the consequences of obligations *erga omnes* and of norms of *jus cogens* without adopting any distinction between crimes and delicts.

81. The Commission, in adopting article 19 at the twenty-eighth session, in 1976, had taken what might be described as a monastic vow—it had said that it would resist all temptations to say what the distinction meant; it had kept that vow very successfully, and as he would show, the Commission more recently had had little success in spelling out those consequences.

*The meeting rose at 1 p.m.*

## 2533rd MEETING

*Wednesday, 20 May 1998, at 10.10 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Khasawneh, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari

Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

**State responsibility<sup>1</sup> (continued) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>2</sup> A/CN.4/490 and Add.1-7,<sup>3</sup> A/CN.4/L.565, A/CN.4/L.569)**

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. CRAWFORD (Special Rapporteur), introducing chapter I.E of his first report (A/CN.4/490 and Add.1-7), said he had sought (2532nd meeting), to demonstrate that, although there was a limited degree of practice supporting the notion of State crime in the particular context of aggression, there was nothing very decisive about it. In particular, article 19 of part one of the draft (International crimes and international delicts)<sup>4</sup> had not been followed in practice, nor indeed by the Commission in elaborating anything that could be described as a proper regime of crimes. And the fact that it had taken a decision at its twenty-eighth session, in 1976, which it had regarded at the time as potentially progressive, did not mean that that decision was irrevocable or really progressive. The Commission was therefore confronted with a choice.

2. Five possible approaches were identified in paragraph 70 of his first report, bearing in mind certain constraints that were structural both to the international community and to the Commission. In particular, it was not possible to force on the Security Council a system of crimes which would, in important respects, qualify the existing provisions of the Charter of the United Nations; and the Commission had to complete its consideration of the topic during the current quinquennium, for, otherwise, it would do serious damage to its standing in the Sixth Committee. But there was another important issue, namely, the issue of the so-called domestic analogy or, rather, the question whether, in using the word “crime”, the Commission meant what it said. That word had a general connotation both in English and in other languages. It meant a distinctive wrongful act which attracted the condemnation of the international community as a whole and which was different in quality and in consequences from other forms of wrongdoing. In all the legal systems of which he knew, crimes attracted special consequences and were subject to special procedures. They were not treated as part of a continuum of the law of obligations,

<sup>1</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>2</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>3</sup> *Ibid.*

<sup>4</sup> See 2532nd meeting, footnote 17.

which operated in parallel with the law of crimes. There might be links between them, but they were distinct.

3. It had been said, and was sometimes said, in the Commission that the word "crime" was not used in the normal sense. In his view, it was inadmissible not to follow usage and, consequently, the analogy with internal law should not be entirely rejected even if there were differences between the international and national systems. But the notion of "international crime" was used before the international courts. It had been used more than 200 times in General Assembly documents over the past four years, but not once in the sense of article 19.

4. In the circumstances, what were the alternatives? The first would be to maintain the status quo, in other words, the provisions of the draft articles relating to crimes. But those provisions were not, strictly speaking, provisions. As he had explained in paragraphs 77 and the following of his report, the Commission had not established any distinctive and appropriate system for crimes. Part one of the draft articles, for example, made no distinction between "crimes" and "delicts". It followed that the rules for imputation were exactly the same as for those two categories. Furthermore, the notion of fault, or *dolus* or *culpa*, did not play a major role in the general law of obligations and rightly so. In the case of State crimes, however, that requirement was more exacting, something that was not covered by draft articles 1 (Responsibility of a State for its internationally wrongful acts) and 3 (Elements of an internationally wrongful act of a State). There was no reason why the rules of complicity should be the same for crimes and for delicts, as provided in draft article 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act).

5. It was true that articles 52 (Specific consequences) and 53 (Obligations for all States) of part two laid down certain distinctions between crimes and delicts, but they were minor and made no difference in reality. He would not revert to the curious article 52, to which he had referred in paragraph 78 of his report, but would comment on what should be the key provision in part two, namely, article 53, which laid down the obligations for all States arising from an international crime. Those obligations had to be distinctive and significant, unless crimes and delicts were to be assimilated. The most important consequence was not to recognize as lawful the situation created by the crime. But it was perfectly clear that, in international law, that obligation was not limited to crimes: it also applied, *inter alia*, to the acquisition of territory by force and to the detention or killing of a diplomat. Another obligation was not to assist the criminal State in maintaining the situation thus created. But there again there would be an obligation, for example, in cases of detention of a diplomat. Indeed, there was some contradiction with article 27, which imposed a stringent obligation not to be complicit in unlawful acts in general. Every obligation listed in article 53 applied, or at any rate, might well apply, to serious delicts.

6. Part three of the draft did not provide for any specific procedure for crimes. Yet not only did the legal systems he knew of make such provision: the international instruments that dealt with due process of law and, in particular, the International Covenant on Civil and Political Rights

also expressly made a distinction between criminal liability and the other forms of obligations. It could not be the case that there was an international State crime to which no procedural consequences attached. But the Commission had failed to agree on any. The conclusion must be that the status quo, by minimizing the consequences of crimes, tended to trivialize delicts.

7. The second alternative adumbrated in the footnote to draft article 40 (Meaning of injured State) as adopted on first reading was to replace the concept of international crime by the concept of exceptionally serious wrongful acts. Either that merely involved a change in name, a new label for a special legal category, or it did not. In the latter case, it was obvious that the term would cover a broad spectrum of more or less serious wrongful acts ranging from acts that had the most dreadful consequences for populations to mere failure to notify a nuclear catastrophe—which could also have catastrophic consequences for populations—or from an extremely serious breach of the rules relating to diplomatic immunity to trivial breaches of the rules relating to the use of force. And yet to say that only certain norms gave rise to serious breaches was to trivialize the rest of international law. That, the Commission should not do. As to the first possibility, it was tantamount to reintroducing the notion of crime under another name. If the Commission meant crimes, it should call them by their name. At all events, that was the solution to which he was most vigorously opposed.

8. The three remaining solutions were the most serious ones. The third was to criminalize State responsibility, namely, to admit that State crimes did exist, bearing in mind that they should be treated like genuine crimes, like the most dreadful acts which called for condemnation, special treatment, special procedures and special consequences. That was not an intellectual viewpoint, for two reasons: in the first place, since 1930, most of the disasters that had happened to humanity had been caused by States and, secondly, the rule of law meant that, in international law, all legal persons should be subject to the full range of its prohibitions and penalties. It was true that many legal systems recognized only the criminal responsibility of individuals, but the maxim *societas delinquere non potest* had been proved wrong and it was being recognized, little by little, that States could commit a crime. But that meant that crimes would have to be properly defined and not only by reference to the seriousness of the act committed, that a proper collective system for investigation and not an ad hoc mechanism would have to be developed, and that a proper procedure for determining the guilt of the State, a proper system of sanctions and a system whereby the criminal State could do penance would have to be introduced. With a little imagination and a proper mandate from Governments, that was not an impossible task.

9. The fourth solution was to exclude the possibility of State crimes because the existing international system was not ready for it and because it was difficult to contradict the Security Council other than by an amendment of the Charter of the United Nations, which was an impossibility. It would be tempting in that case to give up criminalizing State responsibility and simply to pursue crimes committed by individuals. In that connection, the

creation of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda and the possible creation of an international criminal court represented real progress.

10. There was a fifth position, which was that, in a system in which international law itself recognized the procedural and substantive distinctions between a “crime” and a simple breach of an obligation, State crimes, if it was established that they existed, should be treated separately. It was true that some legal systems started out with a decentralized method of pursuing criminals, but the international community had prohibited it in the name of due process. Consequently, that method could not be applied in international law. It followed that it was not only convenient not to deal with the critical question of crimes in the context of the draft articles on State responsibility, but that that approach was entirely consistent with civilized standards of due process. The Commission should not put crimes in cold storage, but should consider the ways in which, with proper authorization from the Sixth Committee, it could look at crimes. There was nothing automatic about the inclusion of crimes in the general law of obligations; in all legal systems, that law encompassed all categories of act and the systems for compensation and for consequences applied to their full extent. But, at the same time, there were special procedures for crimes which applied where appropriate. That system was entirely consistent with the legal experience of mankind and it was the only sensible way for the Commission to proceed. The Commission should admit that crimes might exist and that the international community might perhaps need to accept the notion that States could commit them and it should therefore elaborate the procedures that the international community should then follow. But it should not create a situation in which the draft articles on State responsibility were broken apart in the name of a practical illusion.

11. Mr. PELLET, speaking on a point of clarification, said that he might have been wrong (*ibid.*) to take up the Special Rapporteur’s point about the Austrian proposal because the discussion had focused on “authentic” interpretations of that proposal. As he saw it, what really mattered, leaving aside the proposals of individual countries, however respectable they might be, was what the Commission itself wanted to do. He urged the Commission to consider the possibility of drafting two instruments: a statement of principles, at once formal and succinct, setting forth the fundamental principles of the law of State responsibility, and a guide to practice or, as Mr. Lukashuk had proposed (*ibid.*), a code drafted along far more comprehensive lines and containing details relating to rules—something that States certainly needed. Whether or not the two instruments, which would, in any case, be draft articles with commentaries, should take the form of a treaty did not have to be decided at the current session. The Commission did, however, have to decide as a matter of urgency whether there should be separate categories of principles and rules because that would have crucial implications for its method of work.

12. The first report struck him as being more “the pleading of a case” than a report and the Special Rapporteur’s introduction had simply added to his misgivings. The Special Rapporteur had a certain result in mind and, to

that end, showed a definite tendency to present all the arguments on one side, while skimming rapidly over the others. That was a skilful technique, but the ultimate aim was crystal clear: “to kill” the concept of “crime”—not to “root it out”, an entirely noble task—and let it sink into oblivion, naturally with a big send-off. That was a crime against the very spirit of the awesome draft articles designed and, unfortunately, not completed by a former Special Rapporteur, Mr. Roberto Ago.

13. There were many things in the report that were not wrong, and that was what made it so dangerous. In paragraph 77, the Special Rapporteur said that the notion of “objective” responsibility was a keynote of the draft articles. Quite so, and that was one of Mr. Ago’s strokes of genius, as the Special Rapporteur had acknowledged in another discussion—a stroke of genius that had consisted in separating responsibility from harm: “Every internationally wrongful act of a State entails the international responsibility of that State” (art. 1).<sup>5</sup> That was an acknowledgement in resounding terms that there was such a thing as international lawfulness, that it was universal and that States must respect international law even if they did not, in failing to respect it, harm the specific interests of another State and even if a breach did not perforce inflict a direct injury on another subject of international law. That was so because there existed an international society based on law: a society, not an anarchy.

14. Unfortunately, the Special Rapporteur continued with what was, in his own view, the completely erroneous statement that the notion of “objective” responsibility was more questionable in relation to international crimes than in relation to international delicts. It was, however, precisely in relation to crimes that the “objective” nature of responsibility was most apparent because it was in that context that the general and “objective” interests of the international community as a whole must be protected. Of course, international society was infinitely less integrated and mutually supportive than domestic societies, but there was a society of States nonetheless, as reflected in a minimum number of inviolable rules whose existence was recognized, as yet hesitantly, by the 1969 Vienna Convention and respect for which was a matter of concern to everyone because a violation was a threat not only to the victim State, but also to the international community as a whole. It was not even necessary, where the rules were breached, for a State to be the victim. They could protect the population of the violating State against that State, the prohibition of genocide and apartheid being one example. Such basic obligations for the international community as a whole were incumbent on each of its members and were so essential for the protection of fundamental interests of that community that their breach was intolerable and not to be equated with, for example, the breach of an agreement on citrus fruit trade or on air traffic. In seeking to eliminate that distinction from the draft articles, however, the Special Rapporteur was measuring everything by one standard.

15. If the word “crime” was the source of the problem, he had no objection to trying to find an alternative, but the Special Rapporteur knew full well that he might then be

<sup>5</sup> For the commentaries to articles 1 to 6, see *Yearbook . . . 1973*, vol. II, document A/9010/Rev.1, pp. 173 et seq.

prevented from achieving his goal. That was the reason for his criticism of the proposed alternatives in one of the least convincing passages of his "pleading", in paragraphs 76 to 82, which were extremely weak in terms of intellectual reasoning. In his own view, it was quite feasible either not to name what was currently known as "crime" or to find another name. Ago's shrewd mind and clear-sightedness had admittedly failed him in that regard because both "crime" and "delict" had connotations in criminal law which were frankly out of place in the international sphere. The law governing relations between States was plainly not the domain of criminal law and he was not in favour of saying that it should be. It was, moreover, on the criminal law connotation that the Special Rapporteur had focused all his efforts, although he referred half-heartedly, without endorsing it, to an idea that he himself regarded as entirely correct, namely, that international responsibility was neither civil nor criminal, but *sui generis*.

16. In fact, the Special Rapporteur based his argument on a ready-made idea of the notion of "crime" and of the definition of that notion. It was as though he wished to condemn the Commission to transposing the definition of crime in internal law to the international sphere. The proof lay in the five unbelievable elements that he held to be necessary for a regime of State criminal responsibility. He asserted that, for the notion of crime to be applicable in international law, the crime must be identical in every respect to what was known by that name in internal law. But international society was different from national societies. There were, of course, parallels, and the notion of crime was admittedly one source of proof, but that did not warrant an a priori acceptance of a definition of crime identical to that in internal law. In law, words had the meaning given them by the legal system to which they belonged and definitions were normative. If it was the word that troubled a majority of members of the Commission, there was nothing to prevent them from replacing it by another expression, such as "breach of a rule of fundamental importance for the international community as a whole". As far as he was concerned, however, the terminology issue was of no importance. The Commission could delete the word "crime", if necessary, but it could not get rid of the concept without taking a big step backwards. By getting rid of the word, the Special Rapporteur wanted to get rid of what it designated, although he knew very well, and occasionally admitted, that genocide could not be compared, in terms either of its consequences or of its definition, with a breach of a trade agreement.

17. He urged the Commission not to be intimidated or overawed by the loud and vociferous but sparse opposition to the concept of crime. According to the list drawn up quite candidly in paragraph 52 of the report, there were only a few, admittedly powerful, States opposed to the notion. However, the list did not include most of the ones which were the most likely to be the victims of crimes, the ones which had not long previously welcomed the major step forward represented by the consolidation of *jus cogens*, that is to say, basically the States of the third world and those known at the time as the Eastern European countries. They were not on the list either because they could not afford to be or because they were intimidated by the offensive launched by the most powerful

among the wealthiest countries against the notion of crime and hence the notion of *jus cogens*. The Commission's function was, however, not to defer to a handful of States, however powerful, but to distil the essence of legal rules and to draw conclusions therefrom by progressively developing international law. That was what the draft articles by the former Special Rapporteur, Mr. Ago, had done and it would be disastrous to go back on what had not so long previously, as noted by the Special Rapporteur, been regarded almost unanimously, at least in the East and the South, as an achievement and a major breakthrough in international law. In the interests of a consistent approach to international law, the members of the Commission should not undo the work of their predecessors and they must accept the concepts of *jus cogens* and of crime, which attested to the existence of genuine solidarity among the members of the international community.

18. A number of more specific points raised by the Special Rapporteur included the fact that, in the Special Rapporteur's view, the notion of crime lacked any operational status; the weakness of the legal consequences of crimes; the risks involved in criminalizing international society; and the relationship between the notion of crime and those of obligations *erga omnes* and *jus cogens*.

19. On the first point, the Special Rapporteur stressed that the notion of crime had never been used since it had been embodied in article 19. That was not, in his own view, entirely true: in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ had conceded (see page 616, paragraph 32) that any breach of the Convention on the Prevention and Punishment of the Crime of Genocide, including, therefore, the commission by the State of the crime of genocide, could entail the responsibility of the State itself. The main point was, however, that the same was true of crime and of *jus cogens*, namely, that they were notions designed to exist and not to be used. Since the adoption of the 1969 Vienna Convention and even since the early 1960s, when the notion of peremptory norms had been included in the draft articles on the law of treaties, that notion had in practice virtually never been used, primarily because both the rules of *jus cogens* and crimes were inevitably extremely rare in the highly disintegrated setting of international society. They were a reflection of a sense of community that was still very much in its early stages. Nevertheless, certain peremptory rules did exist, just as there were some breaches of international law that were particularly intolerable because they harmed the interests of the international community as a whole. But rarity did not warrant neglect of such cases of crime or *jus cogens*, since those concepts were the future of international law, the promise of a society in which solidarity would be stronger, and it would be disastrous for the Commission to deal a fatal blow to that slow advance.

20. Secondly, those concepts were "deterrent" in nature and, like nuclear weapons, were not meant to be used, although that was obviously no reason to put them aside. States must know that if they breached an international obligation essential for protecting fundamental interests of the international community as a whole, they did something which was more serious than when they breached a mere trade or financial assistance agreement and that the

consequences would also be more serious. The Special Rapporteur proposed that the Commission should not deal with the issue: that was certainly not the way to underpin that important deterrent function.

21. On the second point, the Special Rapporteur referred to draft articles 51 to 53 and derided the distinction between crimes and delicts. Admittedly, he was to a large extent in agreement with the Special Rapporteur in that connection and thought that the text of the three articles verged on the ridiculous, although he did not agree with the Special Rapporteur's interpretation of article 53, subparagraph (a): in the event of a crime, all States, including the immediate victim, were under an obligation not to recognize as lawful the situation created by a wrongful act; thus, the victim of an aggression could not recognize it as lawful, unlike the victim of the breach of a trade agreement. That was a fundamental difference because it reflected the existence of breaches, which the draft called "crimes", to which the victim could not acquiesce. By contrast, for delicts, only third States were prohibited from recognizing as lawful the situation created by the wrongful act, and that showed to what extent part two of the draft articles, and in particular articles 51 to 53, was disastrously drafted, since the distinctions which should have been included had not been included. There were two reasons for that enormous shortcoming, the first having to do with the method which the Commission had followed at the urging of its previous Special Rapporteur, who had prompted it to codify first, in an undifferentiated manner, the consequences of delicts and of crimes and then, once the damage had been done, had invited it to deal with the specific consequences of the crime. It had already been too late because some of the consequences which should have been set aside for crimes had been provided for in the case of mere delicts. Thus, the provisions on countermeasures, for example, were acceptable when the point was to react to crimes, but they defined a system which was much too lenient and very much in the interest of the most powerful States when the point was to respond to mere delicts. The lesson to be learned was not, as the Special Rapporteur thought, that the Commission should discontinue consideration of the consequences of crimes, but that it must by all means have the difference between crimes and delicts in mind when starting the second reading so that it could systematically draw a distinction between the consequences of crimes and those of delicts and avoid ultimately papering over the distinction between the two, as it had done on first reading.

22. The second reason why articles 51 to 53 were so disappointing was that the Commission had disregarded the fundamental consequences of the notion of crime. For example, the Special Rapporteur asserted that the concept of punitive damages did not exist in international law, yet draft article 45, paragraph 2, tended to prove the contrary. Another example was provided by what might be called the "transparency" of the State in the event of a crime, that is to say, the phenomenon whereby government officials could be brought before international criminal courts. The persons convicted at Nürnberg had probably never killed anyone themselves; what they had been accused of had been acts which they had committed on behalf of the State. In such cases, the individual was usually protected by State immunity. However, as in the case of Nürnberg, that immunity no longer applied when the breaches com-

mitted by the State and in its name were so serious that they had the effect of rendering responsible both the State and the individual through which it acted. An official or head of State who breached a trade agreement was not accountable for consequences of that kind.

23. Concerning the third point, namely the "criminalization" of State responsibility, dealt with in paragraphs 83 and the following of the report, it seemed that the Special Rapporteur was mixing up two things: when a crime was committed by a State, the rulers were held criminally responsible, but that did not mean that the responsibility of the State itself was criminal in the sense that the Special Rapporteur gave to that term. Rather, it meant, once again, that the State became "transparent" and that its leaders could be prosecuted directly. That case was illustrated by the *Prosecutor v. Tihomir Blaskic* case,<sup>6</sup> before the International Tribunal for the Former Yugoslavia: the Appeals Chamber had very clearly concluded that the latter could not subpoena States because their international responsibility was not a criminal responsibility.

24. Hence the need to be wary of putting the various forms of responsibility under internal law into the same category as responsibility in the international sphere and, in particular, of transposing to that sphere the distinction between civil and criminal responsibility which characterized internal law. The international responsibility of the State was neither civil nor criminal, it was quite simply international. For his part, the Special Rapporteur seemed to have a ready-made idea of crime fundamentally based on internal law. But to speak of the international "crime" of a State did not mean that that State would be put in prison. Once again, if it was a mere question of words, it would be enough to change the term. The Special Rapporteur did not seem to want to do so because that would weaken his argument and because the conclusion he reached was the result of a line of reasoning based on the word "crime", with the strong criminal connotation which that had in internal law. Either the term could be replaced by the expression already proposed or it might even be possible to speak of a breach of a rule of *jus cogens*, for that was really what it was.

25. Concerning the last point, that of the relationship between the concept of crime and those of obligations *erga omnes* and rules of *jus cogens*, he noted that the Special Rapporteur proposed in effect to forget about the concept of crime and to focus on something more innocuous which did not trouble anyone, the notion of obligations *erga omnes*. A crime was necessarily a breach of an *erga omnes* obligation, but it must be an obligation of essential importance for the international community as a whole, and that was not the case with all such obligations. However, what he had in mind much more closely resembled a notion akin to *jus cogens*, which article 53 of the 1969 Vienna Convention defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". That definition was very similar to the definition of crime in draft article 19, paragraph 2.

<sup>6</sup> See 2532nd meeting, footnote 21.

26. That had not escaped the Special Rapporteur, who sought to dispose of the problem in various ways: first, by stressing the question of obligations *erga omnes*; then, by occasionally raising, in passing, the question of the violation of peremptory norms, which he more or less categorized as *erga omnes* rules, for example, in paragraph 81 of the report; and, lastly, by forgetting about *jus cogens* in his conclusion in paragraph 95 and remembering only obligations *erga omnes*. Taking too great an interest in the violation of *jus cogens* meant simply reverting to crime, that is to say, according to the definition given in article 19, paragraph 2, the breach of obligations “so essential for the protection of fundamental interests of the international community . . . as a whole”. Reference might just as well be made to breaches of peremptory norms of general international law.

27. For want of being able to reverse the breakthrough in internationalist thought constituted by *jus cogens*, the Special Rapporteur had made crime the target of attack. He hoped that, when analysing State responsibility, the Commission would, on the contrary, examine in greater depth another aspect of the patient construction by international law of a fragile international community to which the notion of crime, like that of *jus cogens*, could add the requisite ethical element.

28. In closing, he justified his long statement by the need to counterbalance a report which had been drafted with talent, but which was unbalanced in that it presented only one side of the important problem with which it dealt and which therefore needed a counterweight. He hoped that the Special Rapporteur would take account of his observations, which were inspired by the importance of the topic, and that the Commission would not withdraw into an overcautious and servile conservatism.

29. Mr. CRAWFORD (Special Rapporteur) said that Mr. Pellet held a view which apparently differed from his own. The Commission would therefore have to choose and that raised the question of the Special Rapporteur’s role: the Commission was on the second reading and, if, endorsing Mr. Pellet’s views, it wanted to have a complete regime applicable to crimes in the framework of the draft articles on State responsibility, he as Special Rapporteur would not object, but it would then have to bear in mind the consequences of that decision from the point of view of the timetable.

30. In fact and despite appearances, he and Mr. Pellet were in agreement on a number of points: first, in the draft articles on State responsibility, much of what concerned State crimes was drafted disastrously, as Mr. Pellet had said, notwithstanding 49 meetings of the Drafting Committee; secondly, international law was not limited to bilateral relations of responsibility; and, thirdly, the draft articles must spell out in a more systematic manner the consequences of both breaches of norms of *jus cogens* and breaches of obligations *erga omnes*.

31. The main disagreement had to do with the fact that Mr. Pellet was in favour of introducing a new distinction between “serious” and other acts in the draft articles on the general law of obligations. In fact, he was attempting to single out four or perhaps five norms of international law which he qualified as “serious” and to trivialize all the

others. Thus, he spoke of “mere” bilateral obligations. But it was possible to imagine a situation of a State for which those “mere” bilateral obligations were vital, for example, because its survival depended on a river which it shared with a neighbour.

32. It was not possible to have such a strict classification and, even if it were, it would be necessary to make it the subject of a separate analysis, that is to say, to find a separate definition of crime—something which had never been done—without destroying the general law of responsibility. It was important not to minimize national experience: after all, in the area of crime, that was all the Commission had. Moreover, whenever an attempt was made to introduce the notion of crime at the international level—and that was happening in the European Union, where fines were being imposed on States—the implications appeared to go beyond the ordinary law of obligations. The notion of international crime had special connotations, a fact which no amount of relabelling would change.

33. He therefore proposed that the Commission should hold a general debate and take a clear decision. For his part, he was not denying the notion of multilateral obligations; on the contrary, he was trying to make it operative. Nor did he rule out the possibility of State crimes: he was seeking to leave it open for the future. It was his judgement that that was best done in the way he suggested.

34. Mr. FERRARI BRAVO said he was firmly convinced that the concept of State crime was really beginning to take shape. The main defect of the approach followed so far by the Commission was that aggression was used as the prime example of that type of crime. In so doing, the Commission had taken the wrong tack: aggression could not be defined in the draft articles for the simple reason that a non-State entity, the Security Council, was involved. Yet there were other State crimes to which the idea of a fundamental obligation applied and which could be linked to the idea of *jus cogens*. In general terms, it could be said that an international crime existed when the option of *actio popularis* was available. When a country could act although it had not directly suffered harm—a case of *actio popularis*—the concept of State crime began to take shape in a very tentative and embryonic way.

35. ICJ was aware of that, as shown by two judgments and the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, which had been issued in 1996 and to which he referred to illustrate his comments. The judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* contained reasoning that related to the concept of State crime, particularly in the separate declaration of Judge Oda (see pages 625 et seq.). Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide provided for an international criminal court and, since none existed, that provision had been considerably broadened. ICJ had found itself in a very delicate position, since it had had to do something, and had ended up by declaring itself competent. In the case concerning *Oil Platforms (Islamic Republic of Iran v. United States of America)*,<sup>7</sup> the Court had also upheld its own jurisdiction to interpret an article on commercial

relations in a case involving the use of force. It could thus be seen that even ICJ expanded on certain treaty provisions. Some treaties contained provisions that were predicated on a given structure of the international community. In the absence of such a structure or in the event of its modification, the provisions still produced effects that had not been foreseen at the time when they had been adopted. Consideration should therefore be given to those recent developments in the decisions of ICJ in order to gain a better understanding of what was happening with the law of international crime.

36. He believed that a distinction must be drawn between State crime and criminal acts committed by Governments which were in some way related to State responsibility.

37. He recalled that the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was to be held at Rome from 15 June to 17 July 1998, with a view to finalizing and adopting a convention on the establishment of an international criminal court.<sup>8</sup> Despite the delay in the codification of the international law of responsibility, he would advise the Commission to wait to hear what positions would be taken by States at the Conference. He himself hoped that the existence of international crimes would be proclaimed. To engage in codification of the subject matter without even mentioning that legal device would be a step backwards and leave the Commission open to an accusation of blindness to changes in modern-day international life.

38. Mr. PAMBOU-TCHIVOUNDA said that the Commission, which was “hostage” to the pleadings of two lawyers, had to turn the situation to good account by making the codification of the law of responsibility its “concern”, even though it was doing that work at the request of and for the benefit of States.

39. With regard to the form of the instruments to be drafted, he was prepared to support Mr. Pellet’s proposal for a statement of principles followed by a code. As to what authority those two instruments would have, he said the question should be left open, it being understood, however, that it must be the authority of law, and not of non-law.

40. In the case of the problem of crimes, a balance must be struck between the concepts of sovereignty and solidarity, although the State must not be lost sight of in the edifice being built. While in the main endorsing the ideas expressed by Mr. Pellet, he emphasized that, over and above conceptual assumptions, the Commission should perhaps examine the structural, normative and institutional implications, while seeking to preserve what had been achieved.

41. Mr. ECONOMIDES said that he was generally surprised and dismayed about the Special Rapporteur’s final recommendation, which he saw as a step backwards and as contrary, moreover, to the spirit of synthesis and compromise that characterized the Commission. He basically endorsed the tenor of Mr. Pellet’s statement and had only one objection: it would be wrong to abandon the distinction between crimes and delicts, first, because the very

word “crime” had a deterrent force that was far from insignificant and, secondly, because the two terms had entered into public consciousness and were part of the heritage of international law and international responsibility.

42. Two trends had been taking shape in that field in the past 30 years. First of all, for the most serious breaches that affected the international community as a whole, there was a tendency to go beyond the strictly bilateral relations which usually prevailed between author State and victim State and which were giving way to a new bilateral arrangement in which the victim State was no longer alone, but benefited from the solidarity of all States of the international community. Secondly, for the same very serious breaches, there was a tendency no longer to regard compensation as the exclusive consequence of responsibility and to add other measures, even sanctions, to force the wrongdoing State to put an end to its wrongful conduct.

43. That twofold trend, which ICJ had acknowledged in the *Barcelona Traction* case, had been designed to develop and consolidate, on the basis of the institution of international responsibility, the notion of international public order in the interests of the entire community of States. At the twenty-eighth session, in 1976, the Special Rapporteur, Mr. Ago, had had the brilliant idea of proposing article 19 of part one, which made a distinction between crimes and delicts, and, as indicated in paragraph (56) of the commentary to that article, the Commission had adopted the article unanimously on first reading. That provision, which had then been part of the progressive development of the law, had nevertheless been based on solid foundations, mainly of two kinds.

44. First, the Charter of the United Nations itself, and Chapter VII thereof in particular, had shattered the classical bilateral relationship of the law of responsibility and its tradition of unity by authorizing the Security Council, on behalf of the international community as a whole, to apply preventive measures and enforcement action of a collective nature, including the use of armed force, against a State that had threatened the peace, breached the peace or committed an act of aggression. Collective security, one of the cornerstones of the contemporary international order, indisputably met all the requirements of a specific regime of responsibility applicable to States that committed serious breaches of international peace and security. It would be inconceivable for the Commission’s draft not to take that into account, especially as Chapter VII of the Charter was being applied more and more frequently to acts other than aggression which, in the opinion of the Council, threatened international peace and security. Secondly, it was on peremptory norms or *jus cogens* that article 19 of part one was based. As stated in paragraph (62) of the commentary to that article, the concepts of peremptory rules and international crimes were closely interrelated. Some writers even established a parallel between the fact that provisions contrary to the rules of *jus cogens* were null and void in the field of the law of treaties and the fact that, in the field of State responsibility, the waiver by a State that had been the victim of an international crime of its right to impose sanctions did not apply to other States. In paragraph 65 of his first report, the Special Rapporteur indicated that there was a hierarchy of norms, some of which involved a difference of

<sup>7</sup> Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 803.

<sup>8</sup> General Assembly resolution 52/160.

kind, a difference which would be expected to have its consequences in the field of State responsibility. Nevertheless, for reasons that were by no means convincing, he had chosen not to follow up on that conclusion.

45. In his own view, it was clear that, at the current time, for reasons relating to justice and the defence of international public order, the distinction between crimes and delicts was a requirement of the most basic justice, as it was inconceivable, as Aristotle had said, to treat two essentially unequal things as equal, that is to say, minor violations and the most serious crimes.

46. Turning to more specific comments, he said it was unfortunate that, after having pointed out that the consequences of international crime as provided for in the draft were fairly limited, the Special Rapporteur had not proposed to enhance those consequences in order to make them more valid. It went without saying that the Commission had to be realistic and refrain from criminalizing the State. The fact remained, however, that draft article 19 would authorize it to increase slightly the admittedly modest, but not negligible, consequences provided for in draft article 53.

47. Secondly, he generally endorsed the comments made by the Special Rapporteur in paragraphs 49 and 50 of his report on article 19, paragraphs 2 and 3. Aggression, colonial domination by force, genocide, slavery and apartheid were serious crimes in themselves and there was no justification for requiring an additional element of seriousness.

48. Thirdly, he agreed with the Special Rapporteur that the number of States that had made comments and observations on the draft was not representative and that it would probably be necessary to wait a long time before drawing any conclusions from them.

49. Lastly, he said the Special Rapporteur's decision to give primacy to *erga omnes* obligations was questionable, especially as there were three types of rules which formed more or less concentric circles: first, the enormous circle of *erga omnes* obligations which corresponded to a very general idea and produced differing effects depending on the issue in international law involved; secondly, the smaller circle of rules of *jus cogens*; and, thirdly, the very tight circle of rules whose breach constituted an international crime. It would be counter-productive to shift the discussion away from international crime or even breaches of *jus cogens* to the softer and smoother ground of breaches of *erga omnes* obligations.

*The meeting rose at 1 p.m.*

## 2534th MEETING

*Friday, 22 May 1998, at 10.10 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Galicki,

Mr. Lukashuk, Mr. Mikulka, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

### State responsibility<sup>1</sup> (*continued*) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>2</sup> A/CN.4/490 and Add.1-7,<sup>3</sup> A/CN.4/L.565, A/CN.4/L.569)

[Agenda item 2]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. SIMMA said that, after the exchanges at the previous meeting on the question of crimes of States, anything that followed could only be described as anticlimax. What he was about to say was particularly addressed to Mr. Pellet, whom he regarded as the party most seriously injured—in the sense of draft article 40 (Meaning of injured State)—by what he had to say. The previous meeting's fireworks had not brought the Commission any closer to a solution that would be acceptable to all and the purpose of his statement was to help pave the way towards such a solution.

2. The debate on crimes, both at the current and at earlier sessions, had been quite confused. The Commission needed to be clear about what its intention was. Was it, on the one hand, in favour of or against the embodiment in the draft of a regime according to which particularly grave violations of international law were to be followed by more severe legal consequences? Or, on the other hand, was it simply defending or criticizing the specific method whereby the former Special Rapporteur, Mr. Ago, and the Commission in earlier incarnations had attempted to introduce such a differentiation of responsibility? Was the current Commission opposed to the principle, or was it opposed to the method by which its predecessors had pursued that principle?

3. For his own part, he was firmly convinced that the draft must take particularly serious breaches into full and specific account. But he was equally convinced that the "crimes of States" approach was flawed and ought to be discarded: not because he failed to recognize the concern behind it, but because he believed the Commission could do better. He simply could not conceive of the Commission ignoring the need for rules of international law that consecrated fundamental interests of the international community to be equipped with a system of legal consequences of a breach that was up to the task. Members would surely agree on that: where they differed was on how to achieve that goal. Hence, the adherents of the "international crimes" concept should give those members who were opposed to it a fair chance to demonstrate that they did not advocate a roll-back to bilateralism, but

<sup>1</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>2</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>3</sup> *Ibid.*

rather, that the common goal could be realized in a less controversial and more sober way. That, incidentally, was precisely how he understood the intention of the Special Rapporteur.

4. He had spoken of a “fair chance” of developing an alternative approach to the issue behind article 19 of part one (International crimes and international delicts). In that regard, he was “not amused” at being labelled a “servile conservative”—a cold, uncommitted observer unable or unwilling to distinguish between a breach of a commercial agreement and a case of genocide—simply because he dared criticize article 19, while the supporters of article 19 reserved for themselves the labels “progressive” and “morally sensitive”. He fully agreed with Mr. Pellet that, if the Commission at the current session were to decide to rest content with a codification of the traditional strictly bilateralist rules on State responsibility, it would indeed deserve to be called “conservative”, in the pejorative sense. But he trusted, or rather he was convinced, that the Commission would not choose that course.

5. As Mr. Pellet had rightly pointed out (2533rd meeting), the Commission of the 1970s had taken the truly revolutionary step of detaching State responsibility from the old bilateralist ethos—described by Mr. Philip Allott as the “contract-delict ethos”—that had been conditioned upon material damage. It had instead chosen an objective approach that brought State responsibility closer to the public order system found in modern domestic law. The Commission must currently take the remaining, second step to implement the conceptual revolution initiated by the former Special Rapporteur, Mr. Ago, and to take that step precisely where it was most necessary, namely, in response to breaches of international law which constituted offences against the international community as a whole. There again, he was in full agreement with the Special Rapporteur. He had seen nothing in the Special Rapporteur’s first report (A/CN.4/490 and Add.1-7) and had heard nothing in its oral introduction to make him suspect that the Special Rapporteur was—in the words of Mr. Pellet—“preparing not to deal with the issue” of differentiated responsibility.

6. True, the first report did concentrate on the dismantling of the concept of “international crimes” and it allowed only a few isolated glimpses of the potential alternatives whereby the Special Rapporteur intended to accommodate community interest in the system of State responsibility. If the Special Rapporteur had been a little more forthcoming in that regard, he might have been spared at least some of the fury of Mr. Pellet’s attack. Yet again he thought Mr. Pellet had misunderstood the Special Rapporteur. It was not the Special Rapporteur’s intention to limit the Commission’s draft to a codification of strictly bilateralist responsibility: the repeated references to obligations *erga omnes* dispelled that suspicion. As he interpreted the meaning of paragraph 95 of the report, it called for separate treatment of the concept of “international crimes” only if that concept was to be understood as introducing a genuinely criminal responsibility of States. He did not read it as an announcement that the issue of policy which underlay the text of article 19 would not be taken care of in the Special Rapporteur’s future work. Should he be mistaken in that regard, he would be

grateful if the Special Rapporteur would correct him as quickly and unambiguously as possible.

7. It was not admissible to denounce the critics of the text of article 19 as thereby opposing the development of a system of differentiated responsibility. His own criticism could be extremely brief, first, because he had written about article 19 on a number of occasions over the years and did not wish to repeat himself; and secondly, because the Special Rapporteur’s “deconstruction” of that text had been complete and deservedly devastating.

8. Mr. Pellet had said (2533rd meeting) that terminology did not matter. Unfortunately, that was not true. Terminology mattered a lot, especially in the law, and if he had to select just one example of how a laudable idea could be spoiled by an unfortunate choice of terminology, article 19 would be his natural choice. The language used in the article had infected the debate with great confusion, which, incidentally, had already been present in the commentary to the article,<sup>4</sup> and it had got worse ever since. References to the international criminal responsibility of individuals were used to lend a foundation to “crimes of States”, and so on. The truth was, of course, that State responsibility was *sui generis*, modelled to accommodate relations between sovereign equals. Owing to that structure, while State responsibility might bear some similarity to the domestic law of torts, it was unacceptable to draw analogies with, or even adopt concepts of, domestic criminal law in the field of State responsibility. To speak of a criminal responsibility of States *sui generis* would only make the confusion worse.

9. Reference had been made to war reparations. Yet aside from propagandistic and polemical contexts, such reparations had always been considered consequences *sui generis*. Secondly, reference had also been made to so-called “punitive damages”. But behind that term there also lay hidden confusion, because the fact that, for instance, triple damages could be claimed in tort suits in the United States of America did not turn such civil actions into criminal proceedings. Thirdly, reference had been made to sanctions under Chapter VII of the Charter of the United Nations, but there was nothing in Chapter VII that would force one to assume that one was in the presence of criminal law elements in that context. What one did find was the possibility of coercion in the service of collective security. That, again, was really *sui generis*, and had nothing to do with criminal responsibility. Such a variety of phenomena should not be pressed into the conceptual straitjacket of “crimes of States”.

10. As shown by no less an expert than Ms. Marina Spinedi, whose contribution to the genesis of article 19 was well known to insiders, the term “crimes of States” had originated above all with certain Soviet writers of the post-Second World War period whose obvious intention had been to provide legal justification for the measures taken against Nazi Germany at Yalta and Potsdam. A reading of the commentary to article 19 revealed that substantial gobbets of Potsdam and Nürnberg had been stirred into an indigestible, politically charged brew. Such a mixture had apparently still had its attractions in the 1970s. But the current Commission should not burden its

<sup>4</sup> See 2532nd meeting, footnote 17.

future work with such a remnant of the political correctness of the cold war.

11. Some remarks could be made on what an adequate regime of State responsibility for breaches of fundamental obligations in the community interest might look like. The recognition of the existence of such international law in the community interest had found threefold expression in modern legal discourse: first, in the acceptance of *jus cogens*, as a barrier standing in the way of the freedom of States to contract out, *inter se*, of any rule, though as Mr. Economides and others had pointed out (*ibid.*), *jus cogens* had a much wider scope than that currently embodied in the law of treaties; secondly, in the emergence of the concept of obligations *erga omnes*, which, according to the *Barcelona Traction* jurisprudence, were the concern of all States, all States having a legal interest in their protection; and thirdly, in the theory of crimes of States, which ought to be discarded. The important thing was that all those doctrines had one and the same basis: that certain rules of international law consecrated values which were not—or were no longer—at the disposal of individual States *inter se*; and that some obligations under international law which protected fundamental interests of the international community must be “strengthened” more than others. The Commission’s approach to taking due consideration of such community interest in State responsibility ought to proceed from that core, and instrumentalize the two out of the three doctrinal developments which had commanded wide, if not universal, acceptance, namely, *jus cogens* and obligations *erga omnes*. Incidentally, a close look at the arguments in support of article 19 revealed constant references to *jus cogens* and obligations *erga omnes*, assembled in a way that tried to let the concept of international crimes appear as a sort of logical and necessary consequence of the recognition of *jus cogens* and obligations *erga omnes*, something which was definitely not the case.

12. With his emphasis on *jus cogens* and obligations *erga omnes* as the conceptual basis for a system of differentiated responsibility, he had come very close to the views of Mr. Pellet. He also agreed with Mr. Pellet that the concern underlying article 19 could not be taken care of by the Commission by basing itself on the concept of obligations *erga omnes* alone. Two elements must be taken into consideration: first, the element of an *erga omnes* “outreach” of an obligation; but secondly, the element of the essential importance of that obligation for the protection of community interests. The concept of obligations *erga omnes*, standing alone, as it very much did in the Special Rapporteur’s first report, did not adequately capture both elements. He had to concede that the relationship between the concepts he was using was not entirely clear, but most authors would agree that the scope of obligations *erga omnes* was wider than that of *jus cogens*. In other words, there could be an obligation *erga omnes* that did not derive from a peremptory norm of international law. For instance, the obligations on States under the general international law to respect and protect human rights constituted obligations *erga omnes*, but one could certainly not assume the totality of those rules to constitute *jus cogens*.

13. He would also make a distinction between general customary international law as such and obligations *erga*

*omnes*—differing in that regard from Mr. Economides, who had said (*ibid.*) that general customary international law was *erga omnes*. In his view, that was true at the textbook level, but in application, such law applied to specific States, and a State owed its obligation to, for instance, the State with which it shared a boundary or to the State that had sent a diplomat to its territory.

14. It must, of course, also be borne in mind that only grave, particularly serious breaches of obligations *juris cogentis* and *erga omnes* would deserve “VIP treatment” in the Commission’s work on State responsibility. Mr. Pellet was right in that regard, and there was a considerable body of literature on those concepts. Like Mr. Pellet, he regarded the formula used in article 19, paragraph 2, to denote international obligations owed to the international community as a good starting point for a new concept replacing that of crimes.

15. One of the most important testing grounds for the new concept would be what was currently draft article 40. As it currently stood, the article implemented the community interest in strong reactions to what were “crimes of State” by designating every State as “injured”. In other words, the draft tried to live up to its promise to provide an objective system of responsibility in the public interest by multilateralizing subjective injury. It was a highly problematic concept, but he doubted whether, at the current stage in the organization of the international community, it was possible to escape that dilemma. It would not necessarily go against the spirit of energetic responses to violations of community obligations to introduce a differentiated schema of responses available to different States, in accordance with what one might call their “proximity” to the breach. But such differences of proximity would exist only where States too were the victims of the breach. In a case of massive violations of the human rights of the perpetrating State’s own population, for instance, such a differentiated schema would not work. In its current formulation, article 40 granted all States the full range of responses, including the right to take countermeasures. Obviously, such an approach must render the danger of abuse particularly great. In the circumstances, the only really effective solution would lie in the elaboration of specific custom-tailored regimes taking into account, and overcoming, the deficiencies of a system trying to achieve something like an objective regime by simply bundling together subjective rights of all States. But that was certainly not the Commission’s mandate and would probably go beyond its means. However, the dilemma was not perhaps as great as it seemed.

16. His last comment was linked to what was currently article 37 (*Lex specialis*) of the draft. If one looked at the list of candidates for “crimes” status in article 19—he did not wish to subscribe to that list as such, but certainly the obligations mentioned therein had to be considered in any system of differentiated responsibility—one must realize that, under international law already in force, there were more, and more comprehensive, *leges speciales* already available in that regard than one might assume at first glance. One had only to think of Chapter VII of the Charter of the United Nations, on aggression, the very comprehensive and differentiated human rights regime built up in the United Nations over the years, or the network of environmental treaties. Those observations would remain

valid for any new approach to securing community obligations in State responsibility. He saw some tension in that field, which ought to caution the Commission to move with particular care: in the case of the most likely candidates for special treatment in State responsibility, one was in the presence of specific regimes custom-made by experts—even though Mr. Brownlie would regard most of those experts as soft lawyers. The Commission should avoid causing those specific systems to lock themselves into self-contained regimes for fear of political contamination. That was certainly the case with regard to the human rights community. Hence it could well be concluded that the more residual the future system of legal consequences to the breach of community obligations turned out to be, the better.

17. If the Commission's discussion did not remain fixated on unfortunate terminology, but instead turned to the real question of how a constructive, generally acceptable solution to the problem could be found, then it would be possible to achieve a real breakthrough. The Commission should cease to "look back in anger". It must at the current time look forward. If members agreed on their goal, the Commission would be able to devise the way to reach it. He was convinced that the decision on what to do with article 19 and the concerns underlying it would be one of the most important, if not the most important, in the history of the Commission.

18. Mr. CRAWFORD (Special Rapporteur) said that Mr. Simma's statement had certainly been no anticlimax. He felt like some long-distance swimmer who, having got into difficulties, had been plucked from the boiling surf by a bronzed life-saver in the form of Mr. Simma. In what was indeed a long-distance race, the Commission would get nowhere if it engaged in sterile controversies over the notions he and Mr. Simma had been talking about. He took issue with Mr. Simma on just one point: he would like to leave open for the future the possibility of there being real international crimes of States and other collective entities, for a regime of corporate criminal responsibility, properly worked out, had a future in legal systems. But, as to the draft articles on State responsibility, he could not add a word to what Mr. Simma had said.

19. Mr. HAFNER said that Mr. Simma had rightly called for a further distinction to be drawn between crimes *jus cogens* and obligations *erga omnes*. In that regard, he asked whether it was possible that there could be a rule of *jus cogens* or preemptory norm of international law giving rise to an obligation that was not an obligation *erga omnes* in the strict sense.

20. Mr. SIMMA said that Mr. Hafner had raised a very interesting question which called for further consideration.

21. Mr. CRAWFORD (Special Rapporteur) said that, at the forty-ninth session, many members had pressed the then Special Rapporteur, Mr. Arangio-Ruiz, to develop the notion of a differentiated regime. The problem was that article 40 acted as a kind of hinge for parts one and two, and then no distinction was made as between the different injured States in article 40 or for the purposes of part two. That created all the problems to which Mr. Simma had referred. The then Special Rapporteur had

seen that a difficulty existed and was not to be blamed for having been unable to do anything about it. That was the reason why his own first report did not enter into the further reflection that those questions quite clearly merited.

22. Mr. BENNOUNA said the thing that stood out from Mr. Simma's excellent statement was that it was impossible to deal with secondary rules without reference to primary rules. In his analysis of the sources of law and the hierarchy of rules, Mr. Simma had shown that questions the Commission had supposed were settled when it had tackled the distinction between crimes and delicts had not in fact been settled at all. Hence the confusion that had reigned so far in the debate on a regime of crimes that satisfied no one. The Commission had dealt only superficially with those problems. Either it should have treated primary rules as a whole, or else it should have made a far more thorough distinction between crimes and delicts. He feared it might currently be too late to do so, and that the issue of crimes might itself have criminal consequences for the future of the topic of State responsibility. His own concern was to save the draft articles, if need be by jettisoning the notion of crimes.

23. Mr. ADDO said that professorial pontifications had a tendency to confuse practical lawyers, himself among them. Mr. Simma had expressed strong disagreement with Mr. Pellet, but had not stated unequivocally whether article 19 should be deleted. Were the "community obligations" to which he had referred part of the general law of obligation or were they something that should be developed further in order to incorporate it into the draft articles?

24. Mr. SIMMA said he hoped that the "crimes" camp and the opposing camp agreed that State responsibility could not be codified in a unified way, limited to the very bilateralist rules found in the textbooks. The Commission had already overcome that theoretical standpoint by adopting, in article 1 (Responsibility of a State for its internationally wrongful acts), the concept known in French doctrine as objective responsibility, in the sense not of no-fault responsibility, but of responsibility that arose if a rule was transgressed, without regard to concrete damage. Once such a system was adopted it became impossible to treat all breaches of international law in the same way, as Mr. Pellet had pointed out (2533rd meeting) ad nauseam. A differentiation had to be made. All members shared that concern; they differed only in their views as to how to couch that concern in precise legal rules. Notwithstanding Mr. Pellet's brilliant advocacy of the "crimes of State" approach (*ibid.*), he himself remained convinced that that approach was thoroughly confused and should be dropped.

25. As for the question of differentiation of responsibility raised by Mr. Bennouna, the problem might not be as intractable as it appeared. Redrafting article 40 so as to bring it closer to article 60 of the 1969 Vienna Convention, in which three different categories of States injured by breaches were distinguished, would constitute an important step towards a solution.

26. Mr. LUKASHUK said that the Special Rapporteur had adduced some highly convincing arguments against making the conduct of States criminal, but the Commis-

sion had long since decided that it had no intention of doing so. It was concerned with something entirely different, namely, singling out especially serious breaches of international law and discussing two separate legal regimes for international, not criminal, responsibility—a position that had repeatedly been restated by the Commission.

27. The concept of State crime was no mere fabrication on the part either of Soviet jurists or of the Commission but had arisen in the minds of populations since the Second World War. That awareness was reflected in the idea that extremely serious breaches of international law, such as aggression and crimes against humanity, were perpetrated by States and their organized authorities. Such especially dangerous crimes required special treatment.

28. It would be difficult indeed to convince the man in the street that aggression of the kind that had led to the Second World War or genocide involving millions of victims could be called a delict. The Special Rapporteur's arguments in support of that thesis were not very convincing for, basically, he referred to the practice of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda which had, however, been set up to deal not with States but with natural persons. On the other hand, the International Tribunal for the Former Yugoslavia had rightly held that it had no power to take forcible measures against a State. Similarly ICJ did not have criminal jurisdiction. In that connection, the Special Rapporteur had quoted the opinion of Judge Lauterpacht in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* to the effect that the Court had essentially civil, and not criminal, jurisdiction.<sup>5</sup> That was quite true. There were, however, many British jurists who held the view that international legal responsibility was civil responsibility. But his own view was that the views of Governments were more correct, for they held that States incurred neither criminal nor civil responsibility but a specific form of international legal responsibility. For that reason, he had doubts about the term "delict" which was a civil law term borrowed from Roman law. That point should be explained in the commentary to article 19 and the title of the article should make it clear that what was referred to was a delict under international law, in clear distinction to national law. That underscored the need for the entire draft to be renamed to refer to the international legal responsibility of States, or the responsibility of States under international law.

29. The Commission's work to establish a special regime of responsibility for the most serious offences was in total accord with contemporary international law. Aggression, the most grievous offence, was so dangerous to the international community as a whole that that community had given the Security Council unique powers to suppress the offence. Aggression was committed not by an individual but by a State, as was clear from the Definition of Aggression,<sup>6</sup> laid down in 1974: individuals bore responsibility for crimes against peace only where there was an act of aggression by the State. The reference there

was not just to any individuals but only to those who had authority and exercised State power. Almost everything that had been said about aggression held true of genocide, which was, above all, a crime of State power rather than of individuals. Unless the Commission grasped that point, its work on responsibility would be flawed.

30. The Special Rapporteur had quoted the opinion of the International Tribunal for the Former Yugoslavia that under present international law it was clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems (para. 57 (d)). A decision along the same lines had been reached by the Inter-American Court of Human Rights.<sup>7</sup> It was clear therefore that the issue was a matter of current international law, but nothing prevented its being developed in an appropriate direction. It was likewise clear from the opinion cited that, in future, State responsibility would entail something entirely different from criminal sanctions under national legal systems.

31. Some light was thrown on the question by international practice. Iraq's aggression against Kuwait had been described by statesmen and in the media as a crime and the measures taken by the Security Council were to a significant extent punitive in nature. One could only agree with the Special Rapporteur when he stated that "crime" had at times been used with respect to the conduct of States in such fields as aggression, genocide, apartheid and the maintenance of colonial domination (para. 58). Nevertheless, account had to be taken of the negative position of some Governments and of their reluctance to adopt the term "crime". It could perhaps be replaced by the proposed formula, to which even Mr. Pellet, who could hardly be called a conservative, had referred, but at all events a special kind of responsibility for such crimes had to be retained. The considerations raised were likewise intended to point to a certain trend towards progressive development of the law on State responsibility. The Special Rapporteur had not excluded such development and referred to measures that had to be implemented to ensure a regime of international crimes of States in the proper sense of the term (para. 84).

32. It had also been indicated that it was necessary to identify the content of State crime and to provide for the procedural aspects. Due process of law could hardly be guaranteed at the current time, although certain elements were emerging. The Security Council handed down decisions under Article 39 of the Charter of the United Nations in cases not only of aggression but also in other cases when it considered that there was a threat to the peace: for instance, in cases involving massive violations of human rights. And the resolutions relating to Iraqi aggression had to a considerable extent replaced not only ceasefire agreements, which had previously performed such functions, but even peace agreements. They resolved a variety of issues and even regulated the question of responsibility. That was a first step. The Council, under Article 36 of the Charter, could recommend that interested States should consider dealing with the question of responsibility through the appropriate procedures, which

<sup>5</sup> See *Counter-claims* . . . (2532nd meeting, footnote 20), p. 286.

<sup>6</sup> General Assembly resolution 3314 (XXIX), annex.

<sup>7</sup> Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Compensatory Damages, Judgment of 21 July 1989 (Art. 63(1) American Convention on Human Rights), Series C, No. 7.

included referral to ICJ, and such referral could be a condition for the lifting of Council sanctions. That procedure might be satisfactory in the near future for dealing with questions of responsibility for especially serious crimes. It had the support of many Governments and scholars and represented a compromise between what was desirable and what was feasible.

33. The Special Rapporteur's recommendation to do away with article 19 would be a step backwards, for the reasons explained by Mr. Pellet. A set of draft articles prepared on that basis would mean non-recognition of particularly serious breaches of international law and of the special responsibility of those who committed them. Hence there was a fundamental problem to which he would propose two possible solutions. One would be to abandon the idea of a special category of especially serious breaches of international law; but such a decision would not be in keeping with modern positive international law or with its progressive development. The entire responsibility for the resulting blockage of an important movement in international law would lie not with Governments but with the Commission. An alternative would be to adopt the article on especially serious breaches: with all its procedural imperfections, it sufficiently clearly embodied the idea and paved the way for a subsequent solution to the problem.

34. Further development of the law of international responsibility would not lead to the establishment of an international criminal law for States akin to national law. The object was to establish a special form of international legal responsibility. If States still rejected the Commission's proposals then responsibility for their doing so would lie with them, not the Commission. The Commission would have done its duty as a body of independent experts charged with the progressive development of international law.

35. Mr. BENNOUNA said that it was precisely with a view to making certain conduct by a State criminal that the former Special Rapporteur, the late Roberto Ago, had introduced the notion of responsibility arising out of a wrongful act, which act could itself be of such gravity as to amount to a crime. Both States and individuals could, of course, commit a criminal act but only an individual could be imprisoned or beheaded on that account. What was so terrible about the matter was that any attempt to punish the State for its crimes, rather than the leaders responsible for those crimes, could in practice result in collective punishment—as when, in the fascist era, the population of a whole village had been executed for one offence committed in that village.

36. If it was at the current time to be concluded that there were degrees of responsibility depending on the primary rule breached, there would be various levels of responsibility rather than just crimes and delicts, and that might correspond more closely to reality. To that end, further analysis would be required to determine the different consequences in terms of codification of the norms involved, which, in turn, would call for a less conservative approach than simply thinking in terms of crimes and delicts. His question to Mr. Lukashuk, therefore, was whether a more satisfactory result would not be achieved if the Special Rapporteur was asked to determine the

degrees of responsibility by reference to the kind of rules breached rather than just to the question of crimes—which in the past had hindered rather than speeded up matters, as it had introduced an element of passion into an area where what was required was legal expertise.

37. Mr. LUKASHUK said that what he had in mind was something far simpler than States being beheaded or imprisoned. He could not however agree that a breach of an international trade agreement and the killing of millions of people were both delicts with the same level of responsibility. In other words, for especially serious crimes there should be a special regime.

38. Mr. THIAM said that his reservations about article 19 were a matter of record. A more immediate question, however, concerned the powers of the Commission. Specifically, did it have the right to revert on second reading to a matter that had been settled on first reading or should members' comments be confined to questions of form?

39. Mr. CRAWFORD (Special Rapporteur) said it was clear from the Commission's practice that the second reading of a draft was a substantive exercise.

40. With regard to Mr. Lukashuk's comments, no one was suggesting that genocide and a breach of a bilateral trade agreement should be treated in the same way. He did however wish that people would stop caricaturing those who wished to get rid of the simplistic distinction in article 19 and engage in the much more refined exercise to which Mr. Bennouna and Mr. Simma had referred.

41. Mr. ADDO asked whether the special regime which Mr. Lukashuk had mentioned would be elaborated within or outside the draft articles on State responsibility.

42. Mr. LUKASHUK said that he had been speaking not about crimes but about the most serious breaches of the law. If the title was changed, he would be quite satisfied with the draft.

43. Mr. PAMBOU-TCHIVOUNDA said that he endorsed Mr. Lukashuk's conclusions and wished to thank him for reminding the Commission of its responsibility in the light of what States expected of it.

44. Mr. PELLET said that he agreed, to a very large extent, with what Mr. Lukashuk had said, but subject to one small nuance concerning the need to envisage procedures. It would, of course, be necessary to reflect on a mechanism to determine what was a crime, just as the 1969 Vienna Convention contained a mechanism to determine whether or not a *jus cogens* rule was at issue. That, however, was a point to which the Commission had agreed to revert. But he was somewhat more doubtful about the need for a mechanism to assess the consequences of a crime, since that would go far beyond what the Commission could do in the context of a draft on State responsibility and might lead it into deep waters. A very careful distinction would have to be made.

45. On the other hand, he could not agree with Mr. Bennouna, who seemed to be barking up the wrong tree. The notion of crime was a normative notion, and the notion of responsibility under discussion was not to be

confused with the question of action by the Security Council. Though draft article 40 (former article 5)—to which the previous Special Rapporteur, Mr. Arangio Ruiz, had desperately, but rightly, reverted—was badly worked out, the idea it contained should be preserved. It was not because the Commission decided to discard the idea of crime that the Council's powers would be changed.

46. He was pleased to hear the Special Rapporteur say that no one suggested putting on an equal footing trifling violations and very serious violations which affected the fundamental interests of the international community as a whole. Yet the recommendation in paragraph 95 evoked the possibility of speaking of breaches of obligations *erga omnes*. Paragraph 95, which did not mention *jus cogens*, went on to say that it should be understood that the exclusion from the draft articles of the notion of "international crimes" of States was without prejudice to the scope of the draft articles or to the future development of the notion. In other words, the Special Rapporteur wanted to bury the idea without actually saying so, and that did not tally with what he had just told the Commission. For his own part, he was in disagreement with the recommendation.

47. Mr. CRAWFORD (Special Rapporteur), replying to Mr. Pellet, noted that paragraph 95 said *inter alia*. He had referred to the notion of obligations *erga omnes* because, first of all, it had been at the origin of article 19, the *Barcelona Traction* dictum was the primary authority cited by the Commission. It was a very important dictum: the Court had been ahead of its time in issuing it, and the Commission should make it operational. In that respect, he was in complete agreement with Mr. Simma and Mr. Bennouna. On the other hand, the notion of "crime", properly so called, could have a role in future; he did not object to that idea, although most people did, and in that regard, he himself might be ahead of his time. He was therefore prepared to leave out the notion, but was totally opposed to reflecting a thing called "crime", which Mr. Pellet wanted to have without using its name, in article 19, disrupting the much more important exercise of elaborating and making operational the notion of obligations of interest to the international community as a whole, which did belong in the draft articles.

48. Mr. BENNOUNA said the debate had clarified a number of issues. To move ahead from a methodological point of view, it would be necessary to say whether or not the Commission retained the notion of "crime". The answer to that question would free the Commission to deal with more serious matters. In his view, there was no need to engage in a metaphysical debate on the existence of the notion of "crime", which was of no interest from the standpoint of international law today.

49. Mr. KATEKA said that he wanted first to comment on the Austrian proposal, which had attracted considerable attention in the Commission. The proposal had been taken by some members to be a two-track approach: a declaration of principles to be accompanied by a convention. Other members had interpreted it as a general declaration to be followed by a guide to practice or a non-binding code. Still others had understood it to mean that the Commission would produce two instruments and

the General Assembly would choose one. It was because of that confusion that he regarded the proposal as attractive, but it had potential snares. He was afraid that once the declaration had been adopted, that would be the end of the matter, and the idea of a binding instrument would be forgotten. One member had drawn attention to the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space,<sup>8</sup> which had later been followed by the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies. But without a watertight linkage between the two possible instruments, he did not endorse the two-pronged approach to the question.

50. In his first report, the Special Rapporteur reminded the Commission that it was engaged in the second reading, 27 reports having been submitted in the nearly 50 years of the topic's history. But the existence of many volumes on State responsibility was no justification for the deletion proposed in paragraph 95. The Commission should not, through radical surgery, kill what could be cured by administering the right medicine. Earlier drafting efforts on article 19 should not be jettisoned. He was concerned that the members of the Commission were trying to undo in one session what their predecessors had taken years to achieve. In that regard, he had considerable sympathy with the comments made by Mr. Thiam.

51. He was relieved, however, to hear the Special Rapporteur say that if the Commission decided to retain crimes he would act accordingly. He personally did not foresee any problem in developing the topic further, because the first reading had been predicated on the existence of State crimes.

52. After considering five distinct approaches to the question of State criminal responsibility in his first report, the Special Rapporteur dismissed the first three and picked up the last two, arguing for rejection of the concept of State criminal responsibility. While he was prepared to give the Special Rapporteur the benefit of the doubt that the weight of evidence currently tended to favour the view that international law did not recognize State criminality, he did not agree that it was not necessary or appropriate to try to do anything about it. That was for the members of the Commission and, ultimately, for the General Assembly to decide. The comments calling for deletion of the concept of State crimes in the comments and observations received from Governments on State responsibility (A/CN.4/488 and Add.1-3) were those of a vocal and insignificant minority of States and did not represent the views of the international community as a whole. The silent majority had yet to make its position known.

53. Mr. Lukashuk was right to say that the concept of State crimes had not been an invention of Soviet lawyers. Paragraph (36) of the commentary to article 19 cited a nineteenth century Swiss lawyer and other legal experts who had distinguished between serious breaches and other, lesser breaches of international obligations. Perhaps it was a matter of wording or terminology.

<sup>8</sup> See 2532nd meeting, footnote 13.

54. He also disagreed with the Special Rapporteur's view, in paragraph 94, that the Commission needed a mandate from the Sixth Committee to deal with the question of State criminality. The Commission already had that mandate, which the General Assembly did not confine to certain aspects of State responsibility. The Sixth Committee collectively had not challenged article 19, which had been provisionally adopted at the twenty-eighth session, in 1976. As could be seen in paragraph 89, the Special Rapporteur had not completely ruled out the notion of State crimes, having allowed for it in the case of aggression; personally, he would add genocide as another example.

55. The Special Rapporteur's five elements for a regime of State responsibility were not all necessary; the fifth element, for instance, on avoiding stigmatizing a State with criminality, overlooked today's reality. It was similar to the argument about punishing a State's entire population. In practice, that had already happened. The Commission had no need to tell the people of Iraq that the adoption of the concept of State crimes could lead to the punishing of an entire people. The Iraqi people were suffering even before the Commission adopted the concept.

56. Certain international crimes could indeed be committed both by individuals and by States. The traditional view, based on the Nuremberg approach, which stated that crimes against international law were committed by men, was too narrow. The International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda dealt with individual criminality, and even the proposed international criminal court limited itself to crimes by the individual. But as the written views of the Nordic countries pointed out in the comments and observations received from Governments on State responsibility, the conduct of an individual could give rise to the responsibility of the State he or she represented. In such cases, the State itself must be made to bear responsibility in one form or another, be it through punitive damages or measures affecting the dignity of the State. Naturally, the penal sanction could not be the same for an individual and for a State.

57. Fear of encroachment on the sovereignty of States had been invoked to oppose criminalizing them. But legal provisions on repression had been confined to compensation, restitution in kind and satisfaction. If a State committed an internationally wrongful act, it must, for example, pay compensation "only for the proximate and natural consequences of its acts", to quote Mr. Brownlie.<sup>9</sup> Just as, in municipal law, a person was deemed to have intended the natural and probable consequences of his acts, so must a State bear international responsibility for serious violations and other breaches.

58. A distinction should be made between international crimes and international delicts and it was essential to use the criterion of the gravity of the breach. As rightly pointed out, the breach of an international tariff clause could not be placed on the same level as aggression or genocide. He did not object to employing the term "crime", although less controversial terms, such as "seri-

ous unlawful act" or "serious violation" were also acceptable. However, the basic concept, namely that a State could commit an internationally wrongful act of a serious nature, must be retained.

59. It had also been suggested that the notion of State crime could be abused by the powerful to oppress the weak. That would not be the case if the Commission provided for an appropriate institutional mechanism to establish objectively when a crime or delict had been committed, a question that should not be left to the subjective determination of the injured State. Even counter-measures had been restricted by imposing conditions and excluding the use or threat of force. Such a mechanism, coupled with compulsory dispute settlement machinery should be possible to allay the fears of some Commission members.

60. Flaws and lacunae remained in the draft articles, but they could be overcome through further debate in the Commission and work in the Drafting Committee. Shortcomings included article 40, where the injured State meant all other States if the internationally wrongful act constituted an international crime. The provision was too broad and it might be abused. Parameters had to be set: while all States might be injured by the breach of an *erga omnes* obligation, not every State would have the right of bringing a claim.

61. As for the consequences of an international crime, some members had raised articles 51 to 53 as an obstacle. He wondered whether anyone could be opposed to the obligation not to recognize as lawful the situation created by an international crime. Who would render assistance to a State that had committed an international crime in maintaining the situation so created? He could understand the reluctance of some States about an obligation to cooperate, but not with the obligations of non-recognition. It had been argued that the Security Council's role might be undermined by the criminalization of States, yet no one had proposed a change in the primary responsibility of the Council in the maintenance of international peace and security. In practice, it was the Council which had failed the international community by intervening too late, as had been the case in the former Yugoslavia, or by doing nothing at all, as had happened during the genocide in Rwanda in 1994. Had an independent system been in place, the tragedies in those countries might have been averted.

62. Article 19, paragraph 3, had been singled out for special criticism, the contention being that paragraph 3 was in contradiction with paragraph 2 and that it merely listed vague concepts of crimes. Yet that argument had not been used in respect of the draft Code of Crimes against the Peace and Security of Mankind,<sup>10</sup> where there had likewise been no specific definition, but a simple enumeration of crimes. The list in paragraph 3 needed some drafting changes to make it acceptable. In that connection, he had been intrigued by a paper delivered by Mr. Pellet in which he argued that the industrial Powers were afraid

<sup>9</sup> J. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), p. 224.

<sup>10</sup> For the text of the articles, and the commentaries thereto, as adopted by the Commission at its forty-eighth session, see *Yearbook... 1996*, vol. II (Part Two), p. 17, document A/51/10, para. 50.

that the legal concept of crime could be used as a weapon against them: after all, it was the small Powers which should be afraid, the major Powers being in any case already covered by the provision of the right of veto in the Security Council.

63. The commentary to article 19 suggested that there was unfinished business that required attention. A clearer distinction based on degree of gravity was possible if the will existed in the Commission. That would contribute to the progressive development of international law in the true sense of the term. He endorsed Mr. Simma's view that the Commission should make it clear whether it was against the principle of dealing with international crimes or the method.

64. Mr. CRAWFORD (Special Rapporteur), asking for the floor on a point of clarification, said that he was not in favour of alternative 4, but alternative 5. His views were set out in paragraphs 83 and 89. Secondly, regarding the fifth of the five conditions he had said would be necessary to have a regime of crimes in the proper sense, the point about stigmatizing conduct as a crime was that, at some juncture, it would prove necessary to say that the book was closed, that the issue had been resolved and the entity in question could be reintegrated into the international community. That was clearly a very serious problem in respect of the treatment of States over long periods. He was not concerned whether they would be stigmatized at the time: it was obvious that they were. The question was at what point that stigma would be regarded as effaced. The issue was a real one, for countries such as South Africa and Cambodia were currently struggling with the problem of closing the books on certain terrible crimes.

65. Mr. OPERTTI BADAN said that he had serious doubts about the subject. He endorsed the comments made by a number of States in the comments and observations received from Governments on State responsibility, for example France under article 19, when it had stated that State responsibility was neither criminal nor civil, but *sui generis*. He agreed with the argument in the comment made by the Government of France under paragraph 3 of that article that at international level there was still no legislator, judge or police to impute criminal responsibility to States or ensure compliance with any criminal law legislation that might be applicable to them. However, the Commission was engaged in the progressive development of international law. It should not begin by adopting a position that might block such development by refusing to consider a matter which was *sui generis* but in any case also required it to give thought to a special procedure or set of rules that would satisfy the international community's legitimate desire to have some protection mechanism.

66. The international community was on the way to creating an international criminal court and the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court<sup>11</sup> was to be held at Rome from 15 June to 17 July 1998. The Commission was currently discussing related issues. The best signal the Commission could give was that, in beginning the debate, it was not starting from scratch; the past

must be taken into account. Hence, the Commission should try to agree on whether it would deal with State responsibility at the level of an internationally wrongful act, whether criminal or *sui generis*. But it was not appropriate to do away with the subject of responsibility by arguing that punishing the State meant punishing the population. Needless to say, the population felt the effect of the acts of its rulers. However, in the case of a population which suffered under the leaders of its own State and populations of another State which also suffered the consequences of the violation of international law by that State, he gave greater attention to the latter population, because it had no way of controlling or influencing the leaders of the State who committed an act of aggression. It was therefore important not to give in to the temptation to be very radical at the outset. That could be done at the end. In the beginning, it was necessary to be open-minded.

67. Mr. ROSENSTOCK said that the mess the Commission had made of article 19 and part two had led Mr. Kateka to suggest that those who opposed the whole idea of article 19 were in some sense not sympathetic to non-recognition of events brought about by the criminal acts of States. That was not the problem: no one was opposed to non-recognition of consequences arising from so-called crimes of States. The mess could be illustrated by the following example: if Canada were to attack the United States and the United States were to rebuff that attack and end up occupying Manitoba, in so doing the United States would have exercised force in self-defence. It would be a perfectly legal act, and no crime would have been committed by the United States, and probably not by Canada either. Should such an acquisition of territory by use of force be recognized? If not, then there must be some question about a regime which established a system in which the *a contrario* implications of part two as it currently stood would recognize that acquisition. Irrespective of whether it was possible to clean up the mess by retaining the notion of article 19 while giving it another name or by deleting article 19, it was essential to find a way out of the current situation. The whole of part two, insofar as it related to so-called crimes or acts of a particularly serious nature, or however the notion was formulated, created a chaotic situation not only for so-called crimes, but for international law in general. He was far from convinced that a solution could be found as long as the Commission retained the neologism of "crime" or whatever it eventually decided to call it.

68. Mr. PELLET, referring to Mr. Rosenstock's comments, said it was difficult to grasp, in the example cited of Canada attacking the United States, how Canada would not inevitably be responsible for committing a crime, namely, aggression against the United States. He shared Mr. Rosenstock's view that the confusion surrounding the question of crime needed to be cleared up, but that did not mean article 19 should be deleted. He saw Mr. Operti Badan's point about the risk of a deadlock and did not think that the Commission needed to enter into the details of the matter. For the time being, it should simply take note of what existed, and he continued to think that such crimes did in fact exist, even if Mr. Bennouna thought that that was merely a metaphysical conviction.

<sup>11</sup> See 2533rd meeting, footnote 8.

69. Mr. Kateka had queried his comment in a lecture at the Graduate Institute of International Studies that one of the reasons for the questions currently being raised about the concept of crime was that the great Powers were fearful of that concept. He had two arguments to justify that view. First, concepts were generally the weapon of the weak: sovereignty, for example, far from being an instrument used against small States, was in fact wielded by them as a formidable legal instrument against larger States. Crime was a concept that could work in a similar way. Secondly, the great Powers already possessed a weapon for imposing punishment, namely the Security Council. The concept of crime was a way of taking a different tack, without giving the Council the power to throw up obstacles in a situation in which the permanent members might block matters when a crime had been committed.

70. Mr. GALICKI said that the impression he gained from the discussion was that the Commission was engaging in the work not of lawyers but of geologists. While digging up the remnants of the past, it had unearthed a variety of mineralogical substances, some solid, some in liquid form. Crimes committed by States were of the latter variety but no legal edifice could be constructed on such unsound foundations. In any case, the Commission's primary task was to prepare a draft on State responsibility. That did not mean the Commission could set aside definitively the task of defining State crimes. The Special Rapporteur was right to say it should concentrate on more solid concepts and to advocate a very flexible course of action, one which he personally fully endorsed. Lastly, it was unwise, and it created misunderstandings, to draw an analogy between responsibility for State crimes and responsibility for crimes committed by individuals.

71. Mr. Sreenivasa RAO said that in general he agreed with Mr. Kateka's comments. The Special Rapporteur had essentially obliged the Commission to answer yes or no to the question of whether article 19 should remain in the draft. As the debate progressed, a number of valid considerations for the overall structure of the draft were being distilled and, irrespective of the fate to be reserved for article 19, those considerations would require much more extensive discussion.

72. Among the points that had emerged—a philosophical question which had practical ramifications—was whether it was feasible to punish a State, in the person of the individuals responsible for its decisions at a particular moment, without punishing all the citizens of that State. To what extent could a leader function entirely autonomously of the society he or she governed? Even in the worst dictatorship, there was often an emotional concordance between society and its leaders, while in a democracy, where leaders were supposed to reflect the will of the people, a certain distancing from the will of the people often occurred in politics.

73. A number of legal questions had arisen as well, and were being elucidated through many comments by members of the Commission: what was the distinction between crime and *erga omnes/jus cogens* obligations? How would States injured, though to differing degrees, be covered, and the common interest ensured?

74. Mr. AL-KHASAWNEH said Mr. Rosenstock was correct in saying that the draft was flawed for having confined non-recognition to crimes: it should apply to many illegal situations, regardless of whether or not they were characterized as crimes. The prime example was the advisory opinion of ICJ in the *Namibia* case in which the Court had called on States not to recognize the continued presence of South Africa in Namibia. There was a real danger that confining non-recognition to crimes would give rise to a *contrario* interpretations. In the example given by Mr. Rosenstock, it mattered very little whether Canada's action was a crime, for Canada was clearly the aggressor and any territory acquired by the United States was gained while acting in self-defence.

75. Mr. DUGARD noted that those who favoured the concept of State crime—as he did—had indicated they would not object to the use of some terminology other than "State crime". Yet it would be more consistent for proponents of that viewpoint to seek to equate the concept of State crime to the concept of crime in domestic law, so as to attach the serious consequences normally attached to crime in domestic law to State crime. Changing the terminology for the concept might trivialize it, reducing State crime to something in between an international delict and an international crime. Did Mr. Kateka and other proponents of "State crime" feel that that compromise could legitimately be made? If Mr. Kateka favoured covering international crime in all its ramifications, did he feel the Commission could do justice to that endeavour within the current draft articles? Or should it embark upon a separate study under the existing mandate? He was greatly attracted by Mr. Kateka's idea that the Commission could undertake a new study without requesting anew the approval of the Sixth Committee, for it had already received such approval by implication. That might offer a way out of the current dilemma.

76. Mr. KATEKA said that, though the use of the word "crime" created philosophical problems for some members of the Commission, replacing it with another term might create problems for the Special Rapporteur. An analogy between domestic crimes and international crimes was likewise problematic: how could one establish the *mens rea* of a State? And the phrase "international crime" was already used in the context of crimes committed by individuals: war crimes, crimes against humanity and genocide, for example.

77. As to whether the Commission could do justice, in the current draft articles, to the concept underlying article 19, that was up to the Special Rapporteur to decide. He had already indicated that a new study should be undertaken to serve that purpose; he himself, on the other hand, thought the problem could be solved within the current draft. The strongly differing views that currently prevailed over a number of issues—crimes, the injured State, compulsory dispute settlement and the mechanisms involved—would have to be worked out. If that was done—and he believed it was possible—there would be no need to begin the work afresh: the current draft could be used as the starting point.

78. Mr. PELLET said he agreed with those remarks. On the other hand, he entirely disagreed with those who considered that there was one immutable, particular meaning

to the word “crime”, that is to say, the meaning that existed in domestic law. He was absolutely convinced of the opposite, and on that point concurred with the view advanced by France in its comments: international responsibility was neither criminal nor civil in nature, it was a different legal system. He did not understand why the “crime partisans” were accused of inconsistency: in fact, they were ready to live without the word “crime”, whereas many opponents of the concept of crime were fixated on the term. He had no objection to speaking of an international crime of the State, as Mr. Kateka had suggested. Alternatively, article 19, paragraph 2, could be reworded to read: “An internationally wrongful act which results from the breach by a State of an obligation that is essential for the protection of fundamental interests of the international community as a whole has specific legal effects.” What he absolutely refused to accept was the idea that a State could be a criminal in the same way as an individual could be a criminal under domestic law.

79. Mr. Galicki had commented that members of the Commission tended to mention individual criminal responsibility rather often. That was true. The first report of the Special Rapporteur, and still more his oral presentation, mixed both things and tried to encourage the Commission to shift from the realm of State crime towards that of the crimes of individuals, though the two realms were completely different. It was inconceivable that the leaders of a State could be brought before an international criminal court, thereby losing their immunity from jurisdiction, without some event having occurred: and that event, in his opinion, was definitely a crime.

80. Mr. CRAWFORD (Special Rapporteur) said the partisans of article 19 could be heard at times to demand a separate regime, and at others, to call for an undifferentiated one. They might be enlightened by referring back to the thinking of the former Special Rapporteur, Mr. Ago, on the subject. Mr. Ago had clearly stated that a separate regime was needed to cover crimes—a statement with which he himself fully agreed. Incorporating crimes would necessitate modification of article 1, which worked perfectly well for internationally wrongful acts in general but would need the addition of a reference to fault to cover crimes as well. Article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity), would also have to be modified, because a State could not be found to have committed a crime in respect of an *ultra vires* act of an official, whereas it could be found to have committed a wrongful act.

81. It was true that there was an emotional force inherent in the concept of crime, and part of the force that Mr. Pellet wanted was precisely the concept of crime. He himself wished to retain that for the future. He was talking not of individuals but of corporate entities, which were already being held criminally accountable. Although that stage had not yet been reached in the case of crimes of State, it was not impossible that it would be in future. Iraq was currently being treated as a virtual criminal. The original aggression, as pointed out by Mr. Simma, was subject to a special regime under the Charter of the United Nations, but as a jurist, he would be happier if the treatment of Iraq and all the ensuing consequences were a more orderly process than it had been. The requisite insti-

tutions were not yet available to do it any other way, but the possibility of their emergence must be preserved for the future.

82. In the meantime, if all that Mr. Pellet was saying was that a breach of an obligation to the international community as a whole carried special consequences, he could not fail to agree. Indeed, he was trying to spell out in a systematic way what those consequences might be and how they would operate. And he agreed with Mr. Pellet on another point as well: that the current draft articles completely failed to do that. The way he himself proposed to remedy the problem was to acknowledge the existence of obligations to the international community as a whole such that their serious breach affected the interests of that community. Not all obligations of interest to the international community as a whole would give rise to “crimes” in the proper sense in the event of a breach, even a serious breach. However, he wanted to reserve the possibility that some might be crimes in the real sense. Morally, a State which committed genocide committed a crime. What had happened in Cambodia was a crime.

83. Mr. HAFNER said it must be borne clearly in mind that individual responsibility was something entirely separate from the responsibility that could be assumed by a State. The responsibility of the individual was dealt with by the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda and would be the work of the future international criminal court. Even in the case of genocide, he had doubts about whether the commission of the crime was identical, irrespective of whether it was committed by an individual or by a State.

84. Mr. PAMBOU-TCHIVOUNDA noted that the positions adopted by members of the Commission were gradually converging. There seemed to be a strong movement towards the idea of reading article 19 in conjunction with article 1 and a growing awareness that any changes to article 19 would automatically entail consequences for the preceding articles. Article 19 was built on the same foundations as article 1, the latter article being the spark that was kindling the revolution in the law of the international responsibility of States. If all analogies with domestic law were to be expunged and, in particular, the word “crime” was to be sacrificed, then the word “delict” might have to suffer the same fate.

85. Mr. CRAWFORD (Special Rapporteur) said he fully supported that idea, since both terms created an analogy with domestic law and, while the French word *délict* had a very specific meaning in criminal law, in English “delict” did not. In view of the many defects in article 19, he was entirely in favour of abandoning it provisionally—without, of course, abandoning the distinction between obligations to the international community as a whole and obligations to particular States. The debate could be clarified and a proper regime developed without article 19, which had immeasurably confused the debate.

86. Mr. GALICKI explained that, in his earlier statement, he had not been saying the Special Rapporteur had wrongly juxtaposed in his report the concepts of the responsibility of individuals and the responsibility of States, but rather that the Commission seemed to be doing so in its discussion. He was in favour, not of abandoning

the concept of State crime definitively, but of leaving it aside temporarily.

87. Mr. BENNOUNA said the problem with article 19 was that it required an offence to be placed in one of two categories, crimes and delicts, but there was actually a continuum in wrongful acts and they must be judged as such, individually. That did not, however, mean the problem of crimes could not be taken up later, in another context.

88. Mr. PAMBOU-TCHIVOUNDA said he could agree to taking up the problem of crime at a later date, but why not do so under the same topic the Commission was currently considering—especially if there was a continuum in internationally wrongful acts? He was not in favour of artificially separating concepts that were in fact related, although they were at different points in the continuum.

89. Mr. AL-KHASAWNEH said the Special Rapporteur appeared to have said that even a serious breach of the fundamental interests of the international community did not constitute a crime. What, then, did? He was not disturbed by the analogy with national legal systems, because what constituted a crime in such systems was ultimately decided on a subjective basis: the degree of reprobation elicited in the public consciousness by the commission of a reprehensible act. There was no uniformity in public consciousness nationally, and there would be still less uniformity in an international society.

#### Organization of work of the session (*continued*)\*

[Agenda item 1]

90. The CHAIRMAN announced that the Commission had established an open-ended working group on diplomatic protection to be chaired by Mr. Bennouna, Special Rapporteur on the topic.

*The meeting rose at 1.15 p.m.*

\* Resumed from the 2530th meeting.

## 2535th MEETING

*Tuesday, 26 May 1998, at 10.05 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Thiam, Mr. Yamada.

**State responsibility<sup>1</sup> (*continued*) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>2</sup> A/CN.4/490 and Add.1-7,<sup>3</sup> A/CN.4/L.565, A/CN.4/L.569)**

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. HAFNER, commenting on the introduction to the first report (A/CN.4/490 and Add.1-7) and particularly on the relevance of the distinction between primary and secondary rules, said that, in his view, the real distinction lay in the function of a particular norm rather than in its content. However that might be, the existence of agreement within the Commission and among States made further discussion of the matter superfluous.

2. With regard to the reorganization of the draft articles, he was in favour of deleting the articles that ruled out the attribution of acts to a State in part one and simplifying other articles such as those relating to complex crimes. Part two, especially draft article 40 (Meaning of injured State), needed to be reformulated. As to part three, the Commission would doubtless, in due course, address the question whether there was really any justification for its existence. It was clear, however, that the system envisaged by the former Special Rapporteur, Mr. Ago, must be retained in view of the as yet embryonic degree of organization of the international community. Neither the insertion of damage as one of the constituent elements of a wrongful act nor the reference to some form of *culpa* or *dolus*, in other words a *mens rea*, could be expected to introduce greater clarity and stability into international relations, given the subjective nature of such notions.

3. The idea of extending to part one of the draft articles the provision in article 37 of part two (*Lex specialis*) was not as simple as it looked because the special regime would prevail only if it provided for a different rule; otherwise the general rule must apply. With regard to the possible addition of a provision on loss of the right to invoke responsibility, analogous, for example, to that in article 45 of the 1969 Vienna Convention, he took the view that the rule of consent would in no way suffice to settle the issue.

4. With regard to the eventual form that the Commission's work should take, he said that the so-called "Austrian" proposal would amount to establishing uncontroversial principles as soon as possible so that States could use them as the basis for their activities, while leaving open the option of elaborating a treaty on State responsibility. According to his interpretation, the first document would set forth guiding principles in the area of State responsibility embracing the content of part one of the draft articles and incorporating some ideas from part two, provided that they did not involve the progressive development of international law and were already accepted in State practice. The purpose of such a formula would be fourfold: to reflect and honour the existing prac-

<sup>1</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>2</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>3</sup> *Ibid.*

tice of States; to lay a basis for future work by the Commission on the topic which States could view as sacrosanct; to provide a document that would stand the test of time and allow the Commission, *inter alia*, to assess whether the reaction of States indicated general acceptance; and, in the event of acceptance by States, to ensure wider acceptance of the Commission's future draft articles, which would be the subject matter of the second document. The latter, whether a treaty or non-treaty instrument, would be more elaborate, possibly containing elements of progressive development, and would seek to tackle all aspects of State responsibility. By adopting such an approach, the Commission, basing itself on the already "mature" portion of its work on the topic, would be in a position to offer States a serviceable instrument for their daily practice and to promote their gradual acceptance of the notion of State responsibility.

5. He personally considered that the elaboration of a treaty was not essential since what was involved was the essence of international law. The example of the 1969 Vienna Convention advanced by some was not really a conclusive argument, since the Convention's positive effect stemmed from its content rather than its form. A further disadvantage of the treaty form was that the application of the law would vary according to whether or not a particular State was a party to the treaty. Other arguments against it concerned the rigidity of treaty language and the possibility for States to enter reservations.

6. With regard to article 19 (International crimes and international delicts) and the problem of State crimes, he perceived certain common threads in the more or less divergent doctrinal views expressed by members of the Commission. It seemed to be generally agreed, for example, that certain wrongful acts were of such concern to mankind that they called for separate treatment, within or outside the system of State responsibility. The main underlying idea was that a common global public order existed and must be protected, but the question of who should be entitled to afford such protection remained unanswered. The community of States was still based largely on the so-called "Westphalian" system, a decentralized system characterized by reciprocity and founded on the sole competence of States to ensure respect for law in accordance with their individual interests. In modern times, however, international relations had evolved to the extent that a common interest had emerged and international society had reached a higher level of organization—international solidarity—whose progress entailed, however, a reduction in State sovereignty. Hence the existing uncertainty about the further development of the community of States and the difficulty of dealing with the question of crimes, although, leaving aside the terminology to be used and the possible borrowing of notions from municipal criminal law, it must be admitted that such violations required separate treatment.

7. It was likewise impossible to ignore the existence, acknowledged in many works of doctrine, of that particular category of contravention. As noted by certain authors, the lack of a judicial decision did not imply the non-existence of crimes, but rather the absence of bodies with jurisdiction to deal with them. Moreover, the assertion of the existence of crimes served a preventive function in its own right and it would be difficult in future to gain

acceptance among States for a denial of their existence. Nevertheless, crimes in that sense contained a progressive element, particularly with regard to the implementation of the responsibility they involved. In that connection, the community of States was still in a transitional phase and based on somewhat shaky foundations. As an illustration of the existing uncertainty, it was a valid question whether, in view of the fact that such contraventions were a matter of concern to the international community and generated, for example, a sense of solidarity, there could exist not only a right of prosecution left to the discretion of one particular State or organ or of five particular States, but also a duty to prosecute. In an international community where the rule of law prevailed, there should be provision for a duty of States to take the necessary steps to bring the responsible State to justice. Thus, when a State committed an act of aggression against another State and occupied its territory, other States must have a duty to take action. When the German Reich had occupied Austria in 1938, only Mexico had immediately sent a written protest to the League of Nations,<sup>4</sup> a step motivated by the interests of the Mexican Government rather than any concern for the rule of law. A further example of the dilemma was the emergence in recent times of a duty under treaty law for coastal States to take measures against foreign vessels in order to protect the marine environment.

8. The duty not to recognize as lawful the situation created by a crime was manifestly insufficient. The confirmation of such a duty in a resolution adopted by the Assembly of the League of Nations<sup>5</sup> prior to the events of 1938 had failed to produce any preventive effect. And what could non-recognition be taken to mean in the case of genocide? While it might seem excessive in the circumstances to institute a duty to prosecute, a dilemma would nevertheless ensue as a matter of course from the Commission's assertion that certain acts were a matter of concern to the international community as a whole. By classifying certain acts as crimes, the Commission would assume a responsibility towards mankind to ensure that such crimes were prosecuted.

9. It was therefore plain that the task of formulating rules concerning crimes would be far from easy, especially when it came to defining crimes. It was impossible to transpose the procedure used to define a peremptory rule of international law in the 1969 Vienna Convention, namely, the inclusion of a reference to their process of creation, to the case of crimes, aside from the fact that one was entering the field of primary law. A more generic definition than that given in article 19 thus seemed virtually unattainable. Even if it was possible to focus on the consequences without having a clear idea of the nature of the crimes themselves, that is to say, to pursue a more phenomenological approach, it would still be difficult to reach a clear-cut conclusion on the responsibility resulting from such crimes because the community of States was currently in a transitional and hence unstable phase of development.

<sup>4</sup> Communication from the Mexican delegation of 19 March 1938 (League of Nations, document C.101.M.53.1938.VII).

<sup>5</sup> See resolution adopted by the Assembly on 11 March 1932 (League of Nations publication, VII, *Political*, 1932.VII.5, document A. (Extr.)48.1932.VII).

10. In that connection, he stressed the need to draw a clear distinction between crimes, breaches of obligations *erga omnes* and breaches of peremptory norms. The notion of obligations *erga omnes* itself should not be confused with the notion of obligations of a general nature and a breach of the former did not necessarily coincide with a breach of the norms of *jus cogens*. The foregoing triple distinction should be recognized in article 40, a requirement that warranted its recasting.

11. Lastly, if the concept of crime was maintained in the draft articles, the Commission must clearly differentiate such crimes from those entailing individual responsibility, bearing in mind the tendency, reflected in the establishment of ad hoc tribunals and the proposal to create an international criminal court, to lay emphasis on the latter type of responsibility. The Commission must therefore approach that concept of crime against the background of two ostensibly conflicting trends: on the one hand, the higher level of integration of the community of States, which lacked a supranational central organ so that the activation of the system was still left to the discretion of States; on the other hand, the obligation of States to surrender parts of their sovereignty when individuals were prosecuted directly by international bodies. On the one hand, a criminalization of the State was demanded and, on the other, individuals were being tried by international bodies. Furthermore, the trend towards a more centralized system of organization was not yet irreversible, so that it was not inconceivable that the old system of States would prevail.

12. The criminalization of States, with all its legal implications, undoubtedly constituted a progressive development of international law and, in that connection, the Commission must also respect such current developments as that relating to the international criminal court. It had been argued that it was unnecessary to extend the court's jurisdiction to acts of aggression since they belonged more appropriately to the category of crimes of State. That idea had therefore acquired the status of a general view.

13. In conclusion, he urged the Commission to hold a special discussion on the question of State crimes. The Special Rapporteur could prepare an outline of the consequences of such crimes (with the possible inclusion of breaches of obligations *erga omnes* and norms of *jus cogens*) which would serve as the basis for a discussion of the matter either in the existing working group or in a separate one. In that way, the discussion could be further structured without encroaching on the work relating to State responsibility.

14. Mr. LUKASHUK said that it would help the discussion if, rather than speaking of "criminalizing" the conduct of the State, the Commission reverted to the idea of international responsibility under the law. Secondly, while acknowledging the desirability of defining a category of exceptionally serious crimes, he believed that the Commission would face great difficulties if it undertook immediately to define all the consequences of such crimes, as well as the procedures relating to them. On the other hand, the Commission could well, as a first step, affirm the most general and fundamental principles of

State responsibility with a view to having a resolution adopted by the General Assembly.

15. He did not think that the Commission necessarily had to embark on the consideration of breaches of *jus cogens* or obligations *erga omnes*, concepts whose relevance in the current context he doubted; the main criterion for defining State responsibility was the fact that the act in question had caused considerable damage and suffering to millions of people.

16. Mr. HAFNER explained that he had not intended to give any technical meaning to the expression "criminalization of the State" and had left the question of a possible analogy with internal law completely open. The only implication was that criminalization was the consequence of a State crime.

17. Mr. BENNOUNA said that he agreed with Mr. Lukashuk's comment about the use of the word "criminalization", which could be confusing. Whatever the supporters of the term might say to dismiss any analogy with internal law, a crime was still a crime.

18. While he agreed with Mr. Hafner that there were exceptionally serious acts which could have a traumatic effect on a people or a State and which could not be placed in the same category as ordinary breaches, he was convinced that dealing with such acts in the general framework of the draft articles on State responsibility would give rise to many difficulties. When all was said and done, a "crime" was a singular act in that it undermined the very essence of international law. And since, at the current stage of its work on the topic, it would be difficult for the Commission to retrace its steps and drop the concept of crime altogether, he too wondered whether it might not be best to avoid failure by isolating the concept from the framework of the general law of State responsibility and dealing with it separately. The previous Special Rapporteur had been well aware of the difficulties and had looked in vain for a competent independent authority—not the Security Council or any particular State taken individually—to which the task of classifying the act as a crime might be entrusted. But in doing so he had found himself trying to change the whole world, including the United Nations and the Charter of the United Nations, and starting on a process that went beyond the limits of the Commission's competence.

19. Thus, the path of wisdom for the Commission would be to preserve the concept of State crimes as a subject for separate treatment and to make proposals along those lines to the General Assembly.

20. Mr. CRAWFORD (Special Rapporteur) said that Mr. Bennouna had given an accurate account of what had happened during the previous quinquennium. The draft articles provided, in substance, that, within the field of general State responsibility, the consequences of an act which was a crime were without prejudice to such further consequences as might follow from the classification, in accordance with international law, of that act as a crime. That amounted to a *renvoi* to some other special regime provided for in the Charter of the United Nations or elsewhere. For those who believed in the possibility of so-called international crimes, the article in question presented no problem. Beyond that, however, the Com-

mission was immediately plunged into a dilemma which had not escaped Mr. Bennouna and Mr. Hafner and which had to be resolved. In the international system, crimes *ut singulis* were simply inconceivable. In that connection, he wondered whether the procedural suggestion put forward by Mr. Hafner at the latter end of his statement had been made with a view to the reintegration of a more systematic treatment of crimes in the draft articles or, in a more nuanced fashion, with a view to giving separate treatment to the subject.

21. Mr. HAFNER explained that, in his view, the Commission should first see what the consequences of taking up the matter of State crimes really were and draw up an outline concerning all the implications of crimes. On the basis of such an outline, it would be able to decide how to proceed. That exercise would inevitably lead to the decision that the question of crimes could not be incorporated in the system of State responsibility as it stood. A further advantage would be that of enabling the Commission to make more rapid progress on the topic of State responsibility and to produce a result long awaited by the international community. As a working hypothesis, the Commission might perhaps speak of "simple State responsibility", a concept which could but need not include State crimes once they had been duly defined.

22. Mr. ECONOMIDES said that he associated himself with the comments made by Mr. Lukashuk and Mr. Bennouna. The fact was that the draft articles on State responsibility did not, strictly speaking, contain any criminal element. Articles 19 and 51 to 53 merely determined the consequences arising from exceptionally serious breaches of international law; they set forth international obligations, not criminal sanctions within the usual meaning of the term.

23. Turning to the question of the definition of the word "crime", he said that, all definitions being of necessity arduous and somewhat arbitrary as well as incomplete, the definition of the expression "international crime" given in article 19 of the draft articles was neither less precise nor less complete than that of a "peremptory norm of international law" (*jus cogens*) given in article 53 of the 1969 Vienna Convention. In fact, it might even be said to be more explicit and clearer, since article 19 gave examples of international crimes which helped to clarify the concept.

24. As for obligations *erga omnes*, he noted that, unlike *jus cogens* as defined in the 1969 Vienna Convention and unlike the concept of international crime as it resulted from the draft articles on State responsibility, those obligations did not as yet have a clear-cut legal status except insofar as it was established that they were obligations incumbent upon all States belonging to the international community. They derived their characteristics from the fact that they were compulsory for all. The question remained whether their breach gave all States the right to impose sanctions of their own. In his view, the answer to that question was no. In other words, the Commission could not use that concept as a basis for dealing with the most serious international breaches. It was not by chance that the former Special Rapporteur, Mr. Ago, had set aside the concepts of *jus cogens* and obligations *erga*

*omnes* and had instead used the still narrower expression "international crime".

25. Mr. ADDO said that he found Mr. Lukashuk's comments perplexing. To his knowledge, there had been no formal decision to exclude all references to the concept of "international crime" or to that of the "criminal responsibility of States" from the discussion. The fact was that the Special Rapporteur had submitted a report in which he considered the question of State crimes and proposed five approaches between which the Commission was invited to choose. He would therefore refer in his own statement to "State crimes". The debate should be open and not unduly restricted.

26. Mr. FERRARI BRAVO said that, the further the discussion went, the greater the uncertainty became. It was clear that the topic related to "State crimes" and not to crimes committed by individuals representing States, which would come under the jurisdiction of the future international criminal court. It was also clear that the two concepts were linked to each other, for a State crime was an act committed by an individual. In the current case, it was a wrongful act of exceptional seriousness. The use of the word "crime" to designate such an act might be regrettable, but the word had existed for a long time and to replace it by another would be difficult.

27. The expression "State crime" still had to be defined. A State crime was an act by a State which, because of its seriousness, gave rise to more serious consequences than an internationally wrongful act. The latter was supposed to lead to a reaction by the victim State, which could, as it were, absolve the perpetrator by giving its consent, whereas, in the case of a State crime, all States had the right to react in the manner provided for by the law of international responsibility. Once a State took action, even if it was not directly a victim of an internationally wrongful act, international responsibility came into play.

28. It was therefore important to define the State crime, it being understood that its subsequent consequences, namely, the consequences of the act which had been committed by an individual and had given rise to a criminal activity of the State fell under the proposed establishment of an international criminal court. There was no other solution. Even changing the terminology, in other words, no longer speaking of "international crimes", would solve nothing and would, instead, disturb the balance of the draft articles under consideration. He was entirely opposed to such an approach.

29. Mr. AL-KHASAWNEH said no one would disagree that a crime was an abominable act by whatever name it was designated and whoever was the perpetrator: that was true, for example, of aggression, massive pollution or genocide. He failed to see why, if the Commission agreed that crimes—international crimes—existed, the analogy with internal law and with national criminal systems, all of which dealt with acts of that kind, should be ruled out. The Commission should be consistent: if it accepted the concept of crime, it could not deprive it of its penal connotations.

30. After a procedural discussion in which Mr. ROSENSTOCK, Mr. CRAWFORD (Special Rapporteur), Mr. HE and Mr. MIKULKA took part, the CHAIR-

MAN suggested that, in order to prevent matters from getting out of hand, the mini-debate within the debate should be confined exclusively to requests for clarification which the members of the Commission might wish to make.

*It was so agreed.*

31. Mr. DUGARD, referring to article 19 of part one of the draft, said that, in proposing that article, the former Special Rapporteur, Mr. Ago,<sup>6</sup> had launched an idea that had dramatically changed the nature of international law in the sense that it reflected a major stage in the evolution of international law from an early undeveloped legal system to an advanced legal system, from bilateralism which had sought to provide reparation only for the injured party to a system of multilateralism in which a community response to the violation of community values was possible and from individual criminal responsibility to State responsibility for crimes under international law. It was, of course, generally agreed that article 19 was poorly drafted. It was an idea rather than a code of criminal responsibility, but it was an idea that had been accepted by the international legal order, despite the fact that it remained incomplete and undeveloped. That was confirmed by the most conservative international text in the English language, which stated that

[T]he comprehensive notion of an international delinquency ranges from ordinary breaches of treaty obligations, involving no more than pecuniary compensation, to violations of International Law amounting to a criminal act in the generally accepted meaning of the term.<sup>7</sup>

32. Of course, there were problems with the concept of “State crime”. First, some were troubled by the domestic law analogy, although he personally was not. If a corporation could be punished by way of a fine or other sanction for the wrongful acts of the management, so could a State be punished for the wrongful acts of its Government. Secondly, there was the question of how to punish a State. There, the Commission needed to give careful consideration to State practice and measures taken by the Security Council against States such as apartheid South Africa, Iraq and the Libyan Arab Jamahiriya before dismissing the possibility that a State could be regarded as criminal. For example, in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, the United Kingdom of Great Britain and Northern Ireland had argued that the Libyan Arab Jamahiriya’s application to lift sanctions had been designed to preclude the Security Council from acting in relation to a wider dispute involving allegations that the Libyan State had been guilty of State terrorism.<sup>8</sup> The Commission should examine State practice, the main features of which had been referred to by the Special Rapporteur in paragraph 59 of his first report.

33. The notion of State crime was today part of the corpus of international law, however incomplete it might be.

Moreover, there was an expectation on the part of States that it would be developed further into an instrument to deter States from violating the most basic norms of the international community.

34. Although article 19 was inspired by the notions of *jus cogens* and obligations *erga omnes*, the latter were not synonymous with State crime, as some speakers seemed to believe. In that respect, he could not agree with those who endorsed the Special Rapporteur’s second option, namely, replacing “State crime” by some other expression and relegating the concept as such to a species of *jus cogens* or obligations *erga omnes*. To quote Oppenheim, the Commission was dealing with the notion of “criminal” acts in its generally accepted meaning, and it must therefore address it properly and seriously. It could not trivialize the concept by treating it simply as a serious form of delictual responsibility. It was argued that the commentary to article 19 did not contemplate “crime” as understood in domestic law. That might be true, but that was irrelevant, since article 19 had acquired a life of its own, distinct from its commentary. The question which the Commission had to address was not whether to accept or discard the notion of State crime, which had already been endorsed, but whether to deal with the concept and to define its consequences in the draft articles on State responsibility. His initial response had been that it should, but, after following the discussions in the working group, he currently believed that it should not, and for three reasons.

35. The first reason was that the draft articles were concerned with civil and delictual responsibility. For example, article 3 (Elements of an internationally wrongful act of a State) dealt with responsibility for omission on the part of a State, and he failed to see how an omission, that is to say, negligence, could constitute a crime. The same applied to *ultra vires* acts, as dealt with in article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity), article 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act), which made no provision for criminal intent (*mens rea*) by the State that offered such aid or assistance, and article 29 (Consent), about which it might be asked whether it could justify a crime.

36. The second reason was that the draft articles did not contain the various components which any system of criminal justice worthy of that name, as referred to in paragraph 85 of the report, must have and which constituted the essential principles of criminal law that must be taken into consideration. The third reason was that the draft articles did not do justice to the concept of State crime.

37. The choice before the Commission was therefore the following: either to convert the draft articles into a comprehensive code of “criminal” and delictual State responsibility, which might take years and at the very least another quinquennium, or to separate criminal and delictual responsibility and deal with each separately. That would allow the Commission to complete a code of delictual responsibility in the current quinquennium. He preferred the latter choice because the Sixth Committee expected a result. But the Commission must conclude a

<sup>6</sup> See 2532nd meeting, footnote 17.

<sup>7</sup> L. Oppenheim, *International Law: A Treatise*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green, 1955), vol. I, *Peace*, p. 339.

<sup>8</sup> *Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 3, in particular, p. 11, para. 27.

saving clause in the draft articles making it clear that it recognized the existence of State crimes and did not reject article 19, which was comparable to article 4 of the draft Code of Crimes against the Peace and Security of Mankind.<sup>9</sup> The Commission must also ask the Sixth Committee for permission to embark on a code of State criminal responsibility, because, unlike Mr. Kateka, he believed that the Commission required a special mandate.

38. Mr. CRAWFORD (Special Rapporteur) said he took it that, in his statement, Mr. Dugard had not used the word "delictual" in the way in which it was employed in article 19 of the draft because to do so would be to reintroduce the notion of crime.

39. Mr. DUGARD said that he had in fact used the term to mean State responsibility in the traditional sense. He agreed that the Commission should avoid using the term "delictual" for the purposes of the draft articles.

40. Mr. ECONOMIDES, noting that, in Mr. Dugard's opinion, a system of State responsibility should include all the elements listed by the Special Rapporteur in paragraph 85 of his first report, asked whether it would not be utopian to envisage such a system. He was afraid that there would be some confusion between State crimes and human rights violations. The approach of the draft articles was very timid from the point of view of the consequences of crime, but it constituted a modest step in the right direction. He was not certain that it would be wise to jettison that approach by discontinuing consideration of crimes in the draft.

41. Mr. PAMBOU-TCHIVOUNDA said that the Special Rapporteur seemed to be in favour of removing the notion of crime from the draft and keeping only that of delict. In his opinion, however, the construction by the former Special Rapporteur, Mr. Ago, was perhaps not perfect and was certainly incomplete, but it was based on a dual representation whose two elements went together: either the Commission approved or rejected it as a whole. The unifying principle of that construction was the internationally wrongful act, which replaced the notion of fault on the basis of which the former law of State responsibility had been drafted. He was afraid that, once crimes were sacrificed, delicts would be disregarded and he did not see how it would then be possible to organize responsibility as a function of damage or fault. Discarding the notion of crime would be tantamount to taking a step backwards and it was not for that reason that the Commission had requested the Special Rapporteur to submit his first report on the key questions of the draft articles which it had adopted on first reading, any more than the Special Rapporteur had drafted his report to set the Commission back a quarter of a century. Even States hostile to the notion of crime would consider that the Commission would be guilty of a "betrayal" of sorts in view of the trends that had been taking shape towards the consolidation of an international public order since the end of the Second World War.

42. The Commission should be grateful to the Special Rapporteur for summing up the draft articles adopted on first reading, but also for everything that had been written

since then on the subject. A concern that was reflected throughout the first report was that the regime of State responsibility should be designed to give effect to the distinction drawn in article 19 between crimes and delicts. Noting, in paragraph 80 of his report, that the consequences attached to international crimes in the draft articles were limited and for the most part non-exclusive and that the draft articles failed to do what the Commission set out to do at the twenty-eighth session, in 1976, that is to say, to elaborate a distinct and specific regime for international crimes, the Special Rapporteur seemed to be showing an abiding interest in moving ahead with the construction begun in 1976. He spoke of shortcomings and inconsistencies and, although it was possible not to be in agreement with him, it must be admitted that article 19 was poorly designed, both in its various elements and in the order in which they followed one another. For example, the notion of the subject matter of the obligation breached, referred to in article 1 (Responsibility of a State for its internationally wrongful acts), had not been used to distinguish between crimes and delicts. But that was not only a question of drafting or legal technique; for some, it was a substantive problem, that is to say, the failure to determine the conceptual point of reference of the dual construction which article 19 outlined. Why, it might be asked, was unlawfulness arbitrarily broken down into only two categories, namely, delicts and crimes?

43. In paragraph 94 of his report, the Special Rapporteur said that the recognition of the concept of "international crimes" would represent a major stage in the development of international law; he endorsed that view, but disagreed when the Special Rapporteur stated, at the end of the same paragraph, that the subject might be treated separately by a body other than the Commission. As it was the Commission which had worked out the notion of crime, he did not see what other body might be able to define its content and produce the relevant regime, whereas the Commission might do so without requiring new terms of reference from the Sixth Committee.

44. In his view, the option proposed by the Special Rapporteur of handling the regime of crimes separately was the result of a misunderstanding, namely, that the unlawfulness which was the basis of the regime of crimes was different from the unlawfulness which served as the foundation for the regime of delicts. That was incorrect because, in the construction by the former Special Rapporteur, Mr. Ago, unlawfulness was the foundation of international responsibility. That was why draft articles 1 and 19 worked together to highlight the importance of modernizing the international law of State responsibility. At issue was the fate of the notion of fault, for the sake of legality, the source of obligations, notably the obligation to provide compensation. Since modern international legality borrowed from various sources and its authority derived from multilateralism, communitarianism and the peremptory nature of the law, the penalty for violating that legality must be rather flexible to match the flexibility of legality itself. The notion of international crime was thus inherent in that of international legality, which had to be taken as the basic point of reference. That unique point of reference applied not only to crimes and delicts, but also to everything that might be less than a delict or which might be imagined to go beyond crime. If that point of

<sup>9</sup> See 2534th meeting, footnote 10.

reference was disregarded, the discussion on the subject would no longer make any sense.

45. From that perspective, any reference to domestic crime was completely inoperative. The “criminalization” of the State did not have a greater criminal connotation than its “delictualization”. Any debate on the notion of international “criminal” responsibility of States was thus out of place because it led to another misunderstanding. The Special Rapporteur noted in paragraph 75 of his report that great caution was always required in drawing analogies from national to international law. The Commission would go astray if it accepted that analogy and ventured out in the direction of who knew what international criminal code. Neither the general principles of international law as enshrined in case law, nor international customary law nor specific conventions establishing special regimes of responsibility contained any rule calling for a particular sanction applicable to States for a breach of its provisions.

46. Neither the logic of codification nor, a fortiori, that of the progressive development of law was a justification for the Commission’s giving separate treatment to the regime of international crimes provided for in the general framework of the law of State responsibility on the grounds that that regime would be for “criminal” matters. The arguments put forward by the Special Rapporteur in support of the idea of a “criminalization” of the State were thus unconvincing. The same held for what he said about the position of the Security Council, that is to say, about Chapter VII of the Charter of the United Nations. It should also be noted that the crime of aggression, to which the Special Rapporteur called attention, was in fact a crime for which the relevant rules of international law were not equally peremptory because the Council did not always react to aggression in the same way.

47. The Commission was duty bound to help ensure that the law of State responsibility could take a decisive step forward towards codification. It must be imaginative and bold in rearranging the parts of the draft articles which it had adopted on first reading. It would then discover the key to the message which was at the basis of article 19 and which was addressed to all special rapporteurs who had succeeded the former Special Rapporteur, Mr. Ago, and to each member of the Commission, who had an obligation to remember and a duty to produce results.

48. Mr. BENNOUNA said that he was surprised to hear the words “betrayal” and “obligation to remember”. He had thought that the members of the Commission were merely under an obligation to be conscientious in making logical and consistent proposals likely to ensure the progressive development of international law.

49. Mr. AL-KHASAWNEH said that the first report was very persuasive, to the point that he had been tempted to discard the notion of State crimes in favour of an approach which would be primarily civil and bilateral, but supplemented by notions of obligations *erga omnes* and rules of *jus cogens*. The temptation was that much greater because the Commission had to strike a balance between, on the one hand, its sense of justice and, on the other, the realities of political life in the post-cold war era, which were not conducive to optimism about the prospects of

codification and progressive development of the law in general and, in particular, in areas that might have an impact on the concept of international peace and security. Notwithstanding the Special Rapporteur’s eloquence and persuasiveness, he would retain the notion of State crime, for the following reasons.

50. The first was that the notion of State crime was far from a new one. The draft as adopted on first reading and the commentaries thereto did indeed represent a “conceptual revolution”, as one of the members of the Commission had pointed out, but it should not be thought that the former Special Rapporteur, Mr. Ago, had created *ex nihilo* a concept called international crimes or that the notion had had its genesis in the writings of some Soviet lawyers in the years immediately following the Second World War, as had been suggested. In reality, the idea that certain breaches committed by States affected the community of nations as a whole and that the effects of the most serious of those breaches could not be erased by compensation went back to the nineteenth century. The commentary to article 19, particularly paragraphs (36) to (53), gave the names of numerous jurists who had noticed the passage from bilateralism to community interests, but those authors had never expressed the idea of responsibility for crimes in a systematic way and Ago’s genius had been in having been able to read his times correctly and to capture the essence of that major trend to reflect it in the draft articles.

51. Article 19 as adopted on first reading had been born of that attempt to integrate major trends. The article’s drafting was far from perfect and, as the previous Special Rapporteur, Mr. Arangio-Ruiz, had prophesied, its drawbacks, especially in connection with the consequences of breaches, had become even more perceptible now, as its consideration on second reading approached and as the Special Rapporteur’s deconstruction of the article and of its consequences revealed. The article was a product of the single most important development in international law in the past century, namely, the emergence of the notion of community interest, but its drafting and the consequences flowing from the distinction between criminal and delictual responsibility were not entirely clear. That was not, however, a reason to abandon the notion of State crimes entirely. Such a decision would be a regressive and regrettable step.

52. The second reason why he supported the retention of the concept of State crimes was very simply that States committed crimes almost on a daily basis. Yet some States were currently being subjected to conditions that made them virtually indistinguishable from criminal States, under an ever-expanding concept of threat to or breach of international peace. The inconsistencies between article 19 and its consequences paled by comparison with the inconsistencies that arose from the absorption of the law of State responsibility by the law of international peace and security.

53. To take the case of Iraq, no action had been taken to follow up the aggression that had launched its war with Iran, but, after its war with Kuwait, sanctions had been imposed, causing massive and irreversible hardship for its population. All that had happened without Iraq having been called a criminal State and without any punitive

intent having been acknowledged. It would be better to call things by their proper names, to elaborate a fully-fledged regime of State criminality with all the attendant requirements of precision in penal matters, with a view to sparing the population of the criminal State, but not the State structure, the consequences of a crime. Such a regime should also contemplate the “purging of collective guilt”, including the corrective value of punishment and the reintegration of the guilty into society. It was inconceivable that States should have lesser guarantees under international law than were given by domestic law to individuals. While the draft could not amend the Charter of the United Nations, as the Commission had acknowledged at its twenty-eighth session, in 1976, the law of State responsibility should not be completely absorbed by the law of international peace and security.

54. It was naturally necessary to be concerned with the success of the Commission’s draft when the great majority of internationally wrongful acts were delicts and not crimes, statistically speaking. Completing a draft which regulated delicts would respond to the needs of the international community, but crimes posed a much greater danger to the rule of law than did ordinary wrongful acts. Ultimately, the Commission had to decide what sort of international law it wanted for the twenty-first century: if that law was to regulate commercial transactions and to provide for compensation for ordinary wrongs, but leave serious infractions without regulation, the Commission would have to admit that it was considering a successful, but modest draft.

55. The third reason why the concept of State crimes should not be deleted was that nothing in the replies by Governments or the reactions of the international community warranted it. When article 19 had been adopted in 1976, it had met with considerable support in the Sixth Committee. Moreover, the concept of objective responsibility on which the entire draft was based rested on solid grounds, as evidenced by more than three decades of debate in the Sixth Committee. Article 19 had been the subject of much controversy, including among academics, but the Commission should keep the options open for the international community. As the Special Rapporteur had observed, the general law of obligations in national systems was distinct from penal law. He had also observed that the original intention of the former Special Rapporteur, Mr. Ago, had been to devise separate consequences for crimes. The Commission should accordingly try to develop those consequences, taking into account the procedural aspects and guarantees of due process for criminal States. The idea that those consequences might be grouped together in a separate chapter that might be optional in nature was also worth looking at, insofar as the Commission must provide the international community with the widest range of choices. But the matter had to be settled as early as possible, otherwise the momentum acquired over three decades would be lost. The new approach also required the approval of the General Assembly.

56. With regard to the argument that international responsibility was neither criminal nor civil, but simply international or *sui generis*, he said he did not accept it, first, because it said nothing about international responsibility and, secondly, because it aimed to dismiss the

considerable wealth of national experience from which many concepts of international law had been developed by analogy. In order for international responsibility to come into play, a right had to have been breached. But the concept of the rights of States had itself been developed from national law. Similarly, the civil nature of State responsibility had been developed from the general law of obligations in national legal systems.

57. International society was different from national societies in two main aspects: first, in the absence of institutions for investigation and enforcement and, secondly, in its greater heterogeneity. That did not, however, serve in any way as a bar to developing the notion of criminal responsibility by analogy with the domestic law of national societies. The debate as to whether punitive damages and interests were recognized by international law was largely academic. The central point was that for certain serious breaches civil responsibility was simply inadequate to make up for the injury suffered: what amount of compensation could make up for genocide, for example? He also believed that punitive damages were part of any system of reparative justice.

58. If the Commission wished to take up the idea of developing a distinct set of consequences for crimes, it would have to redraft article 19. That article laid down a general criterion for defining crimes and followed it with an enumeration of the most obvious crimes. That was not unknown in legal technique, but it was far from perfect. The Special Rapporteur believed that a different approach could be taken (para. 48), for example, by referring to the distinctive procedural incidents of crimes as opposed to delicts or by defining crimes by reference to their consequences. Delicts could be defined as breaches of obligation for which only compensation or restitution was available, as distinct from fines or other sanctions. That was a very promising approach. The previous Special Rapporteur, Mr. Arangio-Ruiz, had proposed simply to effect certain modifications of the consequences of crimes to make them stricter than those for delicts. The current Special Rapporteur had analysed those modifications and had rightly concluded that they did not amount to much and could in fact be wrong, for example, when the duty of non-recognition, which was the most passive duty of solidarity, was confined to the effects of crimes alone. Independently of any decision the Commission would take on the fate of article 19, those matters would have to be looked at and corrected.

59. The Special Rapporteur had also recalled that the Commission had elaborated part one of the draft on the assumption that it would result in a general regime of responsibility that would in turn give rise to various consequences. That had been done to avoid the fragmentation of the concept of responsibility by a number of different regimes. At the same time, the Commission had been trying to reflect the notion that certain internationally wrongful acts were so serious and so detrimental to fundamental interests of the international community that they could be qualified as crimes. That approach had been in consonance with the development of the idea of community interest and had reflected the revulsion inspired by such acts. Yet in part one, the Commission had not laid the groundwork carefully for two regimes. That was why he supported the idea of reopening the debate on the provi-

Rapporteur's statement in the footnote concerning articles 29 to 34 that it was possible to draft key provisions in such a way as to be responsive to very different wrongful acts.

60. Summarizing his views, he said the idea of corporate criminal responsibility, including State criminal responsibility, was gaining ground and should be reflected in the draft, all the more so as no case had been made for deleting it. The deficiencies in article 19 were correctable, although that would be a major exercise. The Commission's work must respond to the needs of the international community: its prestige depended on it. On balance, a draft that did not cover crimes would be a disservice to the topic of State responsibility and to the rule of law in international relations.

61. In conclusion, he noted that the Special Rapporteur had been attacked with unusual harshness by certain members of the Commission, but he congratulated him on having correctly fulfilled his mandate, which had been to study the topic, adduce precedents and marshal relevant arguments and information.

*The meeting rose at 1 p.m.*

## 2536th MEETING

*Wednesday, 27 May 1998, at 10.05 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Khasawneh, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

**State responsibility<sup>1</sup> (*continued*) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>2</sup> A/CN.4/490 and Add.1-7,<sup>3</sup> A/CN.4/L.565, A/CN.4/L.569)**

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. ROSENSTOCK said he believed it would be premature to take a decision at the current time on the

<sup>1</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>2</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>3</sup> *Ibid.*

final form to be given to the Commission's work. He doubted that a convention was a good idea, but was hesitant to adopt the two- or three-step approach that seemed to be envisaged in the Austrian proposal. It would be unfortunate to tell the General Assembly that, after over a quarter of a century, the Commission could submit only a list of principles, but would have more material later. The Austrian proposal, while more complicated than necessary, was an interesting one and should be kept in mind for when the time came to make a decision on form. In the meantime, the Commission should try to complete part one of the draft articles at the current session and see how far it could get with part two at the fifty-first session, in 1999: it would then be able to determine what the best course of action was.

2. As to the main issue, namely the concept of crimes of States, he wished first to associate himself with Mr. Al-Khasawneh and others who had deplored the *ad hominem* and demagogic remarks made by some members. The validity of the concept of international crime should be measured not by the identity of persons or States supporting the concept, but rather, by whether it was a useful idea that the community of States could embrace. A special rapporteur who failed to express a view and provide guidance would not be doing his job. No Special Rapporteur had been more outspoken—to the point of grinding an axe—than Roberto Ago. Though he himself wholeheartedly rejected some of his ideas, he did not think Mr. Ago had been wrong to have them and to press them.

3. He was among those who rejected the concept of crimes of States, and not simply because it was not essential to the Commission's task, was badly handled in article 19 (International crimes and international delicts) and could not work without a judicial or quasi-judicial institution that States were in no way prepared to create. He rejected the concept because it was flawed from the start. As Mr. Brownlie had said, it had "no legal value, cannot be justified in principle, and is contradicted by the majority of developments which have appeared in international law".<sup>4</sup>

4. The roots of the concept lay in the early writings of Mr. Ago and Mr. García Amador and of a few Soviet lawyers. While serving as Special Rapporteur on State responsibility in the 1950s, Mr. García Amador had suggested a category, beyond delicts, which would be punishable—similar in some ways to article 19.<sup>5</sup> The Commission had rejected that distinction in the mid-1950s. Yet had it not been for the special circumstances of the 1970s: the cold war, the emergence of newly independent States anxious to brand the colonial Powers as criminals, hatred of apartheid, frustration over the advisory opinion by ICJ in the *International Status of South West Africa*, lack of progress in building on the Nürnberg principles and, perhaps, electoral politics, the matter would have ended there.

5. The Special Rapporteur's deconstruction of article 19 was unquestionably right, as was his conclusion that arti-

<sup>4</sup> I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), p. 152.

<sup>5</sup> See *Yearbook . . . 1956*, vol. II, p. 183, document A/CN.4/96, paras. 52-53.

cle 19 and references to two regimes of State responsibility should be deleted from the draft as unsound and unworkable.

6. Those who supported the creation of the notion of crimes of States or claimed that it already existed based their views on a number of false premises. They relied on the casual use, lacking any element of *opinio juris*, of florid language by politicians. They relied on dicta in the *Barcelona Traction* case, which spoke of rules that could be violated *erga omnes*, not crimes. The Court had been addressing the scope of the obligation (*erga omnes*), not the type of obligation. In any event, the responsibility involved had undoubtedly been civil responsibility. Finally, supporters of the notion of crimes of States relied on the widespread acceptance—despite the absence of widespread practice—of the notion of *jus cogens*. But to argue that an agreement was void *ab initio* for being against *jus cogens* was hardly the same as saying that the agreement was a crime in any sense of the term. In other words, the recognition implicit in the acceptance of *jus cogens* and *erga omnes* obligations was a recognition that international obligations were not in all cases confined to strictly bilateral contexts. Those who tried to defend the concept of crimes of States by accusing those who opposed them as reactionaries who sought to revert to a purely bilateral world were missing the point or were deliberately seeking to mislead. While recognition of community interest could be regarded as a necessary precondition for any notion of crimes or *jus cogens* or *erga omnes* violations, it could not be said to imply or require concocting the invention of the notion of “State crimes”.

7. The previous Special Rapporteur, Mr. Arangio-Ruiz, had submitted a sophisticated scheme for dispute settlement in his fifth report,<sup>6</sup> but no one had supported it. Who believed that States would accept the binding jurisdiction of ICJ for crimes? Mr. Riphagen had been more realistic when, as Special Rapporteur, he had said in his fourth report that there was little chance States would accept article 19 without a court.<sup>7</sup> The current Special Rapporteur, in paragraphs 75 and 84 of his first report (A/CN.4/490 and Add.1-7), spoke of the need for due process. But that required a judicial or a quasi-judicial institution that the international community did not seem willing to contemplate.

8. The supporters of the concept of State crime relied on the decision of ICJ in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. But the most that could be squeezed out of the decision was that there was a notion of an *erga omnes* violation. Again, they cited the Convention on the Prevention and Punishment of the Crime of Genocide, happily ignoring the fact that criminal responsibility was dealt with in article IV, which related to persons, while article IX, relating to the responsibility of States, mentioned adjudication of disputes by ICJ—not a likely forum for handling criminal responsibility. The *travaux préparatoires* for the Convention indicated that the drafters had had civil responsibility in mind: Mr.

Gerald Fitzmaurice, speaking for the United Kingdom of Great Britain and Northern Ireland, had stated that position unequivocally.<sup>8</sup>

9. The decision of ICJ in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* contained nothing, either in the statements of the Court or the pleadings of the plaintiff, to so much as suggest that the Convention on the Prevention and Punishment of the Crime of Genocide referred to anything other than the civil responsibility of States. It was neither helpful nor accurate to assert that comments made by the Court on the rules of attribution had been directed at some other subject. The Convention spoke of a court, but that was never intended to be an instrument for trying States as criminals.

10. It had thus to be acknowledged that there was no State practice to support the notion of crimes by States. Any talk of crimes of States would only distract the Commission from the positive developments relating to individual responsibility. It would be more useful to perceive a continuum in the seriousness of a breach, running from minor to material, from being of little consequence to the two States involved to being breaches of obligations to all States of a much more serious nature, such as Iraq’s invasion of Kuwait. If one wished to improve the responsibility regime to deal with *erga omnes* obligations, the notion of State crime as embodied in article 19 was most assuredly not the best way. The sensible way, as mapped out by the Special Rapporteur, was a suitably graduated regime of responsibility and countermeasures.

11. Was there, then, any rationale for creating the notion of crimes of States? The consequences of article 19 revealed a mixture of the trivial, the wrong and the confusing. It was of little importance to fiddle with the applicability of restitution, and possibly jeopardize the political independence of the wrongdoing State, but the rejection of punitive damages was a more serious matter. In the Commission’s discussion of punitive damages over the years, strong opposition to the concept had emerged. It was incorrect to suggest that non-recognition and the duty not to aid and abet were specific to a special category of acts designated as crimes: those obligations applied much more broadly, as the Special Rapporteur and he had already pointed out. Was there any logical or rational defence for embracing crime but not accepting punitive or exemplary damages? The frequent answer was that “crime”, as used in article 19, did not really mean crime in the usual sense. That brought to mind a refrain from Humpty Dumpty, a nursery rhyme, to the effect that words meant not what they seemed to mean but what the speaker wanted them to mean. It was also asserted that crimes, used in that special sense, would act as a deterrent. Why should they, in the absence of punitive damages?

12. Even if the notion of crimes, or whatever euphemism Mr. Pellet chose to concoct, was plausible, was it a necessary or even useful idea? Acts involving a threat to the peace, breach of the peace or acts of aggression were covered by the regime under the Charter of the United Nations. He asked how one would trigger an obli-

<sup>6</sup> *Yearbook* . . . 1993, vol. II (Part One), document A/CN.4/453 and Add.1-3.

<sup>7</sup> See *Yearbook* . . . 1983, vol. II (Part One), p. 12, document A/CN.4/366 and Add.1, para. 65.

<sup>8</sup> See *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, 103rd meeting, p. 440.

gation to cooperate: by a finding of crime; and by whom. If the notion of crime was taken beyond what was already covered in the Charter regime, it would appear to require an authority to determine the criminal character of the act. He was not suggesting that the Charter regime spoke to questions of State responsibility. The measures envisaged under Chapter VII were not forms of punishment: they were means to bring about the restoration of peace. He was suggesting, however, that the existence of the Charter regime removed what some had cited as the rationale for crimes of States.

13. Without wishing to launch a polemic, he wished to state that he regarded the description of the measures on Iraq under Security Council resolution 687 (1991) of 3 April 1991 as “quasi-criminal” as sloppy and misleading. He did not believe those measures were punitive in the normal sense. Iraq held the key to free itself from the painful economic measures implemented pursuant to Article 41 of the Charter of the United Nations. No one had expected Iraq’s failure to cooperate with the United Nations Special Commission and IAEA to drag on for so many years. The measures required to restore and maintain peace when dealing with a State that had used poison gas against its own people, had attacked Iran and had tried to swallow Kuwait could not be simple. But it was not a question of crime and punishment in any sense that careful lawyers should perceive. The argument was that the notion of crimes was progressive and that those who wished to remove it from the draft were trying to take a step back. But a step back from what? Article 19 had been a step in the wrong direction. The proponents of the article had given no reason why it would be a better world if the notion of crimes of States was invented. However, such an invention would provide the basis for exacerbating disputes among States, which would be able to call each other criminals more readily and then cite the Commission as authority. The notion of *erga omnes* violations would be further confused. The pressure for progress in improving the institutions governing the criminal responsibility of individuals would be eased. But he failed to see any real benefits from what the Republic of Ireland had called a quantum leap, in its comments under article 19, in the comments and observations received from Governments (A/CN.4/488 and Add.1-3).

14. In short, the term “crime” was at best misleading. He found no basis in law for a qualitative distinction between breaches of international obligations, and thought the existence of Chapter VII of the Charter of the United Nations diminished the need for such a distinction. It would be more useful to focus on the questions of scope, the directly and indirectly injured parties and the nature of their rights. Article 19 had no good consequences and had the potential to cause harm. The sooner it was extirpated, the better. He personally did not believe that there were distinct regimes of State responsibility, but if, as seemed unlikely, a majority in the Commission decided in favour of two regimes, at least the terms “delicts” and “crimes” should be deleted. If, as he hoped, the Commission opted for a single regime of responsibility, there would be no need to apologize for doing so and to urge that the question of crimes be reopened in future.

15. Some day the members of the Commission—or more likely, the participants in the International Law

Seminar—might live in a world that would tolerate the existence of an institution to adjudicate on whether a State had committed a crime. The world of today, however, regarded the idea as something that States would never accept. It was a world in which less than half of all States accepted the jurisdiction of ICJ under article 36 of its Statute, and many that accepted it did so with reservations. The world of today could not handle the notion of crimes of States, even if it made sense. To ask States to give more than they could or would deliver was not progressive: it was subversive of the existing legal order.

16. Aside from the conceptual defects, there were political obstacles. Deleting article 19 would not prevent future consideration of the concept of crimes of States. Yet he could see no reason to encourage the consideration of the concept, whether as an element of State responsibility or otherwise. If the rationale was to avoid an *a contrario* conclusion that deletion of article 19 was without prejudice to the possible utility of the concept of crimes in some other context, such a decision could be rested on the grounds that the Commission was dealing only with the general law of obligations, which, as the Special Rapporteur noted in paragraph 71 of his first report, most legal systems treated separately from crimes.

17. Mr. GOCO, saying that he did not wish to enter into a mini-debate but was simply requesting clarification, recalled that the Nürnberg Tribunal had indicated that crimes “against international law are committed by men, not by abstract entities and that only by punishing individuals who committed such crimes could the provisions of international law be enforced.”<sup>9</sup> Was a State to be considered an abstract entity in that sense—namely, as not subject to criminal liability?

18. Mr. ROSENSTOCK said he answered in the affirmative. It seemed a valid conclusion, although it remained to be seen whether historical analysis would reveal that the judges at Nürnberg had intended the phrase to refer to a State, and not to any other institution or organization.

19. Mr. ECONOMIDES said Mr. Rosenstock was passing severe judgement on article 19. True, the crimes envisaged therein were not accompanied by the usual penal consequences. The Commission was, however, timidly trying to break new ground. The term “crime” was not perhaps the most appropriate, but efforts were being made to establish certain obligations of an international character and they were not devoid of merit. Not recognizing an illegal situation, ending aggression and promoting co-operation among States to expunge the consequences of a crime were all fruitful ideas. They spoke of a growing spirit of solidarity among members of the international community and an attempt to act as a community in accordance with a notion of international public order. It was a positive and promising development and the start of a movement towards an obligation of solidarity among States.

20. Mr. ROSENSTOCK said he had no difficulty with the notion of *erga omnes* obligations—owed to States as a whole—but merely thought it was not productive to

<sup>9</sup> See 2532nd meeting, footnote 18.

plunge into the well of State crimes, which would be unaccompanied by punishment, since such a move would not be supported. His concern was that it might be inferred that non-recognition of an obligation to cooperate was something specific to crimes. That was not true, as it was important in many other circumstances, not least of them being situations involving the obligation not to recognize the acquisition of territory by the use of force. Conversely, there were many acts—which could not be designated as crimes—that States should not aid and abet and which required cooperation among States in order to confront them. Crime was dangerous if applied to non-recognition and the obligation to cooperate because of the unavoidable *a contrario* implications. He feared that the notion of crimes actually weakened the scope of *erga omnes* obligations in general and did nothing to advance the difficult concept of *jus cogens*. There were ways other than inventing the notion of State crime in order to underscore the need for the international community to act in concert.

21. Mr. CRAWFORD (Special Rapporteur) said he endorsed the comments just made by Mr. Rosenstock. As to Mr. Economides' remarks, the debate was not at all about solidarity versus sovereignty: everyone accepted the concept of solidarity among States. It was his hope that the debate would culminate in the establishment by the Commission of a working group that would, for the remainder of the session, try to elaborate the implications of solidarity for parts one and two of the draft articles. A very constructive effort could be made to spell out what solidarity entailed for the international community as a whole. Conversely, it would not be helpful if the work on the topic was forced into the straitjacket of a dichotomy between crimes and delicts. Mr. Pambou-Tchivounda had quite rightly pointed out (2535th meeting) the drawbacks of the notion of delicts, and he would add that one and the same act could constitute either a delict or a crime, in relation to different individuals. The implications of that rigid dichotomy must be carefully explored, including through the working group that he would like to see established, but in any event, the Commission's work must not be further delayed. That would most certainly be the result if the dichotomy was maintained, as articles 1 (Responsibility of a State for its internationally wrongful acts), 3 (Elements of an internationally wrongful act of a State) and 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity), *inter alia*, would necessarily have to be supplemented.

22. Mr. LUKASHUK said he had gained the impression that the Commission had reached an impasse and that continuing the discussion was of no avail. Two opposing viewpoints could be discerned, but neither commanded sufficient support for adoption. The task therefore should be to seek a compromise that would be acceptable to the Commission as a whole. He believed that that was possible by establishing a special category of the most serious offences, one which would include genocide and aggression, and by agreeing that procedural matters would be resolved in keeping with the principles of the Charter of the United Nations. Other questions could be left for future discussion. However, the achievements of the past must not be jettisoned.

23. Mr. DUGARD said he endorsed that appeal for compromise. The Commission appeared to be evenly divided on the issue. He would like to know if Mr. Rosenstock could accept the proposal by the Special Rapporteur to insert a saving clause, making it clear that the question of State crimes was being deferred for further consideration. The clause could be drafted in such a way as to indicate that the Commission was not rejecting the notion completely but was putting it aside so that it could get on with its second reading of the draft articles.

24. Mr. ROSENSTOCK said that if such a compromise was prejudicial to neither side in the debate, he could accept it.

25. Mr. PAMBOU-TCHIVOUNDA said he fully endorsed the recommendation made by the Special Rapporteur, which took account of the fact that the Commission had not delved deeply enough into certain matters, specifically, the requisite amendments to articles 1, 3 and 10 if article 19 was to be retained. The discussion had truly brought out a number of interesting and positive ideas.

26. Mr. CRAWFORD (Special Rapporteur) said it was sometimes asserted that the group of members in the Commission opposed to the notion of crimes was very small. That remained to be seen, but he could say that Mr. Brownlie was opposed to it, for reasons along the lines of those argued by Mr. Rosenstock. There was a real impasse and, as Special Rapporteur, he felt that he had to raise the issue. He wanted the second reading to move forward and that meant confronting the reality of the division in the Commission.

27. Mr. Sreenivasa RAO said that Mr. Rosenstock had raised fundamental issues. Procedural questions could be worked out, but as Mr. Kateka had stated recently (2534th meeting), even procedure had substantive implications. There could be no compromise on differing views of the world.

28. Crimes had always been committed and would continue to be committed in the future. The word "crime" had connotations of violence and condemnation by world opinion. Such acts could not be placed on the same footing as normal delicts, which were wrongs and were dealt with separately. Hence it was neither realistic, proper or accurate to regard crimes as grave delicts. He did not understand why in 1998 the Commission no longer recognized an approach which it had approved in 1976. Surely the conduct of States had not improved so much as to make the concept of crimes irrelevant. On the contrary, the world had become even more dangerous. Crimes were committed at the international level, just as they were at national level. However, the concepts of *jus cogens* and *erga omnes* were not designed to deal with crimes, though they could have certain implications. But the members had a goal to pursue, within certain time limits. The Special Rapporteur had made a compromise in his presentation, and he could go along with it.

29. Mr. SIMMA, referring to Mr. Dugard's proposal, said that a saving clause in favour of something which did not exist made no sense. A true concept of crimes as the former Special Rapporteur, Mr. Ago, had had in mind did not exist, and a saving clause was therefore unacceptable.

He suggested that a phrase should be inserted in the commentary saying that, by confining itself to the law of obligations, the Commission did not intend to preclude further developments with regard to what he personally would call true crimes.

30. Mr. AL-KHASAWNEH said that Mr. Rosenstock had made a number of important points. He agreed that the duties of solidarity should be corrected in the draft, because it was plainly wrong at the moment to confine the duty of non-recognition to crimes. He shared Mr. Rosenstock's view that crimes without punishment made no sense. But if the Commission was to have a working group on solidarity, would it be limited to correcting matters which should in any case be corrected, or should it reflect the fact that, as Mr. Rosenstock had said, there was no recognition whatsoever in international law of the idea of State crimes? Others thought that some recognition did exist. He did not believe anyone would affirm that the concept was as firmly established as that relating to delicts. He referred in that connection to the memorial submitted by the Government of the United Kingdom in 1947, in the *Corfu Channel* case.<sup>10</sup> The action of Albania had been defined as an international delinquency. He did not know whether it would help if the term "delinquency" was used instead of "crimes".

31. Hence, there was disagreement on the degree of recognition which international law currently gave to the idea of crimes and to the extent to which that signified progressive development or codification. It was never easy to distinguish progressive development from codification. Any compromise should concern the elaboration of a fully-fledged concept of crimes with punishment—which should be set out in an optional form—and the development of the rest of the topic concurrently, leaving it to States to take the final decision. One reason for that assertion was that the unity of purpose of the law of State responsibility, at least under the objective theory of State responsibility, would simply collapse. The other reason was that the momentum of three decades of work would be lost. In his view, that was the real compromise.

32. Mr. THIAM said that he had always been opposed to the concept of State responsibility. What compromise could be found to reconcile the position of those who maintained that State crimes existed and those who said that they did not?

33. Mr. GOCO said it was premature to say how many members of the Commission were in favour of the notion of State crimes and how many were opposed to it. That would become clearer once all members had expressed their views.

34. Mr. ADDO, commending the Special Rapporteur for a balanced and incisive first report, said that he was in entire agreement with much of what the Special Rapporteur said about deleting article 19 from the draft, and unhesitatingly endorsed his recommendation, which represented the most pragmatic way of looking at the issue at hand.

35. If some members supported the idea of deleting article 19 it was because they had weighed up the pros and cons before reaching that conclusion, and not because they had been intimidated, as Mr. Pellet seemed to suggest. They had minds of their own and had the capacity to make reasonable choices without prompting from anyone.

36. The commentary to article 19 made it clear that an international crime was not the same as a crime in international law, pointing out that States were responsible for international crimes, whilst individuals bore responsibility for crimes in international law. He found that rather puzzling. The former Special Rapporteur, Mr. Ago, himself had warned that the international crimes of the State to which he had been referring must not be confused with crime under international law: "war crimes", crimes against the peace, crimes against humanity, and so on, which were used in a number of conventions and international instruments to designate certain heinous individual crimes for which those instruments required States to punish the guilty persons adequately.

37. In the first place, the distinction drawn between crime and delict was not necessary. Secondly, the contours of the said crimes of State had not been well laid out. The crime lacked specificity. The definition given was confusing in the extreme and most unhelpful for the indictment of any individual or State. A crime was a serious matter and must therefore be defined with precision, something which article 19 failed to do. Instead, it made the crime dependent on what the international community said or recognized. How certain was it that the international community would recognize the said State crimes? The article stipulated that a wrongful act would be an international crime only if so recognized by the international community as a whole, something that required unanimity of decision on the part of States, which might be difficult if not impossible to achieve. But at the twenty-eighth session, in 1976, the members of the Commission had stated, in paragraph (61) of the commentary to article 19, that that did not call for unanimity but rather for the agreement of all the "essential components" of the international community.<sup>11</sup> Could those who advocated retaining article 19 please indicate who constituted the essential components of the international community today and what the criteria were for selecting them? The disturbing thing about "crime" as spelled out in article 19 was that, apart from a circular and illusory definition, the draft did not deal with the legal consequences of such crime. Properly speaking, a crime must have penal sanctions. That was not the case with article 19. He did not know of a single example of criminal punishment imposed on any State for an alleged crime. If no criminal penalties were called for under the said international crime of the State, then it did not qualify as a crime.

38. Admittedly, some internationally wrongful acts were more serious than others, but that did not necessarily make them crimes. They could be internationally wrongful acts of a serious nature which could be compensated for by damages reflecting the serious nature of the acts.

<sup>10</sup> *I.C.J. Pleadings, Corfu Channel case, Judgment of 9 April 1949*, vol. I, p. 40.

<sup>11</sup> See 2532nd meeting, footnote 17.

39. If punitive damages were all Mr. Pellet required for his defence of article 19, then he could safely abandon the distinction between delict and crime and just stick to an internationally wrongful act of a serious nature, and the exemplary or punitive damages that he considered appropriate for a State crime could be subsumed under a delict and the general law of obligations. Personally, he thought punitive damages flowed from delicts, not crimes, which must of necessity have penal sanctions; otherwise, there was no point in calling such acts crimes. In speaking of a delict, he meant both contractual and tortious situations and, indeed, the general law of obligations.

40. Mr. Pellet, supported by Mr. Kateka, had proposed changing the word "crime", but neither of them had indicated what word should replace it. More was involved than merely changing names. Would a change of name make such acts something other than crimes; would they become delicts, or something else? What would the resulting legal consequences be? Mr. Pellet had said that State responsibility was neither civil nor criminal, but international. What did that mean? Compensatory damages flowed from delicts and the general law of obligations and criminal penalties flowed from crimes, but what was it that would flow from Mr. Pellet's "international" stance?

41. The focus in articles 51 to 53 was mainly on collective sanctions. Article 53 (Obligations for all States) only called for solidarity of States and imposed obligations on all other States in their dealings with the so-called criminally responsible State. They were not to render it assistance or recognize the situation created by the violation as legal. Actually that added very little to what was expected of States under the draft rules on liability for delicts. They were not criminal penalties. He had tried hard to be persuaded by Mr. Pellet's observations but parted company with him and those who endorsed his line of reasoning. Instead, he lent support to the Special Rapporteur and urged his colleagues to do the same, because the best way forward was the path taken by the Special Rapporteur in his first report and recommendations.

42. The Commission should not repeat the mistake it had made some years ago in connection with reservations to treaties. The General Assembly, seeking an advisory opinion from ICJ on the question of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, had also invited the Commission to study the question of reservations to multilateral conventions from the standpoint of both the codification and the progressive development of international law.<sup>12</sup> Even though the Court had rendered an opinion in 1951,<sup>13</sup> in the same year the Commission had considered that the criterion of the compatibility of a reservation with object and purpose, applied by the Court, was not suitable for multilateral conventions in general.<sup>14</sup> In other words, it had recommended reverting to the traditional unanimity rule. The report of the Commission to the General Assembly on the work of its third session, in 1951, had met with a

mixed reception in the Assembly and the outcome had been a neutral resolution requesting the Secretary-General to conform his practice to the advisory opinion given by the Court.<sup>15</sup> It had taken the Commission 11 years to see the obvious, for by 1962 it had proposed the flexible system<sup>16</sup> which, with minor modifications, was currently embodied in the 1969 Vienna Convention.

43. The Commission should not repeat the process its predecessors had gone through. It should delete article 19. It should not mar the draft, which had taken 40 years to produce, by retaining an article that had no place in a draft dealing with the general law of obligations. The idea of the former Special Rapporteur, Mr. Ago, should be developed in a proper manner outside the draft, as argued by the Special Rapporteur.

44. He failed to understand Mr. Pellet's remark that the Special Rapporteur was supposedly attempting to kill Mr. Ago's concept of State crimes. The Special Rapporteur was simply saying that leaving the concept of State crimes among draft articles on the general law of obligations was an oddity and possibly even an aberration. Mr. Ferrari Bravo had admitted that, although the concept of State crimes was in the making, it was still vague.

45. The Special Rapporteur had made it perfectly clear in his recommendation that deletion of article 19 was without prejudice to possible future development of the notion of international crime, either as a separate topic for the Commission, through State practice or through the practice of international organizations. Nothing was to be lost by doing away with article 19, as almost all the crimes referred to in article 19, paragraph 3, were covered by the draft Code of Crimes against the Peace and Security of Mankind,<sup>17</sup> and they had found jurisdiction in the draft statute for an international criminal court.<sup>18</sup>

46. The concept of the former Special Rapporteur, Mr. Ago, should be subjected to a rigorous reappraisal to determine its feasibility for current purposes. In doing so, the Special Rapporteur was not attacking "crime" or doing away with Mr. Ago's idea. Whatever merits the idea might have had in the past, developments in the meanwhile were such that it might no longer have any practical utility if left unchanged. It would be more worth while to move ahead with the concept of the international criminal responsibility of individuals, an area in which significant progress had been made. The Commission had adopted 20 articles of the draft Code of Crimes against the Peace and Security of Mankind, which incorporated many crimes that featured in the Ago concept underlying article 19, for example, aggression, genocide and crimes against humanity, including slavery. Hence, what might be lost in article 19 was already covered in both the draft Code and the draft statute. Accordingly, the Commission could safely sound the death knell of article 19.

47. He understood Mr. Pellet to say that the Ago concept would make it possible to deal with the people at the very highest level who planned and executed acts of

<sup>12</sup> General Assembly resolution 478 (V), paras. 1 and 2 (a), respectively.

<sup>13</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15.

<sup>14</sup> *Yearbook . . . 1951*, vol. II, p. 128, document A/1858, para. 24.

<sup>15</sup> General Assembly resolution 598 (VI), para. 3 (a).

<sup>16</sup> See *Yearbook . . . 1962*, vol. II, pp. 159 et seq., document A/5209.

<sup>17</sup> See 2534th meeting, footnote 10.

<sup>18</sup> See 2532nd meeting, footnote 7.

aggression and genocide. He was not too sure about that. He was sure, however, that article 7 of the draft Code (Official position and responsibility), which extended the principle of criminal responsibility to heads of State or Government, took a clearer stand in the matter. As noted in paragraph (1) of the commentary to article 7, it would be paradoxical if those individuals who were in some respects the most responsible for the crimes covered by the Code could invoke, and hide behind, State sovereignty. The draft statute—to be the subject of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, to be held at Rome from 15 June to 17 July 1998<sup>19</sup>—contained similar provisions. Further, although article 19 had not been adopted, a former head of Government had recently been convicted by the International Tribunal for Rwanda<sup>20</sup>—a conviction secured on the basis of rules similar to those formulated in the draft Code and in the draft statute.

48. The notion of State crimes was unnecessary. States, after all, were made up of people and people who planned and executed heinous acts of States should not be spared, whatever their rank. They were the people who must be targeted, as was admirably demonstrated in the draft Code and the draft statute. Their diabolical crimes would not escape punishment. The Special Rapporteur's recommendation, far from being a backward step, as suggested by Mr. Economides, was a move in the right direction.

49. Those who advocated that article 19 should be retained must realize that they were sowing the seeds for the destruction of the entire draft, which had taken more than 40 years to produce. If the article were to be retained, a whole host of procedural provisions would have to be incorporated in the draft to deal, for instance, with a possible prosecuting agency, complaints system, rules of defence and evidence, arrest, bail and release. An international judicial authority would also be required with compulsory powers to determine guilt and matters pertaining to sentence. The result would be complete chaos. He therefore agreed that Mr. Pellet's arguments in defence of the notion of State crime were totally flawed. As the Special Rapporteur had made quite clear, any future development of that notion could be achieved outside the existing draft articles, which should be acceptable to those who favoured the Ago concept.

50. When the occasion so required, bold action was necessary. The Special Rapporteur's task was a daunting, but not impossible—not impossible, because he had the capabilities to deal with it, but daunting, because those who advocated that article 19 should be maintained had not provided him with any guidance on how the concept of State crimes should be developed and applied. They had merely outlined the principle. It was embarrassing that it had taken 40 years to develop the draft articles, but it would be little short of scandalous if still more years were needed in order to develop the concept of State crimes.

51. He could not agree with Mr. Simma about the need to develop the *erga omnes* principle as laid down in arti-

cle 19, since that would give rise to certain problems. In the first place, the dictum on the principle handed down by ICJ in one case was not, in his view, meant to cover absolutely everything. For a proper understanding of it, the context in which it had been pronounced must be examined closely. It was clear that the *erga omnes* principle had more to do with *locus standi* than anything else, in other words, with the interest and standing of States in a particular case.

52. Another case in which the *erga omnes* concept had been invoked, in 1966, had been brought before ICJ by Ethiopia and Liberia against South Africa in the *South West Africa* cases for violation of the League of Nations mandate in connection with the treatment of the inhabitants of Namibia. Ghana had been very much involved in bringing that case before the Court. The Court had denied that Ethiopia and Liberia had a legal interest or the standing to act in that case and had described their claim as analogous to the *actio popularis* in Roman law. Both cases were equally valid. They were not binding, but they did have persuasive authority. He did not, however, think it was implicit in the Court's dictum that any State had a right to bring an action to protect a "public" or "collective" interest of the community.

53. He had a number of nagging doubts in that connection. For instance, such a right could surely not be exercised unless the respondent State agreed specifically to jurisdiction or had consented to compulsory jurisdiction under article 35, paragraph 2, of the Statute of the Court. A number of questions then arose. If the category of potential plaintiffs was increased, would there not be a proliferation of legal actions? Would States be more reluctant to submit in advance to the jurisdiction of the Court? Would States which deemed that they had a legal interest in vindicating the community or collective interest assert that interest outside the judicial arena, for instance, in international forums? Would they take countermeasures, unilaterally or jointly, against what they perceived to be the offending State or States? Was there any danger that, in the absence of judicial control, every State could become a self-appointed policeman of the international community in the name of an *erga omnes* obligation?

54. All those problems made him even more hesitant about embracing the *erga omnes* principle as set out in article 19. In particular, the principle should not be stretched as it had been in the article. A claim for compensation by a State that had not suffered material damage did not seem to him to be right and proper. In passing, he would note it was somewhat ironic that those who, at the forty-ninth session, had argued so strenuously against international liability for massive environmental pollution were currently prepared to make that same massive pollution a crime under article 19, paragraph 3 (*d*).

55. It was important not to overload the draft articles, which, with the commentaries, already made for somewhat cumbersome reading. He was, however, persuaded by the Special Rapporteur's arguments as set forth in his first report and oral introduction and favoured deletion of article 19 and, as a consequence, of articles 51 to 53.

<sup>19</sup> See 2533rd meeting, footnote 8.

<sup>20</sup> *The Prosecutor v. Jean Kambanda*, case No. ICTR-97-23-DP, indictment of 16 October 1997.

56. Mr. PAMBOU-TCHIVOUNDA said Mr. Addo had stated that it was people who were the leaders of States and that States themselves were an abstraction. Did that mean he was prepared to replace the word "State", throughout the draft articles, by, for example, the words "minister", "President of the Republic" or "head of Government"? In other words, should the draft be modified to attribute responsibility for any acts deemed to be wrongful or involving fault, as understood in the traditional sense, to the leaders of States?

57. Mr. ADDO said that he had been referring to crimes, not delicts or the general law of obligations. The idea of State crime did exist, but it had yet to be generally accepted. His point was that the Commission could not wait interminably for that idea to be developed. If leaders of States could be punished under the Code, why not do so, leaving the principle of State crimes to be developed outside the draft articles?

58. Mr. SIMMA said that the best way of dealing with the matter would be to adopt the Special Rapporteur's proposal for the establishment of a working group to explore the implications of *jus cogens* and *erga omnes* obligations, which would do much to dispel the concerns of those who defended the notion of State crime.

59. Mr. GOCO said he would like to know whether Mr. Addo objected basically to the concept of State crime or whether he merely thought that article 19, though imperfect, could be improved if the crimes attributable to a State were defined. Mr. Addo had also mentioned corporate liability but, whereas a corporation could be wound up if its officers were charged with a crime, no matter how heinous the crimes a State had committed, it continued to exist with all its essential components: territory, population, sovereign authority. Did Mr. Addo believe that, if the draft articles were suitably amended, a State could be charged with a crime or a wrongful act committed in violation of international law?

60. Mr. ADDO said that the concept of State crime, though in the making, was not yet fully developed. Consequently, while he was not totally opposed to it, in his opinion, it had no place in the general law of obligations and should be discarded from the draft. So far as corporate liability was concerned, even if a company was wound up, the individuals responsible for, say, fraud could still be charged on that account. An analogous situation had arisen in the case of the former Rwandan head of Government who, though he had gone into hiding, had been caught and brought to trial on the basis of rules similar to those laid down in the draft Code. It would be a waste of time to incorporate something so indeterminate as the concept of State crime in the draft on State responsibility, even with the proviso that the concept would be developed further. Of course the Commission could develop it, but not in the current draft.

61. Mr. KUSUMA-ATMADJA said he had been pleased to hear that the Special Rapporteur was open to any suggested adjustments. The world community was passing through a transitional phase, moving away from purely State relationships towards a more open system involving the responsibility of the individual. Mr. Al-Khasawneh's statement had made a very useful contribu-

tion in that connection and had been followed by others in the same vein. It was not necessarily true, however, that the distinction between crimes and delicts had to be maintained. The main problem was that it would take a lot of time to adjust to changing conditions, for which reason he favoured a "soft" law approach rather than a hard-line approach for which the international community was not ready. He might be rebuked for being on the side of the major industrial Powers but that was not so, for he was present in the Commission in his private capacity. The irony was that, if the events in Indonesia over the past 32 years were to be characterized as a crime of the State, then its successor might inherit the problems, which would be unfair. For that practical reason, the concept of State crime could not be incorporated in the draft on State responsibility. It would also be necessary to specify which crimes came within the purview of the concept of State crimes; at the same time it had to be recognized that the power of lawyers to do something in such circumstances was limited.

62. Mr. YAMADA, commenting on the distinction between criminal and delictual responsibility, said that he endorsed the Special Rapporteur's conclusions, as set forth in paragraph 95, advocating that article 19 should be deleted from the draft on State responsibility. As to the inclusion of the concept of a crime of the State, he wished to be associated with many of the points made by Messrs. Addo, Dugard, Kusuma-Atmadja and Rosenstock. While he appreciated that there were different categories of internationally wrongful acts, involving breaches of *erga omnes* obligations and breaches of obligations under bilateral contracts, and did not deny that some internationally wrongful acts could be categorized as a crime of a State, the categorization of wrongful acts as such was not at issue. What was at issue was whether the category of a crime of a State should be introduced into the regime of State responsibility, and the State pursued for its responsibility for such crimes. His answer was in the negative.

63. The Commission had embarked at the twenty-eighth session, in 1976, on an ambitious project which included the concept of a crime of State set out in article 19 of part one. When it had come to deal with the legal consequences for wrongful acts in part two, however, it had been unable to provide for punitive damages for such crimes, let alone for fines or other sanctions. In his view, the Commission's decision at that time merely reflected the realities of the current state of affairs. As yet, there was no adequate State practice in the matter and no procedure for determining with authority whether a crime of State had been committed. Nor was there any institution fit to enforce criminal justice for State crime in the international community.

64. Although he was perfectly aware of the need to exercise caution in drawing analogies between national and international law, he firmly believed that legal terms must be used to express a concept that was broadly similar in the two cases. The term "crime"—entailing criminal responsibility—was a well-defined concept in national systems of criminal justice, but it should not be used in the context of international law unless provision was made for criminal responsibility in the regime of State responsibility. Naturally, the international community must take action to suppress such abhorrent State crimes as aggress-

sion, genocide and war crimes, but the regime of State responsibility should not be expected to figure prominently in that endeavour.

65. In countering organized crime, national Governments mobilized the political and administrative regime to take deterrent action and dismantle the organizations involved, the criminal justice regime to punish individual offenders and impose penalties, and the civil responsibility regime to redress the damage incurred by victims. Each regime had a limited role and operated in conjunction with the others.

66. In the international sphere, where a State engaged in ethnic cleansing of a minority population, thereby committing the crime of genocide, the Security Council was the political institution authorized to take action either under article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide or under Chapter VII of the Charter of the United Nations. Although it had failed to do so in Cambodia and Rwanda, and its freedom of action was impeded by the veto system, those were defects to be remedied by the United Nations itself and not by a regime of State responsibility.

67. A criminal justice regime for the crime of genocide was being developed. The Convention on the Prevention and Punishment of the Crime of Genocide required the contracting parties to punish perpetrators and the proposed international criminal court was expected to establish criminal responsibility in the case of individuals. Although article IX of the Convention spoke of the responsibility of a State for genocide, it did not, in his view, refer to criminal responsibility. He would nevertheless submit that the concept of criminal responsibility of States already existed in embryonic form and he would have no objection to initiating work on the subject, provided it was kept separate from work on State responsibility.

68. The role of the State responsibility regime vis-à-vis the crime of genocide was more or less analogous to that of the national civil responsibility regime, namely to establish the civil responsibility of States to redress the injuries suffered by the victims. He was not, of course, equating the international regime of State responsibility with that of domestic civil responsibility. The Commission must deal with the particular legal consequences of a breach of an obligation *erga omnes*. On that issue, he fully shared the Special Rapporteur's conclusion in paragraph 95 of the first report.

69. He agreed with the comments by the Governments of France and the Czech Republic under article 19, in the comments and observations received from Governments, to the effect that the law of State responsibility was neither civil nor criminal. However, that circumstance could be attributed to the fact that the international community and international law were as yet immature and he believed that international law also would and should develop in the direction of a separation of civil and criminal responsibility. For example, article 11 of the International Covenant on Civil and Political Rights already prohibited imprisonment for inability to fulfil a contractual obligation, "debtor's prison". He thought that

the international community had also grown out of the days of Charles Dickens.

70. He trusted that the Commission would solve the critical issue of the distinction between "criminal" and "delictual" responsibility in the manner recommended by the Special Rapporteur and would succeed in completing the second reading of the draft articles during the current quinquennium.

71. Mr. ECONOMIDES said that State crimes were being represented in the Commission as something non-existent or indefinable. Yet aggression had been defined as a State crime in the Definition of Aggression contained in the annex to General Assembly resolution 3314 (XXIX), which had been adopted unanimously. Surely, the Commission was duty-bound to establish wherein lay the responsibility of an aggressor State.

72. In his view, Chapter VII of the Charter of the United Nations was closely related to the law on State responsibility. In the event of a serious breach by a State of international obligations that posed a threat to international peace and security, the international community as a whole, in the shape of the Security Council, was authorized to take preventive or other measures, including the use of force. Could the Council's action in authorizing, for example, the bombardment of Iraq be described as a civil sanction rather than a criminal penalty? Several members of the Commission had already recognized that State crimes formed part of the corpus of international law, and the concept was gradually gaining acceptance, even in ICJ. If the Commission overlooked that development, it would be failing in its duty.

73. Mr. YAMADA stressed that he had not denied that a concept of State crime was in the making. He was prepared to discuss the consequent criminal responsibility of States, albeit separately from the current discussion on State responsibility.

74. Mr. THIAM pointed out that General Assembly resolution 3314 (XXIX) had been adopted by consensus, without a vote, and not unanimously. Moreover, the draft Code contained no definition of aggression because of the enormous difficulty of defining such a concept.

75. Mr. ECONOMIDES submitted that consensus had the same effect as unanimity.

76. Mr. LUKASHUK noted some inconsistency in the view that, notwithstanding the lack of any concept of State crime in international law, the Security Council was authorized to take whatever measures it deemed necessary against Member States under the Charter of the United Nations. Surely, the right to adopt such measures was based squarely on relations of responsibility, since the Council was empowered to take action only in the event of the violation by a State of particularly important norms of international law.

77. Even if the phenomenon of aggression could not be defined in legal terms, it did not follow that there was no such thing as a crime of aggression. He cautioned against adopting a narrow legalistic and sterile approach.

78. Mr. THIAM said that, when he had sought to include a definition based on General Assembly resolution 3314 (XXIX) in the articles of the draft Code,<sup>21</sup> the majority of States had objected on the grounds that the resolution was a political text and not a legal instrument.<sup>22</sup>

79. Mr. ROSENSTOCK said that the Security Council did not act in terms of State responsibility and did not impose sanctions or penalties. When confronted with a situation that posed a threat to international peace and security, it was enabled to take appropriate military or non-military measures to redress the situation. Those measures might be contrary to the interests of an innocent State or might affect a State that had committed an act viewed as contrary to international law.

80. The idea of international crimes had no basis in State practice. Mr. Thiam's description of the purely political character of the situation with regard to a definition of aggression was accurate.

81. Mr. PAMBOU-TCHIVOUNDA said he shared the view that the Security Council was a political body which followed its own bent when it came to deciding when aggression had occurred. Again, it served no purpose to draw comparisons between two entirely different things—for example, the annexation by one State of part of the territory of another and a breach of a bilateral trade agreement.

82. Mr. HE said that many States, prominent scholars and lawyers had taken issue with the Commission when at its twenty-eighth session, in 1976, it had drawn a distinction in article 19 between international crimes and international delicts. The crux of the matter was whether the concept of State crimes could be established in the international law of State responsibility and, if so, whether there was any commonly accepted mechanism to decide on the existence of a crime and the requisite legal response.

83. There was no basis in State practice thus far for the concept of international State crimes. The principle of individual criminal responsibility had been established, on the other hand, in the Nürnberg<sup>23</sup> and Tokyo<sup>24</sup> International Military Tribunals and, more recently, in the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda. It had also been codified in numerous international instruments and would be put into practice in the future international criminal court.

84. It had been suggested that traditional State practice should be brought into line with changing circumstances and that provision should be made for a concept of State crime. If the Commission chose to give priority in the area of State responsibility to progressive development of international law, it should make sure that it was acting in keeping with the wishes and concerns of States. Otherwise, the product of its efforts might fail to secure sufficient ratifications and the Commission's prestige would

suffer accordingly. The Commission should seek to combine codification with progressive development, recognizing State practice as an element of customary international law.

85. It would be extremely difficult to transplant the penal concept of crime into the realm of international law. Criminal justice presupposed the existence of a judicial system to decide whether an offence had occurred and to determine guilt. But according to the maxim *par in parem imperium non habet*, there was no mechanism that had criminal jurisdiction over States in the international community as currently structured and no central authority that could determine and impute criminal responsibility or mete out punishment. The complex regime for handling accusations of State crime proposed by the previous Special Rapporteur had been rejected by the Commission as unworkable and contrary to the Charter of the United Nations.

86. The view of advocates of the concept of State crime, namely that it would serve as a deterrent and thereby strengthen international public order, had no sound legal basis and would not be acceptable to States. However, he saw some merit in the proposal regarding obligations *erga omnes* and urged the Commission to give it further consideration.

87. He endorsed the Special Rapporteur's criticism of the fatal defects of article 19 and his recommendation that articles 51 to 53 should be deleted and article 40, paragraph 3, reconsidered in order to deal with breaches of obligations *erga omnes*. He reserved his position regarding the suggestion that the concept of "international crime" required separate treatment by the Commission or another body. There was no need to develop such a concept in view of the provisions in the Charter of the United Nations for the maintenance of international peace and security and the current vigorous action by the Security Council under Chapter VII of the Charter. The need for such a concept would be further reduced by the establishment of the proposed international criminal court.

*The meeting rose at 1 p.m.*

## 2537th MEETING

*Thursday, 28 May 1998, at 10.05 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Later:* Mr. Igor Ivanovich LUKASHUK

<sup>21</sup> See *Yearbook . . . 1985*, vol. II (Part One), p. 73, document A/CN.4/387, para. 87.

<sup>22</sup> See *Yearbook . . . 1987*, vol. II (Part One), document A/CN.4/407 and Add.1 and 2, and document A/42/484 and Add.1 and 2.

<sup>23</sup> See 2524th meeting, footnote 16.

<sup>24</sup> Charter of the International Military Tribunal for the Far East; *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 et seq.

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr.

## Cooperation with other bodies

[Agenda item 9]

### STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN, recalling that the Commission had long-standing ties of cooperation with the Asian-African Legal Consultative Committee, welcomed the Secretary-General of the Committee and invited him to make a statement to supplement the text that had been distributed to the members of the Commission.

2. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said that there were many examples of the Committee's relations with the Commission which showed how the two bodies exchanged representatives at their respective sessions. The Committee had held its thirty-seventh session at New Delhi from 13 to 18 April 1998. It had had before it 14 substantive items, but had been able to consider only some of them, including the work of the Commission at its forty-ninth session.

3. On the question of State responsibility, the Committee had considered that the draft articles on countermeasures dealt with the most difficult and controversial aspect of the whole regime. In its view, the first countermeasure which the injured State could take was not to comply with one or more of its obligations towards the wrongdoing State. Secondly, the injured State should not resort to countermeasures based on a unilateral assessment. If its assessment was incorrect, the State was running the risk of incurring responsibility for a wrongful act. A neutral State, if asked to pass judgement, would not necessarily make the same assessment as the injured State. But proper evaluation of the subject was still required in order to determine the extent to which the right of an injured State to resort to countermeasures was circumscribed by that State's permissible functions and the aims to be achieved by such measures.

4. The law relating to countermeasures had also been discussed at the Seminar on the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties, organized by the Committee at Tehran from 24 to 25 January 1998. The participants had generally agreed that the rules of prohibited countermeasures as formulated by the Commission in its draft articles on State responsibility must be applied to determining the legality of the countermeasures that were purportedly effected by the extraterritorial application of two Acts of the United States of America entitled, "Iran and Libya Sanctions Act of 1996"<sup>1</sup> and "Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996" (Helms-Burton Act).<sup>2</sup> Those Acts covered the prohibition of injury to third States, proportionality and the prohibited countermeasures listed in article 50 (Prohibited countermeasures) of the Commission's draft articles on State responsibility.<sup>3</sup>

5. As to unilateral acts of States, the Committee had observed that the Commission's objective should be to identify the constituent elements and effects of unilateral legal acts of States and to formulate rules generally applicable to them. The question of unilateral acts of States was closely linked to the question of the extraterritorial application of national laws, a subject which the Committee had recently considered and of which it had affirmed the significance, complexity and important implications. It had requested its secretariat to examine the executive orders by which sanctions were imposed on certain States, a topic that had been on its agenda since its previous session. The deliberations at the Seminar at Tehran had revealed general agreement that the validity of any unilateral imposition of economic sanctions through the extraterritorial application of national legislation must be tested against accepted norms and principles of international law: sovereignty, territorial integrity, sovereign equality, non-intervention, self-determination, freedom of trade and, specifically, the right to development and permanent sovereignty over natural resources.

6. The Committee's secretariat recognized that the extraterritorial application of national legislation was necessary in certain instances and that contemporary international law provided for its application in such instances as the performance of consular functions and the control of drug trafficking. The secretariat study was not restricted to the analysis of the legality or otherwise of any particular legislation or to the examination of the legislation of any particular State. Rather, the secretariat's task was to study the general theoretical principles of the jurisdiction of States in order to extract prescriptive principles to enable the Committee to adopt its own opinion. It could not be overemphasized that the canvas was rather large and that there had been an exchange of views at the Tehran Seminar on the legislation of a particular State only to illustrate the extraterritorial ramifications of municipal legislation.

7. Referring to reservations to treaties, he said that the Committee had organized a special meeting on the subject in the context of its thirty-seventh session at New Delhi. It had considered the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties adopted by the Commission at its forty-ninth session<sup>4</sup> and a number of documents prepared by the Committee's secretariat. Recognizing the significance and complexity of the topic, the Committee had stressed the universal applicability of the regime established by the Vienna Conventions and had proposed that the ambiguities should be removed and the gaps filled by commentaries on the existing provisions of those texts. It had recommended that the Commission should continue with its work on the topic on the basis not only of "intuitive feeling", but also of an empirical study of the behaviour of States. It had taken the view that the Commission should study the motives underlying reservations to treaties and thereafter seek to develop the reservations regime by way of "interpretative codification".

8. The Committee had raised the question whether reservations to human rights treaties were different from

<sup>1</sup> ILM, vol. XXXV, No. 5 (September 1996), p. 1274.

<sup>2</sup> Ibid., No. 2 (March 1996), p. 359.

<sup>3</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>4</sup> *Yearbook . . . 1997*, vol. II (Part Two), p. 56, para. 157.

reservations to other normative treaties. The view had been expressed that almost all treaties contained normative and contractual obligations. The Committee had also asked the question whether human rights treaties deserved to be classified in the category of treaties which admitted of no reservations. It had been pointed out that the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights had been adopted a good two years before the United Nations Conference on the Law of Treaties in 1968,<sup>5</sup> and that that Conference had not deemed it necessary to differentiate between human rights treaties and other normative instruments. The Commission could not do what a conference of plenipotentiaries had not done. Nevertheless, the members of the Committee had agreed that a distinction needed to be drawn between the two categories of instruments with respect to the regime of reservations, but they had not been able to agree with the formulation in paragraph 3 of the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties adopted by the Commission.

9. The participants in the Special meeting on Reservations to Treaties had also debated the functions, role and competence of the monitoring bodies in assessing or determining the admissibility of a reservation. Although the view of the Commission that the legal force of the findings of such bodies could not exceed that resulting from the powers given to them had met with approval, the suggestion of providing specific clauses in normative multilateral treaties or elaborating protocols to confer competence on the monitoring bodies for assessing or determining the admissibility of reservations had encountered resistance. The view had also been expressed that a strict regime of reservations with a monitoring body at its apex would detract from the objective of universal participation in the treaty, whereas the aim should instead be to promote and encourage the ratification process.

10. Paragraph 5 of the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties adopted by the Commission relating to the role of the monitoring bodies of human rights treaties had been considered unacceptable. Exception had been taken to the use of the term "monitoring body", which implied an element of surveillance, and it had been proposed that it should be replaced by the term "supervisory body". The opinion had also been expressed that the proposed role of the monitoring bodies was a dangerous proposition because States would not accept that such a body passed value judgements on the admissibility of their reservations or on their practice: that would open Pandora's box. It had also been stated that the formulation of a reservation to a treaty constituted a sovereign right of a State and that paragraph 5 contradicted that cardinal principle of the law of treaties.

11. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, the Committee had observed that the Commission had yet to find proper direction in furthering its work. It was to be hoped that the Working Group on the topic would chart out a course of action for it. Although

the title was confusing, the content of the topic was very clear. The Commission's work on the sub-topic of prevention of transboundary damage from hazardous activities should also cover the issues of liability and compensation. The Committee had concurred with the conclusion of the Special Rapporteur on the topic, namely, that the duty of prevention required States to identify activities that were likely to cause significant transboundary harm and notify the concerned States thereof and that that duty to notify included the obligation of consultation and negotiation. It agreed with the Special Rapporteur that a distinction should be drawn between a State's duty of prevention and the duties incumbent upon the operators of activities at risk. However, the Commission should give consideration to the idea of dealing with the consequences of the failure to comply with those obligations within the framework of its topic on State responsibility.

12. Mr. GOCO asked to what extent the Asian-African Legal Consultative Committee would participate in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, to be held at Rome from 15 June to 17 July 1998.<sup>6</sup>

13. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said that the Committee would be represented at the Conference by a delegation of several persons. He wanted to attend in order to be able to hold consultations with a number of States on subjects of particular concern to the countries of Africa and Asia. The Committee's secretariat had already made the necessary arrangements with the United Nations Secretariat.

14. Mr. YAMADA said that he had represented the Commission at the Committee's thirty-seventh session at New Delhi, where he had given an extensive account of the Commission's work in the past year. He had also asked the members of the Committee to comment on the discussions which the Commission had on topics referred to it. The record of his statement would appear in the report on the Committee's session.

15. Mr. Sreenivasa RAO said that he had also attended the Committee's thirty-seventh session at New Delhi. The Committee's discussions had been closely followed and several ministers of justice and senior officials of member States had spoken. The subject of reservations to treaties, which was very important for States, had been discussed at length by the specialists, as indicated in the written communication of the Committee's Secretary-General. But the most salient feature of the session had been the cooperation between the representatives of the member States and the excellent regional team of specialists brought together for the occasion. That had been an excellent initiative which had been repeated by the Seminar on the Extra-territorial Application of National Legislation: Sanctions Imposed Against Third Parties.

16. It was good to know that the Committee would soon have its headquarters in New Delhi, thereby offering a forum for dialogue not only to the States of Africa and Asia, but also to countries of other regions.

<sup>5</sup> See 2526th meeting, footnote 17.

<sup>6</sup> See 2533rd meeting, footnote 8.

17. Mr. THIAM asked what efforts had been made to promote greater participation by French-speaking countries, particularly African ones, in the Committee's work.

18. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said that the Committee had contacted a number of French-speaking countries through various channels; he hoped that the session to be held the following year in Ghana would be an occasion for establishing links with the countries of western Africa.

19. Replying to a question by Mr. SIMMA on reservations to human rights treaties, which had been considered in the course of the special meeting in the framework of the Committee's thirty-seventh session, he said that the Committee had not taken any official decision and that, in his statement, he had given an account only of the opinions expressed by the experts in their personal capacity.

**State responsibility<sup>7</sup> (*continued*) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>8</sup> A/CN.4/490 and Add.1-7,<sup>9</sup> A/CN.4/L.565, A/CN.4/L.569)**

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPOREUR (*continued*)

20. Mr. MIKULKA said that the conceptual approach adopted by the Commission in 1962 on the recommendation of the former Special Rapporteur, Mr. Ago, which had been to give priority to a definition of general rules of international State responsibility, irrespective of the content of the substantive rule breached in any given case, was, in view of its relevance, still valid.<sup>10</sup> Likewise, the distinction drawn between primary and secondary rules, despite all its imperfections, had considerably facilitated the Commission's task by freeing it from the burdensome legacy of doctrinal debate on the existence of damage or the moral element as a condition of responsibility. It would be difficult and, above all, pointless to seek another principle on which to base the structure of the draft articles.

21. By deciding to leave aside the specific content of the "primary" rule breached by a wrongful act, the Commission, as the Special Rapporteur noted in paragraph 13 of his first report (A/CN.4/490 and Add.1-7), had not intended to disregard the distinction between the various categories of primary rules—including the distinction which imposed itself almost of necessity between the rules of *jus dispositivum* and rules of *jus cogens*—or, as a result, the various consequences which their breach could entail. However, for more than two decades the Commission had studied State responsibility for "ordinary" wrongful acts and had also confined itself to bilateral relations. Article 19 (International crimes and international delicts), which had introduced a distinction between "delicts" and "crimes", had long remained the sole provision indicating the existence of a "qualitative" distinction

between secondary rules as a function of the content of the primary rules breached by the wrongful act, by reference in particular to the fundamental interests of the international community which were protected by those primary rules. But the real debate on the specific nature of those "secondary rules" had been postponed from year to year. Hence, since its twenty-eighth session, in 1976, the Commission had not been able to define the regime of so-called "crimes"—not, as some maintained, because such a task was impossible, but because the debate had not taken place. It was not until the forty-seventh session, in 1995, that it had begun to consider the question of the "content of responsibility" stemming from a breach of a primary rule whose purpose was to protect fundamental interests of the international community as a whole, as opposed to a breach of a primary rule which was not of that nature. From that time on, the debate on "crimes" had been limited to the framework of part two of the draft.

22. Thus, the provisions of part one, which, apart from article 19, had all been drafted exclusively for the purpose of dealing with "delicts", had suddenly become applicable to "crimes" as well, without the Commission having ever given further consideration to whether, in the case of "crimes", certain rules of part one should not be reformulated. That was the case, for example, with provisions relating to circumstances precluding wrongfulness. Whereas the case covered in article 19 called for "specific" consequences for crimes, moreover, article 51 (Consequences of an international crime) spoke only of "further" consequences.

23. Contrary to what was argued by some, the existing state of affairs could not be explained exclusively by the complexity of the issues arising from breaches of obligations essential for the protection of the fundamental interests of the international community and still less by the absence of such breaches in international life; it was largely the result of the lack of consistency in the approach adopted by the Commission, which, after dealing with "ordinary" breaches—"delicts"—had failed to devote sufficient attention to "crimes" on first reading. On the second reading of the draft articles, the Commission should therefore take account of a number of factors.

24. Above all, the existence of rules of international law essential for the protection of the fundamental interests of the international community as a whole and the fact that those rules were quite often breached were generally admitted today and, while it was true that the distinction established in article 19 had not been followed up in international jurisprudence, fundamental interests of the international community that were threatened by a particular wrongful act were often mentioned in various international bodies. The consideration of the consequences arising from a breach of a rule essential for the protection of those interests was covered by the mandate which the Commission had received and which it was required to fulfil. The idea of the existence of such a category of wrongful acts embodied in article 19, paragraph 2, should be maintained; article 19, paragraph 3, on the other hand, should quite simply be deleted. Although words had the meaning that was given to them and the concept of "State crime" did not intrinsically have penal connotations, the Commission might, in order to overcome the obstacles which were unnecessarily dividing it as a result of the

<sup>7</sup> See footnote 3 above.

<sup>8</sup> Reproduced in *Yearbook* . . . 1998, vol. II (Part One).

<sup>9</sup> *Ibid.*

<sup>10</sup> See 2536th meeting, footnote 16.

many misunderstandings to which the terminology of article 19 gave rise, resort to drafting techniques that made it possible to settle questions of substance without using a specific terminology.

25. The question of the specific characteristics of the "secondary rules" connected with breaches of the "primary rules" essential for the protection of the fundamental interests of the international community as a whole should be raised in relation to the whole of the draft and not only to part two. Thus, it was obvious that certain articles in part one could not be readily applied to breaches of a multilateral obligation and still less readily to breaches of obligations *erga omnes*, a category of obligations which was, incidentally, wider than that referred to in article 19, paragraph 2, given the "qualitative" differentiation between *erga omnes* rules depending on whether or not they were peremptory norms. Nevertheless, in view of the "technical" nature of the rules embodied in part one, the question arose whether, within the category of *erga omnes* rules, a differentiation based on a "qualitative" distinction of their "content" was still necessary or, more precisely, in what cases it was necessary. The second reading of the draft should make it possible to assess, article by article, to what category of "primary rules" the secondary rule embodied in the article applied.

26. As to the "content" of State responsibility for wrongful acts and, in particular, the "qualitative" distinction between the consequences of wrongful acts which endangered the fundamental interests of the international community as a whole and the consequences of other wrongful acts, he entirely endorsed the arguments put forward, in particular, by Mr. Economides, Mr. Pambou-Tchivounda and Mr. Pellet. The draft articles were and must remain not only general, but also residual; in the case of "delicts", the "specific" regime could be established by a convention designed to become universal, but it could also be established by a bilateral treaty. Likewise, the draft articles would be residual with respect to "crimes", more particularly because they could not provide in detail how State responsibility should be implemented through action on the part of the international community; in that respect, there could be different specific regimes attaching respectively, to particular "primary" rules.

27. In conclusion, referring to the problem of consistency raised in paragraph 25 of the first report and to the question considered by ICJ in paragraph 47 of its judgment in the *Gabčíkovo-Nagymaros Project* case, he stressed that the relationship between the draft articles to be produced by the Commission and the provisions of the 1969 Vienna Convention had to be clearly explained.

*Mr. Lukashuk took the Chair.*

28. Mr. CRAWFORD (Special Rapporteur) said that the expression "so-called crimes" used by Mr. Mikulka was an additional reason to hope that progress might be made in the debate.

29. Mr. Sreenivasa RAO pointed out that the Commission had grappled with the problem of article 19 since its adoption in 1976; the constituent elements of a crime, its very definition, had been strongly challenged, in particular by the Special Rapporteur. He did not think that any of

the arguments advanced, whether they concerned *erga omnes* or *jus cogens* obligations or the recognition of an internationally wrongful act as a crime by the international community as a whole, was fundamental and convincing to the point of justifying the deletion of article 19, although he agreed that its wording could be polished up. Moreover, the article defined certain important flagrant breaches of international law that could never be classified as ordinary wrongful acts. That was true, for example, of aggression, genocide and apartheid, which should be called by their name and, if they had to be qualified as crimes, they should be so qualified without hesitation.

30. The Commission had discussed at length whether wrongful acts of that kind and their consequences should be within the competence of the Security Council and the regime established by the Charter of the United Nations. But, as some had remarked, the Council, being a political organ entrusted with the maintenance of peace and security, would deal with those matters from the political angle only, since it was not a judicial organ with authority to punish. Could it be asserted that, in the absence of a competent court, such facts could be dealt with only from a political angle and that no measures of a judicial nature could be taken? The Commission could not accept such a view. In that connection, it should be noted that those who defended it had resolutely supported the idea of the competence of the future international criminal court in respect of individuals. Yet what applied to individuals should also be applicable to States.

31. The concepts developed in article 19 retained their full value. In listing the most serious crimes commonly accepted as such, the Commission had acted advisedly. The argument of generalization could not be invoked in order to demolish those concepts. Generalization permitted flexibility, made it possible to go forward. The fact that article 19 was general did not mean that it had lost its *raison d'être*.

32. He was convinced that, if only it had the will to do so, the Commission could agree on a set of common, uniform and objective standards that would apply to all nations, powerful or weak. There was no question of compromise, but only of taking account of realities. The point at issue was to prevent the suffering of peoples and, in that sense, only the concept of "crime" could play a deterrent role. Moreover, although, in the present instance, the Commission balked at the idea of defining that concept it did not balk at the idea of "punishing" States, admittedly through specific measures. The fact was that the Commission had to act in order to avoid arbitrariness and measures taken unilaterally.

33. That being said, he could accept the Special Rapporteur's proposal that international crimes should be dealt with separately, possibly at a later stage.

*Mr. Baena Soares resumed the Chair.*

34. Mr. GOCO said it was inconceivable that a State could be charged with and held responsible for a crime. A State was an abstract entity and only ever became a "criminal" State in the eyes of the international community through acts committed by individuals. How could it then be convicted, independently of the authors of a wrongful act? He cited as an example, among many

others, his own country, the Philippines, where, in the past, certain acts had been committed under martial law, apparently with the backing of the then lawful authorities, from which individuals had suffered.

35. Mr. Sreenivasa RAO said that Mr. Goco's comments went to the heart of the issue. The examples of international crimes listed in article 19 showed clearly that such acts did not result from individual conduct: they came about as a result of State policy. It would be illogical to punish such acts solely at the individual level. On the other hand, the example cited by Mr. Goco was a matter of internal constitutional law and the State could not be held accountable.

36. Mr. PELLET said that the problem of attribution was not peculiar to crimes, but arose in exactly the same terms in the case of delicts. Moreover, he did not share Mr. Sreenivasa Rao's view that the idea of "punishing" States was not unacceptable. Words did not have the same meaning in international law as in domestic law. It was not a matter of sanctions, since a sanctions regime existed under the Charter of the United Nations and the Commission had no call to concern itself with that regime in a study of State responsibility, unless it reverted to a criminal approach. The Commission must simply find a way of showing that breaches of international law were not all on the same plane and that there were basic rules affecting the international community as a whole, the breach of which entailed specific consequences.

37. He also took issue with Mr. Sreenivasa Rao, who, after dwelling at length on the importance of the notion of crime, concluded that its consideration should be deferred. That was unacceptable because the Commission would be repeating the mistake it had made under its previous Special Rapporteur, namely, beginning with a study of State responsibility in general and then considering crimes and their consequences. If it followed the same course, it would once more find itself at a dead end. He thought that the Commission should, at all costs, reach a quick decision on the question.

38. Mr. THIAM asked the Special Rapporteur what was meant by "separate treatment of crimes". He asked whether the idea was to treat it as a separate topic with a separate Special Rapporteur.

39. Mr. CRAWFORD (Special Rapporteur) said that some members of the Commission certainly seemed to support the idea of separate treatment of crimes, but no one wanted to exclude any category of wrongful acts of States from the draft articles, thereby casting doubt on the unitary conception of State responsibility.

40. Mr. ROSENSTOCK, referring to Mr. Goco's comment, said that punishing a State that was not a democracy was tantamount to punishing innocent people and forcing them to bear a burden of guilt for generations for an act in which they had in no way been implicated. While he agreed with Mr. Pellet that a decision should be taken on article 19, he feared a repetition of the past mistake of accepting the notion of crime and only afterwards, in part two, dealing with its consequences. No one denied that there were more and less serious wrongful acts, but he challenged the idea that there was a qualitative distinction between two categories. The Special Rapporteur had

shown that it was possible, without making such a distinction, to deal with the question of more or less serious breaches of international law, without drifting too far from the existing draft articles, by making substantial amendments to article 40 (Meaning of injured State). Lastly, he felt that the notion of crime had domestic criminal connotations for the vast majority of people.

41. Mr. AL-KHASAWNEH said that a qualitative distinction was necessary, if only from the point of view of reparation. Pecuniary compensation was inappropriate in the case of certain serious crimes such as genocide. As for the question of guilt, the Special Rapporteur had raised the possibility in his first report of a regime that would provide for gradual relief from the burden of guilt. It was a moral imperative for the Commission based on its sense of justice to consecrate the notion of crime; abandoning it would lay the Commission open to criticism of the integrity of its work.

42. Mr. Sreenivasa RAO, replying to Mr. Pellet, said he had perhaps been misunderstood: he was not by any means advocating the transposition of domestic criminal law to the international level. However, the most serious violations of international law needed special treatment not only in political, but also in legal terms. Besides, to ensure that the notion of crime was applied with the requisite guarantees against arbitrariness, it would be necessary to develop a system and that could be an extremely lengthy process. It would require, in addition, a community of values in the international community and a certain degree of integration which seemed to be lacking at present.

43. Mr. PELLET said that Mr. Simma and Mr. Tomuschat had shown in their courses at the Academy of International Law that "international community" was a relative idea.<sup>11</sup> The fact was that international society could no longer be viewed as an anarchic mass and there were traces of "community spirit" in, for example, the notion of *jus cogens*, which was embodied in the 1969 Vienna Convention. The notion of crime should be another example. Even if that notion was not to be used in practice, the Commission had a duty to take account of such manifestations of international community spirit at the level of State responsibility. Otherwise, it would have failed in its mandate, certainly in respect of the development of the law, but also in respect of its codification.

44. Mr. Sreenivasa RAO said that he was not denying the existence of an international community, but he thought that the degree of integration varied in terms of the ends pursued. For the purpose of the notion of crime, a higher degree of integration was necessary and there was nothing to say that the process of development would not be rapid, for example, if the proposed international criminal court was actually established at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court to be held the following month at Rome.

<sup>11</sup> B. Simma, "From bilateralism to community interest in international law", *Collected Courses of the Hague Academy of International Law, 1994-VI* (The Hague, Martinus Nijhoff, 1997), vol. 250, pp. 217-384; and C. Tomuschat, "Obligations arising for States without or against their will", *ibid.*, 1993-IV (Dordrecht, Martinus Nijhoff, 1994), vol. 241, pp. 195-374.

45. Mr. SIMMA, endorsing all of Mr. Pellet's comments, said he thought that the Commission was within a hair's breadth of a solution. The protagonists of the notion of crime seemed willing to consider any proposals by their adversaries that took their concerns into account. The latter group would therefore do well to explore the consequences for them, in terms of responsibility, of the notions of *jus cogens* and *erga omnes* obligations and to make proposals to the other camp. The question of whether or not to keep article 19 could be settled afterwards.

46. Mr. ROSENSTOCK said that he found Mr. Simma's proposal to reverse the burden of proof somewhat curious: it was not for those, such as himself, who held that State crimes did not exist to prove the usefulness of a distinction that they challenged. It would be reasonable, in his view, to delete article 19 at once and work on part two of the draft articles, with the option of returning to part one if the advocates of the notion of crime made constructive proposals on the consequences of the distinction they upheld.

*The meeting rose at 1 p.m.*

## 2538th MEETING

*Friday, 29 May 1998, at 10.10 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

**State responsibility<sup>1</sup> (continued) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>2</sup> A/CN.4/490 and Add.1-7,<sup>3</sup> A/CN.4/L.565, A/CN.4/L.569)**

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPporteur (continued)

1. Mr. THIAM said that, notwithstanding the endeavours of the authors of article 19 (International crimes and international delicts), lawyers would continue to associate

<sup>1</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>2</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>3</sup> Ibid.

the word crime and the distinction between a crime and a delict with the field of criminal law. It was inappropriate to use such terms to denote a phenomenon that was unrelated to crime. He wondered what the consequences would be if, as had been suggested, the word crime was replaced by "serious breach of an international obligation". According to article 53 (Obligations for all States), when a State committed an international crime, other States must not recognize the situation thus created. Surely, the same applied to any breach of an international obligation. States were furthermore required to cooperate in withholding assistance from the perpetrator. Such consequences were, in his view, derisory. If a crime had been committed, commensurate action should be taken, but the risk then arose of encroaching on the area of responsibility of the Security Council, which was a political body.

2. He had not found a single Government comment in the comments and observations received from Governments on State responsibility (A/CN.4/488 and Add.1-3) that was staunchly in favour of the notion of State crime. Most States expressed serious reservations on the grounds that the concept had no basis in international law. Some even viewed it as a threat to the Commission's work of codification. Under those circumstances, it might be advisable to abandon the idea entirely. Alternatively, as suggested by the Special Rapporteur, it could be taken up as a separate topic but that would require General Assembly approval and the appointment of a new special rapporteur.

3. While he understood that some members wished to take a revolutionary step comparable to that involved in the recognition of the individual as a subject of international criminal law, he feared they had little chance of success. Under article 4 of the draft Code of Crimes against the Peace and Security of Mankind,<sup>4</sup> action could be taken to establish the criminal responsibility of a State where its agents had committed a crime. Such a State could be prosecuted on the grounds of international responsibility in the traditional sense of the term, but a State could not itself commit a crime.

4. Mr. MIKULKA asked Mr. Thiam whether, in his view, States were capable of committing a wrongful act that could jeopardize the fundamental interests of the international community as a whole and, if so, whether the consequences of such a wrongful act were comparable to the consequences of, for example, a breach of a trade agreement.

5. Mr. THIAM said that a State, as a legal person, could not be the direct perpetrator of a crime. It acted through its organs, consisting of natural persons, and bore responsibility for the consequences.

6. Mr. MIKULKA said that the adversaries of the ideas of the former Special Rapporteur, Mr. Roberto Ago, clearly felt a greater need to use the word crime than did their defenders. Would Mr. Thiam agree that certain norms of international law were essential for the purpose of safeguarding fundamental interests of the international community as a whole and that breaches of such norms had occurred?

<sup>4</sup> See 2534th meeting, footnote 10.

7. Mr. THIAM said he agreed that some breaches of international law were worse than others, but it was the leaders of the States concerned who must be held criminally responsible. He had never heard of a single case of a State being directly prosecuted for a criminal act.

8. Mr. PELLET said that criminal responsibility was not the question at issue. The State was a legal person, but was not always transparent. Its leaders could be called to account only in certain cases, the cases that Mr. Thiam persisted in calling crimes. If the word “crime” was abandoned in favour of responsibility, the issue raised by Mr. Thiam would not arise, unless one rejected the idea that the State could be responsible at all, for it always acted through its agents.

9. He failed to see why a different approach was required in dealing with breaches of obligations of vital importance for the international community as a whole and breaches of other obligations.

10. Mr. ROSENSTOCK said that, while nobody doubted that some internationally wrongful acts were more serious violations of rights and obligations than others, the purpose of establishing a qualitative distinction between them was unclear. The history of the Commission demonstrated the futility of the exercise of concocting qualitative distinctions based on different notions of crime.

11. Mr. ECONOMIDES said that, while the notion of international State crime might have been considered revolutionary at the twenty-eighth session, in 1976, when article 19 was formulated,<sup>5</sup> it was more pertinent today to speak in terms of evolution in the context of codification and progressive development of international law.

12. Mr. Thiam had drawn a distinction between international criminal law and the law of responsibility. He asked whether there was any rule that prevented certain elements of international criminal law from being used in the international law of responsibility if they could serve a useful purpose and were generally accepted. He saw no reason to adopt a rigid and uncompromising position on the matter.

13. Mr. THIAM said that the elements he had mentioned had a precise meaning in their context, which was that of criminal law. The advocates of the new approach should propose an acceptably precise new terminology. The terms suggested so far were unduly vague for legal purposes.

14. Mr. PAMBOU-TCHIVOUNDA said it was distressing to hear a denial of the international responsibility of the State. Whatever the act for which a State was held responsible, its originator was in all cases a State body or even a non-State body where individuals acted in a particular fashion while the State remained aloof, refraining from adopting the conduct required by law. It was currently argued that, in the case of crimes, specific State bodies must be targeted. It was, in his view, a curious approach to adopt. One might as well dismiss the idea of international State responsibility altogether. The words employed in legal disciplines derived their meaning from

a particular usage. They were not precise in themselves. The same applied, moreover, to all scientific disciplines.

15. Mr. THIAM said he had never denied the existence of international State responsibility. He had even proposed that a State whose organs had committed crimes should be held responsible for the consequences.

16. As to article 53, in his experience of international affairs, State solidarity did not work, for example in the case of sanctions. If the Commission held that certain internationally wrongful acts should entail more serious consequences than others, more serious penalties must be prescribed and that was a matter which fell within the competence of the Security Council.

17. Mr. LUKASHUK said that aggression had been officially recognized as a State crime and the Charter of the United Nations conferred special powers on the Security Council to deal with it. Moreover, aggression was such a serious breach of international law that it could be committed only by States and not by natural persons. The draft must therefore, in his view, address the question of extremely serious breaches of international law.

18. Mr. THIAM said that aggression was committed by persons acting on behalf of the State and using its resources. A State had never been tried for aggression, but the leaders of a State had been tried, for example, at Nürnberg.

19. Mr. MIKULKA said that, if the same argument had been used at Nürnberg, the criminals who were the target of the draft Code of Crimes against the Peace and Security of Mankind would never have been arraigned before an international criminal court. One of the defence arguments of the Nazi leaders was that the trial was unprecedented, but a decision had been taken to break with the past and to institute international criminal proceedings.

20. As an example of a State being tried for an internationally wrongful act that threatened the interests of the international community as a whole, one could cite the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* brought against Yugoslavia in ICJ.

21. Mr. THIAM said that Yugoslav leaders had been brought before the Court. A State as a legal person was never the defendant in legal proceedings.

22. Mr. ROSENSTOCK said that the case mentioned by Mr. Mikulka demonstrated conclusively that the State of Yugoslavia was being held responsible for an internationally wrongful act and was not in any meaningful sense being tried for a crime. The Convention on the Prevention and Punishment of the Crime of Genocide made it perfectly clear that a State's responsibility was civil. Even the plaintiff's pleadings made the same point.

23. He was pleased with the admission that any recognition of the notion of State crime would amount to a revolution. Personally, he was not prepared to be a party to that revolution and he was sure that not many States were willing either. However, the Special Rapporteur had indicated a way out of the impasse which would not do

<sup>5</sup> See 2532nd meeting, footnote 17.

irreparable harm to those who dreamed of the day when States could be treated as criminals.

24. Mr. FERRARI BRAVO said he was in partial agreement with Mr. Rosenstock. In the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Bosnia and Herzegovina had invoked a provision in the Convention on the Prevention and Punishment of the Crime of Genocide in order to bring Yugoslavia before ICJ for allegedly having committed, or causing to commit, criminal acts. Bosnia and Herzegovina had not yet won the case, however, for the Court had ruled only on the issue of admissibility. It had acknowledged its own jurisdiction in the matter, but had indicated that it was not in a position to declare that the State of Yugoslavia was a criminal. One nonetheless sensed that the Court was somewhat uncomfortable with that position and considered that a criminal entity was involved.

25. Mr. ECONOMIDES, following up on Mr. Lukashuk's arguments, said that, as far as he was aware, whenever the Security Council took steps under Chapter VII of the Charter of the United Nations to restore the peace, those steps were taken against States, not against individuals.

26. Mr. THIAM pointed out that the Security Council was a political institution, whereas courts were judicial bodies. No comparison could be drawn between steps taken by the Council and penalties imposed by a court.

27. Mr. PELLET said that personally, he had no desire whatsoever to start a revolution. That was precisely why he believed the Commission should not speak of criminal responsibility of States. Even though such a possibility was left open under article 4 of the draft Code of Crimes against the Peace and Security of Mankind, the Commission should, in its work on State responsibility, studiously avoid any attempt at codification of the criminal responsibility of States. That should be left for the undoubtedly distant future.

28. The Convention on the Prevention and Punishment of the Crime of Genocide was not as unambiguous as Mr. Rosenstock suggested, but it did serve as a good example. The title of the Convention spoke of the "crime" of genocide, and the judgment of ICJ in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* clearly indicated that no offence under the Convention could not be attributed to a State. Quite simply, it very definitely was not a crime within the meaning of criminal law. Bosnia and Herzegovina had plainly said that it was not taking action on criminal grounds. Actually, proceedings were being brought in the Court against a State for crime and complicity in crime, but the proceedings were not penal in character. Everything Mr. Thiam had said related to a word, and not to a problem of substance.

29. Mr. ROSENSTOCK said that the Commission was continuing to go over the same terrain and that a way out of that impasse must be found.

30. Mr. RODRÍGUEZ CEDEÑO said that in any legal system, the responsibility regime was fundamental to the structure and functioning of the society to which it was

applied. The Commission had been considering the topic of responsibility since its eighth session, in 1956, when the first Special Rapporteur on the topic, Mr. García Amador, had taken up two issues that were fundamental to the Commission's work today: a broader approach than the classical notion of responsibility, which until then had been confined to damage caused to foreign persons and property; and the contemplation of various degrees within the internationally wrongful act.<sup>6</sup>

31. The current focus of the Commission's work was undoubtedly article 19, which made a distinction between international crimes and international delicts, and the matter should be carefully and realistically examined to find a viable way of moving forward, as the Commission had already done once before when, in order to get out of an impasse, it had decided to shift its study from the primary rules to the secondary rules. The Commission's discussion of the article must not be limited to codification but must also encompass progressive development of the relevant norms. While the elaboration of legal provisions responded to the imperatives of the society in which they were to be applied, it must also take into account the changes that occurred in the social environment in keeping with natural trends. International society was constantly changing, its structure improving, just as once-anarchic domestic societies had been better structured by application of the law. The concept of community, based on solidarity, was slowly gaining ground and must be taken into account in devising the legal provisions to regulate relations among States. The existence of varying degrees of international obligations and, consequently, of differing categories of internationally wrongful acts and the various consequences and regimes applicable to the violation of such international obligations, could not be ignored. The aim was not to characterize an obligation as one of result or of conduct, but to determine whether the obligations in question stemmed from a rule under an inter-subjective relationship or whether they were obligations essential to the protection of the international community as a whole.

32. Article 19 drew an unfortunate distinction between an international crime and an international delict of the State, when in fact the point at issue was the reparation of two categories of obligations and wrongful acts. Rather than place a breach of an international obligation in one of two categories, crimes or delicts, the aim should be to grade obligations from those affecting an inter-subjective relationship to those affecting the fundamental interests of the international community. A breach of a fundamental rule and a breach of a rule that was not fundamental had different legal consequences.

33. Acknowledging that distinction, the Commission should examine *erga omnes* rules in order to set out in different but balanced regimes within the draft the legal consequences of their violation. He was among those who believed that not all *erga omnes* norms were necessarily peremptory or fundamental to the existence of the international community, and that all *jus cogens* norms were by definition *erga omnes*. In any event, the Commission must carefully examine the interrelationship between

<sup>6</sup> See 2536th meeting, footnote 5.

such norms when considering wrongful acts, and in particular, very serious wrongful acts.

34. The discussion of State crimes had nearly run its course. In his opinion, such crimes did exist, as was recognized in some of the doctrine and, he would venture to say, in international practice. Naturally, a clear distinction must be made between State responsibility and individual criminal responsibility, which fell into two separate contexts. The idea of criminalizing the State should be dismissed, for there was no way that international law could assimilate domestic-law concepts that applied solely to individuals.

35. Article I of the Convention on the Prevention and Punishment of the Crime of Genocide said that genocide was a crime under international law, which did not mean that they were crimes committed exclusively by State agents. In its judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court had indicated that article IX of the Convention did not exclude any form of State responsibility, nor was the responsibility of a State for acts of its organs excluded by article IV of the Convention, which contemplated the commission of an act of genocide by rulers or public officials (see page 616, paragraph 32). However, whether or not the term “crime” was accepted, the main thing was to distinguish among the various wrongful acts a State could commit in breach by violating various international obligations and, above all, to specify the legal consequences that the various categories of wrongful acts produced.

36. The draft articles did not resolve a number of issues in differentiating various degrees of wrongful acts. In the context of an inter-subjective relationship, it was for the injured State to take action, and the damage, the causal link and the necessary compensation or indemnification were constituent elements of the regime of responsibility. When the breach was of an essential norm, or of a higher degree, it was for the community to take action—direct harm need not have occurred and the penalty was the consequence of the breach.

37. The articles should draw a balanced distinction between the two categories of responsibility, and that would require a separate regime for breaches of a norm fundamental to the protection of the international community as a whole, but the draft, particularly articles 51 to 53, failed to make clear provision for such a regime. There were a number of other gaps, including who could raise the matter of a breach, what the machinery was for determining the existence of a serious breach and how and by whom the corresponding penalties would be established.

38. The Commission had been discussing whether internationally wrongful acts in the form of crimes of aggression, genocide, apartheid, terrorism or environmental damage could be imputed to States as well as to its rulers or officials, who were subject to individual criminal responsibility. Clearly, a State, although an abstract entity, could indeed commit very serious wrongful acts, which entailed such consequences as the specific sanctions laid down in numerous resolutions of the Security Council. The Commission had asked itself whether a sanction imposed on an abstract entity was a sanction

imposed on a people or, rather, a security measure required in the interests of the international community as a whole.

39. The Commission should continue to work on the task assigned to it by the General Assembly, taking into account the diversity or gradation of obligations, the diversity of wrongful acts and the necessary differentiation between legal regimes, and leaving behind the debate about crimes and delicts. The matter of breaches of essential norms and their legal consequences must in no way be eliminated from the draft. The regime of responsibility was a unified whole, although within it there was a diversity of obligations, wrongful acts, consequences and applicable regimes. Draft articles in a field such as responsibility that related solely to the violation of norms deriving from inter-subjective relations and failed to take account of fundamental or essential norms would not only be incomplete—they would also be incompatible with the Commission’s proper role of adviser to the General Assembly in the elaboration of international law by codification and progressive development. In short, he believed that it would be difficult to move forward with the draft without finding a solution to the problem raised in article 19.

40. Mr. MELESCANU said Mr. Rodríguez Cedeño had aptly summarized the situation currently facing the Commission. Some members believed that there were international crimes for which States were responsible, while others disagreed with that view. Both sides had adduced strong supporting arguments. There was no way the Commission could move ahead in discussing the issue and Mr. Rosenstock had suggested the best course of action: to create a more informal setting for further study of the matter. The Special Rapporteur should be asked to suggest a mechanism that would enable the Commission to make further progress in rectifying the impoverished state of international law, in which the term “wrongful acts” was used for a wide variety of actions that could be of greatly differing magnitude and content. The Commission should mainly be concerned with the legal consequences of such acts.

41. Mr. CRAWFORD (Special Rapporteur) said it was indeed his intention, when the time came to sum up the discussion, to propose such an approach to further discussion of the subject matter of article 19.

42. Mr. Sreenivasa RAO said that, as he and Mr. Rosenstock had both pointed out before, the Commission was going around in circles. Some members thought a case could be made for the existence of State crimes, in other words, of crimes of a very serious nature prompted by State policy, not by personal motives. Obviously, the Commission’s intention was in no sense to impose punishment upon a State in the way individuals were punished: for example, by bringing them before a court of law. The difference between States and individuals as wrongdoers was that individuals had *mens rea*, that is to say, personal motivation based on jealousy, greed, vengeance or other factors. States, however, compelled the individuals in their service to carry out policies. The individuals in question could well be acting very much against their will, at odds with their personal motivation and with no *mens rea*.

43. Mr. CANDIOTI said that the Special Rapporteur's impeccable analysis of the issues raised by article 19 and his first report (A/CN.4/490 and Add.1-7) had prompted a fruitful debate that shed light on many questions and provided the basis for choosing the road forward.

44. To his mind, in the current state of development of the international community, account had to be taken of the fact that, alongside common or ordinary breaches by States of international obligations, there were particularly serious wrongful acts which, owing to their magnitude, the extent of the interests affected and the nature of the rule that had been violated, were of special importance and merited special treatment. On the basis of the Charter of the United Nations and of international practice, treaty law had designated aggression, genocide, war crimes, crimes against the peace, crimes against humanity, apartheid and racial discrimination as particularly serious wrongful acts. As Mr. Ferrari Bravo had rightly pointed out, with the evolution of international law, particularly of international jurisprudence, acknowledgement of such wrongdoing by States as a particular category of wrongful acts was gradually taking shape. With the development of the international responsibility of individuals for such offences after Nürnberg, it would appear inconsistent at the current time to refuse to recognize the particularly solemn responsibility of States themselves for the same type of offences, although the nature of the responsibility and the consequences were necessarily different. Such an evolution was logical and desirable, since it moved in the direction of safeguarding the supreme values of mankind, international peace and justice. But like all major achievements in international law, before particularly serious wrongful acts were fully recognized and adequately covered, a long process of maturation must take place within the international community.

45. At the time it was drafted, article 19 had been an important step in addressing the problem, and the response by States had been positive. For a number of reasons, however, the Commission's subsequent efforts had not resulted in a satisfactory definition of particularly serious wrongful acts, nor had references to such acts in other parts of the draft contributed much to the definition of a specific and coherent legal regime. The penalistic connotation of the terminology used had only complicated the handling of the topic.

46. The Commission was therefore facing two basic tasks: to decide whether to continue considering the special category of particularly serious wrongful acts, which he believed it should; and, if it did, to define as clearly as possible the criteria to be used for identifying such acts and the specific rules on responsibility that would be applied to them. If anything should be preserved from article 19, it was the basic idea underlying the particular seriousness of such wrongful acts, namely, the breach of an international obligation essential for the protection of fundamental interests of the international community as a whole. That concept took account of the need to protect the greater interests of the international community as a whole.

47. The concept was linked with, but not identical to, the notions of *erga omnes* obligations and *jus cogens* obligations. The consequences of breaches of both types of obligations could currently be given closer attention. In

order to define a regime for such offences, basic elements must be developed such as attribution of the wrongful act, circumstances precluding wrongfulness, identification of the injured State, rights and obligations of other States, means of compensation, operation of self-help mechanisms, dispute settlement and the relationship between the general regime of responsibility and special regimes. The current draft articles on those matters would have to be reviewed to determine whether they should be reorganized or more rigorously reformulated.

48. That approach did not mean that international responsibility was to be criminalized, nor that the specific field of responsibility was to be confused with other institutions or regimes. He agreed with those who maintained that international responsibility was neither strictly civil nor criminal but rather *sui generis*. He likewise concluded that the content and consequences of international responsibility for particularly serious wrongful acts must be distinguished from the powers conferred by the Charter of the United Nations on the Security Council to maintain and restore international peace and security.

49. A number of the ideas advanced so far provided fertile ground for further progress in a realistic and positive, although not unduly ambitious, way. Mr. Hafner had proposed that the Special Rapporteur should draw up a schematic outline of the consequences of particularly serious wrongful acts, and the Special Rapporteur himself had suggested the establishment of a working group to study the obligation of solidarity, which was inadequately set forth in the draft. A number of members had pointed to the desirability of clarifying the link between breaches of *erga omnes* obligations, breaches of *jus cogens* obligations and particularly serious wrongful acts. In the comments and observations received from Governments on State responsibility, the Czech Republic had made a very interesting suggestion to the effect that provisions on the consequences of particularly serious wrongful acts should be divided into one or several separate sections. The Nordic countries had indicated that the division into categories of wrongful acts must be distinct and clear. At all events, he did not believe that the Commission could eliminate the category of particularly serious wrongful acts from the topic of responsibility. That would be a step backwards in the work of building a more just and more equitable international order.

50. Mr. GOCO noted that Rosalyn Higgins, a judge at ICJ, had written in her book,<sup>7</sup> that the question of State responsibility had been on the Commission's agenda since the 1950s, but conclusion of work was nowhere in sight, the difficulties the Commission had had with the topic reflected the main different approaches, and it had been handled by a series of Special Rapporteurs, each with his own perspectives, and the work of each of them had been not so much a continuation of what had been done before as a great shift of direction. Actually, in his opinion the work that had been done was a collation of views on the subject and the Commission could currently reasonably be expected to complete the topic.

51. In its original form, State responsibility had referred only to the protection of aliens and their property. As a

<sup>7</sup> R. Higgins, *Problems and Process: International Law and How We Use It* (New York, Oxford University Press, 1994), pp. 146-147.

general rule, a State was responsible for maintaining law and order within its territory and when acts of violence occurred therein, it could be said to be indirectly responsible. For a State to be responsible, there must be an act or omission in violation of international law that was imputable to the State and resulted in injury to the claimant State either directly or indirectly through harm to a national. Hence, a State was under an obligation to make reparation to another State for the failure to fulfil its primary obligation, that of affording, in accordance with international law, the proper protection of an alien who was a national of that other State.

52. Of course, a new meaning had been attached to State responsibility; it had much greater scope and content and had even ventured into areas never explored before. The current draft contained a compendium of new subjects which might all be regarded as relevant to the progressive development of international law.

53. The word “imputable”, according to an earlier assertion, was an essential element of State responsibility arising out of an act or omission in violation of international law and ascribable to the State. Chapter II of part one of the draft articles dealt with acts of the State under international law, but instead of the word “imputable”, it employed “attribution”. Thus, the conduct of State organs, of other entities empowered to exercise elements of government authority and of persons acting in fact on behalf of the State were regarded as acts of State. It was said that every breach of duty on the part of States must arise out of the act or omission of one or more organs of the State and the question of liability of the legal person was overlaid by categories of imputability.

54. Chapter II of part one of the draft articles was eminently important in relation to State responsibility and was also essential for a clearer understanding of article 19. The basic task was to establish when, under international law, it was the State which must be regarded as acting. What actions or omissions could, in principle, be considered to be the conduct of the State, and in what circumstances must it be attributable to the State as a subject of international law? In other words, Chapter II spoke of imputability and attribution. The commentary addressed his apprehensions about the subject of article 19, namely, a State could only act through acts or omissions of individuals or groups of individuals.

55. Earlier, a point had been made about individuals playing a role in terms of liability or guilt. The classical view was that States alone were the subjects of international law, and individuals could be no more than objects of international law. The opposite view held that individuals were to be regarded as subjects, and not merely objects, of international law. The middle ground, or modern view, maintained that, while States were usually the subject of international law, individuals had to some degree also become subjects of that law. For instance, the Nürnberg Tribunal had ruled that crimes “against international law are committed by men, not by abstract entities and only by punishing individuals who committed such crimes could the provisions of international law be enforced.”<sup>8</sup>

56. The “abstract entity” was of course the State of which the individual offenders, such as its officials, were subjects. Attributing a breach of an international obligation or the commission of an internationally wrongful act to a State automatically implicated the individuals who perpetrated those acts. It was an easy matter to cite examples in recent history of atrocities committed by State leaders. In wartime Germany, a community living close to a notorious concentration camp had not known what had been happening in the camp until the war had ended. The point was that, in some situations, State leaders committed acts at the highest level of authority and the vast majority of the population was not aware of what was taking place. The leaders, or certain bodies or entities within the State whose officials had committed heinous offences, must be held responsible for their acts, which were acts of State because they were imputable to the State. However, he could not imagine the condemnation of a State as criminal. History was replete with leaders who, vested with State authority, had brought shame upon their States.

57. As to the domestic analogy, the Special Rapporteur had cautioned that the term international crime should not lead to confusion with the term as applied in other international instruments or national legal systems, but had also asserted that it was difficult to dismiss the extensive international experience of crimes and their punishments so readily. It was true that, in proposing the category of State crimes, the Commission was entering into a largely uncharted area. But the appeal of the notion of international crimes, especially in the case of the most serious wrongful acts like genocide, could not be dissociated from general human experience. The underlying notion of a grave offence against the community as such, warranting moral and legal condemnation and punishment, must in some sense and to some degree be common to international crimes of States and to other forms of crimes. If it was not, then the notion of “crimes” and the term “crime” should be avoided. Moreover, many of the same problems arose in considering how to respond to offences against the community of States as a whole as arose in the context of general criminal law (first report, para. 75). In other words, international crimes could not be seen separately from domestic crimes.

58. Did article 19 deal with acts that constituted an international crime? If not, were they wrongful acts? The moment the notion of crime was introduced, matters took on a totally different character. The substantive requirements of the penal statute must make very plain exactly what offence was imputed; otherwise no one would submit to jurisdiction. Assuming that the language was precise, prosecution of a State would be similar to prosecution of an individual, yet who in the State would face the charges before an international tribunal? Obviously, the “domestic analogy” could not be dismissed.

59. He did not fully agree with the Special Rapporteur’s reasoning, in paragraphs 83 to 86 of his first report, about criminalizing State responsibility. In his view, there had been considerable success in prosecuting the perpetrators of such crimes in question, Nürnberg being the classic example. In the case of the Nürnberg Tribunal, some had argued that indictments had been issued against certain persons because they had lost the war. In reality, however, it was because they had violated principles so essential to

<sup>8</sup> See 2532nd meeting, footnote 18.

the protection of the fundamental interests of the international community that their acts had to be regarded as crimes.

### Cooperation with other bodies (*continued*)

[Agenda item 9]

#### VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

60. The CHAIRMAN welcomed Judge Schwebel, President of the International Court of Justice, who was visiting the Commission. Judge Schwebel, a former member of the Commission, had been its Special Rapporteur on the topic of the law of the non-navigational uses of international watercourses. On behalf of the members of the Commission, he said he took great pleasure in extending him a warm welcome. His presence was a reminder of the personal links between the Court and the Commission and of the cross-fertilization between the two bodies.

61. Mr. SCHWEBEL (President of the International Court of Justice), expressing pleasure at once again being able to take part in the Commission's deliberations, said that he would give a brief account of the current range of work of ICJ. There were currently 10 cases pending before the Court, in marked contrast to the situation when he had left the Commission in 1980 to take a seat on the Court in early 1981, at which time the Court had had only one case before it.

62. One case currently was that of *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*.<sup>9</sup> It concerned a boundary dispute, which might be called the "staple" of the Court's work, but it was unusual in that it involved both land and water. The case was of immense importance to the two States concerned. Unusually, the Court had issued two judgments pertaining to jurisdiction and admissibility.<sup>10</sup> The case had quite extraordinary complications, and the substantive issues at stake were of great complexity and had given rise to lengthy pleadings.

63. Then there were a pair of cases, namely *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* and *(Libyan Arab Jamahiriya v. United States of America)*,<sup>11</sup> in which the Court had declined to issue an order of provisional measures.<sup>12</sup> It had not upheld challenges to jurisdiction and admissibility.<sup>13</sup> Obviously, the cases were of very broad interest to the international community, not only because they dealt with the construction of an important international convention designed to address acts of terrorism against international aircraft and concerned

allegations of international terrorism of the grossest kind, but also because they posed very significant issues of the relationship of the authority of the Court to that of the Security Council.

64. Fourth was the case concerning *Oil Platforms (Islamic Republic of Iran v. United States of America)*.<sup>14</sup> The Islamic Republic of Iran alleged that the destruction of certain oil platforms in the Gulf by United States forces during the Iran-Iraq war had been unlawful. There again, there had been a challenge to jurisdiction, but once again the Court had upheld jurisdiction. The United States had raised counter-claims against Iran, alleging unlawful actions by Iran in destroying neutral commerce in the Gulf in the course of the Iran-Iraq war, since those actions had had an adverse impact on United States interests. The Court had accepted elements of those counter-claims.<sup>15</sup> Hence, the Court had decided that it had jurisdiction for certain, but not all, claims of Iran, and for certain counter-claims of the United States.

65. Fifth was the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, brought by Bosnia and Herzegovina against Yugoslavia. The Court had issued two orders of provisional measures,<sup>16</sup> upheld its jurisdiction in the matter and admitted counter-claims by Yugoslavia.<sup>17</sup> The Government of Bosnia and Herzegovina alleged that Yugoslavia had promoted genocide in its territory; the Government of Yugoslavia alleged that the Bosnian side had promoted genocide of Serbs living in its territory. A disposition on the merits was currently awaited.

66. The sixth case before the Court involved a dispute over the *Land and Maritime Boundary between Cameroon and Nigeria*. The Government of Cameroon alleged that Nigerian forces had occupied parts of its territory at various points along the border. The Court had issued provisional measures,<sup>18</sup> the matter had been taken up by the Security Council,<sup>19</sup> and the Secretary-General had sent an investigation team to the region. Meanwhile, Nigeria had issued a challenge to the original Cameroonian application, which was currently being considered by the Court.

67. The seventh case, *Fisheries Jurisdiction (Spain v. Canada)*,<sup>20</sup> had been filed following the arrest of a Spanish fishing vessel just outside Canada's exclusive economic zone. The Court's jurisdiction had been challenged, and the matter was scheduled to be taken up in June 1998.

68. The eighth case, *Kasikili/Sedudu Island (Botswana/Namibia)*, was essentially a boundary dispute between Botswana and Namibia. The ninth case concerned the

<sup>14</sup> See 2533rd meeting, footnote 7.

<sup>15</sup> *Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 190.

<sup>16</sup> *Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 3; and *ibid.*, *Order of 13 September 1993, I.C.J. Reports 1993*, p. 325.

<sup>17</sup> See 2532nd meeting, footnote 20.

<sup>18</sup> *Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996*, p. 13.

<sup>19</sup> See S/1996/150.

<sup>20</sup> *Order of 2 May 1995, I.C.J. Reports 1995*, p. 87.

<sup>9</sup> *Order of 1 February 1996, I.C.J. Reports 1996*, p. 6.

<sup>10</sup> *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 112; and *ibid.*, *I.C.J. Reports 1995*, p. 6.

<sup>11</sup> *Order of 22 September 1995, I.C.J. Reports 1995*, p. 282; and *ibid.*, p. 285.

<sup>12</sup> *Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 3; and *ibid.*, p. 114.

<sup>13</sup> *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9; and *ibid.*, p. 115.

*Vienna Convention on Consular Relations (Paraguay v. United States of America)*.<sup>21</sup> Days before the scheduled execution of a Paraguayan national in the United States, the Paraguayan Government had filed a request for provisional measures including a stay of execution, so that the merits of the Paraguayan case could be heard while the accused was still alive. The Paraguayan Government had contended that the accused had never been apprised of his right to consult with a Paraguayan consul. Thereupon, both parties to the dispute and the Court itself had acted with extraordinary speed in view of the imminent nature of the execution. The Court had issued an order of interim measures of protection stating that the accused should not be executed until the merits of the application had been assessed. However, the United States Supreme Court and the State Governor had refused a stay of execution, and the accused had been duly executed. The Paraguayan Government was continuing to press its case, which was due to be heard in 1999.

69. The last of the cases currently before the Court was the case concerning the *Gabčíkovo-Nagymaros Project*. It had been determined that, should the litigating States be unable to resolve their differences, they should have further recourse to the Court. It appeared that the matter had not been fully resolved and further legal proceedings were therefore anticipated.

70. While the Court generally welcomed its expanded caseload, the additional work had inevitably led to increasingly lengthy delays in hearing cases. On average, States could currently expect to wait about four years between initial filing and final judgment. Such delays had understandably given rise to a certain restiveness both inside and outside the Court. The basic problem was that the resources at the Court's disposal had not increased in line with the demand for its services. The translation services and archives department were the same size as they had been in the early 1980s. Unlike the judges of ad hoc tribunals established by the United Nations, the judges at the Court did not have clerks, nor was there a corps in the Registry designed to assist them individually. The legal staff numbered no more than six in all. ACABQ and the General Assembly had found themselves unable to increase, and indeed in recent years had cut the resources allocated to the Court.

71. On the other hand, the Court itself had taken a number of steps to expedite its procedures. On an experimental basis, for example, judges would not be required to submit individual notes in certain phases of cases concerning jurisdiction and admissibility, thereby saving their time and that of the translators. States were being encouraged to submit their pleadings consecutively rather than simultaneously, thus encouraging them to disclose as much information as soon as possible rather than constantly waiting to see what evidence the other party would adduce. States were also being urged to curb the proliferation of annexes to pleadings which tended to absorb a disproportionate amount of translation time. The Court had also adopted a more liberal policy with regard to accepting documentation after final written pleadings had been filed.

72. Mr. LUKASHUK asked whether the Court was able to make use of draft articles adopted by the Commission.

73. Mr. SCHWEBEL (President of the International Court of Justice) said that, over the years, the Court had habitually attached considerable importance to the conventions elaborated by the Commission. Draft articles were, of course, only drafts and therefore could not be accorded the same weight, but in cases where the parties to a dispute agreed that certain draft articles were an authoritative statement of the law on a particular point, the Court naturally gave relevant weight to them.

74. Mr. AL-KHASAWNEH asked whether litigating States might not be asked to make some contribution to the cost of processing and translating the Court's voluminous documentation.

75. Mr. SCHWEBEL (President of the International Court of Justice) said that the possibility of shifting the burden of translation onto litigating States had been broached a few years previously, at the lowest point of the financial crisis in the United Nations. The Court had felt that such a request would place an undue and unfair burden on certain developing States whose official language was neither English nor French, which were the working languages of the Court. Current practice was to welcome but not to solicit translations. Further budget cuts would have an extremely deleterious effect on the Court's work. When pressed on the issue, ACABQ had not been particularly encouraging with regard to the Court's financial plight, but at the same time the Court had noted that the United Nations had managed to find sufficient resources to finance more recently established judicial bodies.

*The meeting rose at 1.15 p.m.*

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## 2539th MEETING

*Tuesday, 2 June 1998, at 3.05 p.m.*

*Chairman:* Mr. João BAENA SOARES

*Later:* Mr. Igor Ivanovich LUKASHUK

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

<sup>21</sup> *Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248.

**State responsibility<sup>1</sup> (continued)** (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>2</sup> A/CN.4/490 and Add.1-7,<sup>3</sup> A/CN.4/L.565, A/CN.4/L.569)

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. GOCO said it was not enough merely to assert that States could commit crimes under international law and the intention of article 19 (International crimes and international delicts) was not to transplant criminal law into the international domain, but, rather, to attach graver consequences to violations which constituted international crimes and which could not be reduced to a bilateral relationship between the injured State and the wrongdoing State. It was unnecessary to turn article 19 into a penal provision and, consequently, all its elements with criminal connotations could be deleted without ill-effect.

2. In paragraph 89 of his first report (A/CN.4/490 and Add.1-7), the Special Rapporteur referred to corporate criminal responsibility. The possibility of applying that notion to the conduct of States should be examined. He endorsed the remarks contained in paragraph 93 of the report and supported the recommendation in paragraph 95 that article 19 and articles 51 to 53 should be deleted from the draft articles. He also agreed that a regime of State responsibility in the proper sense of the term should incorporate the five elements listed in paragraph 85.

3. With regard to the definition of crime, he joined previous speakers who had expressed concern about the woolliness and inadequacy of the wording of article 19, which a seasoned defence counsel could turn to account with little effort. If the Commission discarded the notion of State crimes and replaced it by that of serious wrongful acts, it could develop the topic of responsibility without having to define the penalties associated with a criminal offence. While it was true that an internationally wrongful act could be aggravated by the circumstances mentioned in article 19, paragraphs 2 and 3, the comments and observations received from Governments (A/CN.4/488 and Add.1-3), on the matter were instructive. One State, the Czech Republic, in its comments under part two, chapter IV, of the draft articles, for example, held that the idea of treating as a crime the breach of an obligation essential for the protection of fundamental interests of the international community was a political rather than a legal assessment. Another, Italy, viewed article 19 as positive in that it proposed criteria for determining what constituted wrongful acts without giving rise to a "crystallization" of international crimes. Yet another, Ireland, in its comments under article 19, maintained that there was no clear evidence that the State responsibility flowing from a prohibited act of aggression had been recognized by the international community as pertaining to a particular category designated as "criminal" and that it could not be inferred from the Definition of Aggression adopted by the

General Assembly<sup>4</sup> that an act of aggression constituted a crime. What the General Assembly had had in mind in adopting article 5, paragraph 2, of the Definition was the role of the United Nations, particularly the Security Council, in the maintenance of international peace and security. According to the Government of Ireland, the reliance on evidence of obligations *erga omnes* to support the existence of a category of international criminal responsibility of States was misplaced and it should be noted that nowhere in the judgment of ICJ in the *Barcelona Traction* case did it draw a link between a breach of an obligation *erga omnes* and the attribution of criminal responsibility to a State. However that might be, the comments by Ireland were, in his view, highly persuasive in respect of article 19.

4. Mr. AL-BAHARNA said that he totally disagreed with the Special Rapporteur's conclusions under his recommendation in paragraphs 94 and 95 of his first report. The concept of "international crimes" had been part of article 19 since its unanimous adoption by the Commission, on first reading, in 1976.<sup>5</sup> It had been recognized in textbooks of authority which cited the existence of different regimes of State responsibility for internationally wrongful acts and had gained support in State practice, at least with regard to crimes such as aggression or genocide. Furthermore, the Special Rapporteur had himself acknowledged in paragraph 90 of his report that a number of States continued to support the distinction between crimes and delicts formulated in article 19 and indicated in paragraph 44 of the report that a majority of States that had spoken in the Sixth Committee on the subject in the period 1976-1980 supported the distinction between crimes and delicts and an even larger majority thought that the degree of seriousness of wrongful acts should be taken into account. Paragraph 45 also confirmed that, following the adoption of parts two and three of the draft articles, all Governments that had commented had dealt with the issue of international crimes. As noted by the Special Rapporteur, a wide range of views existed, both among States and in the literature, but the conclusion to be drawn was that the issue of international crimes of States was still alive. Referring to paragraphs (43), (46), (47), (51), (54) and (56) of the commentary to article 19, he drew attention to the Commission's conclusion that it would be disappointing the hopes placed in its work if it prepared a draft convention which made no reference to the regime of responsibility applicable to the breach of the most essential international obligations and expressed the view that today's Commission would be wrong to ignore the developments that had taken place over the past quarter of a century with respect to international crimes of States. It could not reject what had been achieved in good faith and through hard work on account of differences of opinion about the expression "international crime", although it had gained recognition in legal textbooks, in State practice and, to some extent, in legal decisions. Of course, some States were opposed to the notion of international crime and would be happy to see article 19 deleted, since they believed that the Security Council and the proposed international criminal court could concern themselves with such acts. The Council, in particular, was

<sup>1</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>2</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>3</sup> *Ibid.*

<sup>4</sup> See 2534th meeting, footnote 6.

<sup>5</sup> See 2532nd meeting, footnote 17.

authorized under Chapter VII of the Charter of the United Nations to deal with situations that constituted a threat to or breach of the peace, such as acts of aggression and other criminal acts mentioned in article 19, paragraph 2. That was true, but the Council dealt with the political aspects of such crimes and it was for the regime of State responsibility to find legal and juridical solutions. Besides, Council practice had been inconsistent in dealing with such situations and, by exercising the right of veto, the permanent members of the Council had frequently prevented the international community from taking effective measures against States involved in the commission of international crimes, as indicated by the Special Rapporteur in paragraph 59 of his report. The establishment of a regime applicable to international crimes in no way encroached on the Charter or the special regime of measures that the Charter provided for in certain situations.

5. Noting that the Special Rapporteur envisaged five possible approaches to the question of State criminal responsibility in paragraph 70 of his first report, he said that the Special Rapporteur went too far when he deemed the draft articles, as adopted on first reading, inadequate for the reasons given in paragraph 85. The authors of article 19 had not intended to go into the complexities of what the Special Rapporteur referred to as “criminalizing” State responsibility. They had simply wished to spell out in simple and general legal terms the notion of “international crime” in the context of the regime of internationally wrongful acts. The commentary to article 19 stated clearly what was meant by “international crime”. The idea was not to establish a “code of crimes”, since States and their organs were not subject to legal prosecution, and he saw the logic of the Commission’s view expressed in paragraph (60) of the commentary to article 19, since the purpose of that article was not to establish a comprehensive definition of crimes of aggression or genocide or a clear-cut definition of the two categories of internationally wrongful acts, namely, international crimes and international delicts. As noted in paragraph (61) of the commentary to article 19, the Commission had therefore decided to follow the system adopted in the first instance by itself and subsequently by the United Nations Conference on the Law of Treaties<sup>6</sup> for determining the “peremptory” norms of international law, a system which consisted in giving only a basic criterion for determining international obligations. Article 19, paragraph 2, served a useful purpose in that it provided an objective criterion for the definition of an international crime, which would entail more serious legal consequences when the “community as a whole” subjectively recognized it as such. The paragraph would therefore remain inoperative in the absence of such a subjective assessment. But the recognition in question, which need not be unanimous, could be backed up by a General Assembly resolution expressing concern at and condemning the act in question. In other words, it was a collective political decision that initiated the judicial proceedings against the wrongdoing State. The legal consequences stipulated in articles 51 to 53 would then become applicable with full rigour. The proceedings would eventually be referred to ICJ, which would have to decide whether an international crime had in fact been committed.

6. He was quite satisfied with article 19, which he viewed as the product of a reasonable and progressive effort of codification of the notion of an internationally wrongful act in the form either of a delict or of a crime. In that spirit, he urged his colleagues to resist the temptation to delete the article, as they had been invited to do by the Special Rapporteur. It constituted, in his view, the golden rule of State responsibility. With its accompanying commentary, it was a mine of modern and progressive legal ideas about what State responsibility should be in the future, even though it had been written over 20 years earlier.

7. Frankly, he did not see why the notion of international crime was considered as taboo and scared Government representatives in the Sixth Committee. The jurists of the Commission should have their own idea of what form the progressive development of international law should take and stick to the course that had been courageously embarked on in 1976. Otherwise, they would look as though they were swimming against the tide of history and the development of international law. A Special Rapporteur often tried to please everyone, but then found he had no option but to water down his text for the sake of compromise, but at the expense of quality. To that end, he would strive to produce a “minimalist” text that a simple majority of members could approve. That was the Commission’s approach today to any set of draft articles. The members of the Commission at its twenty-eighth session, in 1976, doubtless more courageous and “progressive”, had adopted, unanimously and without much ado, the article that certain members currently wished to consign to the grave.

8. With regard to the consequences of international crimes dealt with in article 40 (Meaning of injured State), paragraph 3, and articles 51 to 53, the Special Rapporteur recommended the reconsideration of the paragraph and the deletion of the three articles in line with his suggestions in paragraphs 91 to 93 of his first report about “decriminalizing” State responsibility. He criticized those provisions as being inadequate to address the question of legal consequences. But assuming that article 19 was retained, they seemed acceptable, even with the inadequacies to which the Special Rapporteur had drawn attention. He found it unlikely that the Commission, which believed in compromise and the minimalist approach, would be able to improve on the articles which had been adopted in 1976 after heated discussion, not unanimously, but by a simple majority vote. They represented a compromise, and any further compromise would be made at the expense of quality.

9. Concluding that portion of his statement, he said he was convinced that article 19, chapters I to III of part two and part three, on the settlement of disputes, which had been submitted to the General Assembly at the forty-eighth session, in 1996, were the best provisions available in the circumstances and that it would be useless, if not disastrous, to reopen the discussion on them.

10. If the international crime of a State, which the Special Rapporteur rightly called the crime that dare not speak its name, was looked at closely, it would be seen that the legal consequences did not involve any penal sanctions. Even the Special Rapporteur, who was very

<sup>6</sup> See 2526th meeting, footnote 17.

critical of article 19, paragraph 2, admitted at the end of paragraph 51 of his first report that the consequences attached to international crimes were rather minimal. It was quite clear from parts two and three of the draft articles that the consequences attached to an international crime, as referred to in articles 41 to 53, were mostly civil. In addition, articles 51 to 53 specified the obligations arising from the consequences of international crime. Those obligations did not involve penal sanctions, all the more so as there was yet no competent court of law which could impose such sanctions. The idea behind the concept of international crimes of States was that it should be a deterrent, in the sense used in the nuclear field, against certain adventurous States. He hoped he had been able to show that the concept of international crime as defined in article 19 was really harmless, despite its disturbing name. But it was no less real for all that and any regime of State responsibility devoid of that legal device would have no meaning and would be going against history. Article 19 in fact represented a valuable historical achievement which should not be thrown away.

11. His view was that there was no need to codify State responsibility in respect of international delicts, because the literature and legal materials on the subject were abundant, whether in the form of customary law, case law, arbitral awards, treaties or the findings of commissions. The fact that the Commission had not been able to finish its work on international delicts in the past 30 years had not stopped ICJ and other courts from delivering judgements and decisions on claims between States. The true challenge before the Commission was thus that of codifying responsibility for international crimes: it was the challenge of the century.

12. Before taking any decision about article 19, the Commission should seek a new mandate from the General Assembly to authorize it to do so. At the least, the Commission should authorize the Special Rapporteur to provide a questionnaire to the delegates in the Sixth Committee to seek the views of their Governments on three basic questions: was the Commission authorized to delete article 19, and if so, to what extent? Should article 19 be redrafted in a form that would cover only international delicts? If so, how should the Commission deal with internationally wrongful acts arising from the commission of an international crime?

13. Mr. CRAWFORD (Special Rapporteur), summing up the debate on the topic, said that the draft articles were unsatisfactory on nearly all accounts in their treatment of what could be described as the broad field of multilateral obligations. There was a consensus in the Commission that the topic was not limited to merely bilateral responsibility, although that was included. It was also clear that the original vision that the Commission had had in formulating article 19 had not been realized. As pointed out in paragraph 67 of his first report, at that time, it had specifically excluded the "least common denominator" approach to international crimes, but in fact that was the approach that had been adopted. Among the eloquent spokesmen for the fundamental distinction between international crimes and international delicts embodied in article 19, paragraph 2, none had denied that that had been a *détournement* of intentions.

14. That was why the Commission of today, which had the responsibility of considering the draft articles on second reading, was facing a serious problem with the differences of opinion on article 19. It would be unconstructive for both sides to maintain that one half of the Commission should prevail over the other. The disagreement among members was obvious and an indicative vote would not only be very undesirable, but would not solve the problem. He understood Mr. Al-Baharna's concern over what he had described as the continual adoption of compromise solutions. But one could respond that that was inevitable in a deliberative body like the Commission. The compromise solution that the Commission had adopted on the international criminal court had not done badly. It was thus clear that, when operating under its normal procedures, namely, using working groups and the Drafting Committee, the Commission could produce constructive solutions which could be the platform for further discussion by States.

15. The exceptionally rich debate on the topic had shown the complexity of the problems raised by article 19 and the reality of the issues raised by paragraph 2. To illustrate above all the complexity of the concept of State crime, he mentioned the case when a single act could be considered a crime if committed by one State, but a delict if committed by another because the two would be affected by its consequences to different degrees. As to the difficulties raised by paragraph 2, only perhaps one member of the Commission had indicated that the draft articles should be reduced to strictly bilateral responsibilities. On the contrary, most members had affirmed that there were obligations to the international community and that their manifestations within the field of international responsibility should be duly reflected in the draft articles. The draft had inherited from the "least common denominator" solution the defect of treating the multilateral forms of responsibility effectively as bilateral forms: article 40, paragraph 3, converted the so-called multilateral obligation into a series of bilateral obligations, and that created a severe problem, not just in theory, but also in practice, by authorizing injured States—States that were injured in a general sense and that were not the primary States concerned—to adopt unilateral approaches. The previous Special Rapporteur had been stymied by that issue after three years of work, and that was what had led to his resignation. Neither the Commission nor the Working Group which it had established and which he himself had chaired had found a solution to the massive procedural difficulty that would exist if individual States were authorized to represent community interests without any form of control.

16. In sum, it would appear that the members of the Commission were in agreement on five major points that he would outline one by one. The first was the distinction between international crimes and international delicts, which satisfied no one and had been subjected to much criticism. Many members had said that the term "crime" had given rise to confusion: it was obviously contaminated by its connotations in respect of penal sanctions. But the Commission appeared to be ready to envisage ways of solving the problem other than that of establishing a categorical distinction between crimes and delicts.

17. The second point on which there was agreement was the relevance of the established categories of *jus cogens* and obligations *erga omnes*, it being agreed that the first category was narrower than the second. It must be recalled that when ICJ had formulated the idea of obligations *erga omnes* in its judgment in the *Barcelona Traction* case, the Court had thought that it was talking about a fundamental distinction and about very important norms. The examples it had given in its famous dictum had in fact been examples of norms that would currently be regarded as norms of *jus cogens*. The Court had certainly not been seeking to make the existence of obligations *erga omnes* dependent on the existence of multilateral instruments: the fact that a treaty was a multilateral instrument did not mean that its provisions applied *erga omnes*. Those two modern concepts in the area of the obligations of States were assuredly part of the progressive development of the law and had important implications within the field of State responsibility.

18. The third point on which there seemed to be general agreement in the Commission was precisely that the draft articles as they stood did not do sufficient justice to those fundamental concepts—particularly in article 40, which would certainly have to be redrafted. A further question was whether, within the field of obligations *erga omnes* and norms of *jus cogens*, a further distinction should be drawn between serious and less serious breaches. That distinction certainly made sense in relation to obligations *erga omnes*. The usefulness of such a distinction was less clear in respect of norms of *jus cogens*, for which there was the problem of the threshold beyond which a situation constituted genocide, for example, as opposed to a crime against humanity. But it was very hard to say that international law drew a further distinction within each of those categories between serious crimes against humanity and serious genocide. Article 19, paragraph 3, was a source of confusion in that regard.

19. The fourth element which had emerged from the discussions was an awareness that the draft articles created significant difficulties of implementation. There was the problem to which he had already referred, that of dispute settlement, and the one, much discussed at the previous sessions of the Commission, of the relationship between the directly injured State and other States, which needed further reflection. Another problem which had indirectly appeared, but which was no less essential, had to do with the fact that, with respect to most breaches of fundamental norms, the primary victims were usually not other States, but populations. That was the case not only with breaches of norms relating to genocide or basic rules concerning the right to self-determination of peoples, but also with aggression, which obviously involved an inter-State situation. Thus, without going so far as to say that the Commission should deal only with crimes committed against populations or groups of people, it was clear that that was a fundamental element which inevitably raised the serious question of representation and exacerbated the problem of distinguishing between directly and less directly injured States.

20. Given those difficulties of implementation, which must not be underestimated, the general regime of State responsibility was to some extent residual in that field, and not just in relation to the most obvious cases of

aggression. It was true that, in respect of collective obligations of a fundamental character, the rules of State responsibility might actually have negative and not merely positive effects as to the application of measures of enforcement. If the existence of a collective interest was recognized, the problem was in ensuring that the enforcement measures applied retained a collective character, which article 40 could be criticized for not doing. Hence, the Commission should reconsider those problems, taking into account the proposal by a number of members for the adoption of a more differentiated regime, for example, between cessation and reparation in connection with the rights of injured States.

21. The fifth point on which general agreement had emerged between the two groups of members who had expressed views in the discussion was the idea that, at the current stage of the development of international law, State crimes should not be envisaged as a distinct penal entity. Both sides had endorsed the proposal which the Commission had itself approved in 1976, namely, that State responsibility was in some sense a unified field, notwithstanding the fact that a distinction was made within it between obligations of interest to the international community as a whole and obligations of interest to one or several States. Leaving him with his firm conviction that in future, the international system might well come up with a genuine form of corporate criminal liability, most members of the Commission had refused to envisage that hypothesis and had spoken out in favour of a two-track approach, developing the notion of individual criminal liability through the mechanism of ad hoc tribunals and the future international criminal court, acting in complementarity with State courts, and developing within the field of State responsibility the notion of responsibility for breaches of the most serious norms of concern to the international community as a whole.

22. Concluding on the utopian project of a genuine criminalization of State conduct, he stressed that it was not merely a question of labelling and that, if the Commission must return to it in the future, it must attach genuine consequences through genuine procedures.

23. With a view to enabling the Commission to overcome the difficulties which it was facing and to complete its work of codification and progressive development in the general law of State responsibility in the foreseeable future, taking full account of the obligations owed to the international community as a whole, he said he was submitting five proposals to the Commission as a basis for discussion.

24. The first proposal read:

“The Commission should proceed with its second reading of the draft articles on State responsibility on the basis that the field of State responsibility is neither ‘criminal’ nor ‘civil’ and that the draft articles cover the whole field of internationally wrongful acts.”

The last part of the sentence did not mean that the purpose of the draft articles was to regulate the field of internationally wrongful acts in all its aspects; other instruments would deal in more detail with certain aspects of State responsibility and the draft itself contained a *lex specialis*

article (art. 37), as well as a saving clause concerning the Charter of the United Nations.

25. The second proposal read:

“On that basis, the draft articles should not seek to address the issue of the possible criminal liability of States or the penalties or procedures that any such liability would entail.”

That proposal amounted to setting aside the penalization of State conduct, in the strong sense of the term.

26. The third proposal read:

“On the other hand, the draft articles need fully to reflect the consequences within the field of State responsibility of the basic principle that certain international obligations are essential, are non-derogable (*jus cogens*) and are owed not to individual States, but to the international community as a whole (*erga omnes*).”

He noted that those obligations and their character stemmed from general international law, which justified the Commission taking that into account in the field of State responsibility and envisaging only aspects, notably effects, of relevance to the subject.

27. The fourth proposal read:

“Consequently, in the course of the second reading, the Commission will, in place of article 19, seek systematically to take account of serious breaches of the obligations referred to in paragraph 3 above. In the first instance, this could be done through a working group to be convened in New York in the second part of the session.”

That proposal emanated from recognition of the fact that the Commission could not adopt a distinction between crimes and delicts by consensus; hence the idea that it should proceed instead to spell out systematically the consequences and fundamental obligations referred to in the third proposal.

28. The fifth proposal read:

“Consideration would be given to a suitable saving clause, making it clear that the draft articles are without prejudice to the existence or non-existence of ‘international’ crimes of States.”

29. In the absence of an agreement on the five proposals, which could be amended, the Commission would not be able to make progress, given the impasse into which the distinction between crimes and delicts had led it. He suggested that the five proposals should be referred to an open-ended working group to decide on the exact wording.

*Mr. Lukashuk took the Chair.*

30. Mr. FERRARI BRAVO said that the proposals had to be drafted as simply as possible because at issue was merely a draft mandate for a working group. That prompted him to request the deletion in the first proposal of the phrase beginning with the words “on the basis that”, as well as the entire second proposal. On the other hand,

the third proposal, which focused on consequences, was at the crux of the problem and must be retained. The fourth proposal was acceptable, provided that the phrase “in place of article 19” was deleted; retaining it would be tantamount to prejudging the results of the working group which that proposal would create. Consideration of the fifth proposal should be postponed.

31. Mr. ECONOMIDES thanked the Special Rapporteur for his efforts to find a generally acceptable solution. However, he thought that the proposed text was not a compromise at all, but rather a “first-class burial” of the concept of “State crime”. That was what clearly emerged from the fifth proposal, which entirely ruled out that notion for the time being, although it had been at the heart of the discussion and divided the Commission, giving rise to two currents of thought with a more or less equal number of supporters. Only one current of thought was being taken into account. Likewise, article 19 of the draft had been removed from play by the fourth proposal.

32. The third proposal broadened the scope of the topic: it was no longer a question of essential obligations alone which jeopardized the fundamental interests of the international community as a whole, but all international obligations—obligations *erga omnes*—which created commitments towards the international community as a whole. In so doing, the risk was great of trivializing really essential obligations by blurring all distinctions. Lastly, the first and second proposals were completely superfluous and should be deleted.

33. In view of the discussion which had taken place on the subject, a good compromise would be to take the third proposal as a starting point and to create a working group to consider the consequences in the field of State responsibility which flowed from obligations *erga omnes*, but also, and above all, obligations designed to protect the fundamental interests of the international community. Article 19 and the notion of “international crime”—or any other expression which might be retained to replace the word “crime”, which seemed to give rise to much criticism in the Commission—would be left aside for the moment and possibly returned to later if the working group was unable to produce any results.

34. Mr. CRAWFORD (Special Rapporteur) said that the words “in place of article 19” in the fourth proposal were indeed intended in the sense given them by Mr. Economides. Unlike the latter, however, he considered the first proposal important because it reflected the position adopted by the Commission in 1976.

35. Mr. PELLET said that, not being a member of the working group, he would refer to the Special Rapporteur’s proposals in some detail. They were, he thought, very reasonable, at least in spirit. In that regard, he did not subscribe to Mr. Economides’ analysis, although he shared the latter’s concerns as to substance.

36. He could not help noting that, with the proposals under consideration, the Special Rapporteur was in reality joining the supporters of the concept of State crimes in considering that the concept of “international crimes of States” existed in international law and that it was penal. He himself did not rule out the possibility, but did not interpret article 19 in that way and preferred to reserve his

position on that point. It was through the fifth proposal that the Special Rapporteur was trying to have his “criminalistic” approach to State crime confirmed by the Commission. His own view was that such a position was mistaken and he hoped that the Commission would not confirm it or, if it felt it had to do so, that it would specify that the draft articles were without prejudice to the possible criminal responsibility of States, which would be additional to international responsibility. It was clearly understood that the topic under consideration was the international responsibility of the State, which was neither criminal nor civil. Accordingly, an expression such as “in the penal sense of the term” ought to be added after the words “to the existence or non-existence of ‘international crimes of States’” in the Special Rapporteur’s fifth proposal.

37. Referring to the first proposal, he suggested that the words “within the meaning of the present draft articles” should be added after the words “on the basis that the field of State responsibility is neither ‘criminal’ nor ‘civil’”, implying that, outside the context of the draft, it would be possible to imagine the criminal responsibility of States, as the Commission had done in article 5 of the draft Code of Crimes against the Peace and Security of Mankind.<sup>7</sup> With regard to the second proposal, he said that he failed to understand the exact meaning of the word “penalties”. If it meant criminal penalties, he could accept the proposal. In that connection, he reminded Mr. Ferrari Bravo that the previous Special Rapporteur had fought to get the Commission to deal with the question of penalties. In the circumstances, it would be better to state clearly that the Commission did not intend to set up any system or international criminal mechanisms, as the previous Special Rapporteur, Mr. Arangio-Ruiz, had proposed.

38. His position on the third proposal was closer to that of the Special Rapporteur than to that of Mr. Economides. He believed that it was useful and important to speak of the three concentric circles constituted by obligations *erga omnes*, obligations deriving from a peremptory norm of international law (*jus cogens*) and, obligations so essential for the protection of the international community as a whole that their breaches were characterized by the latter as crimes, although the word “crime” could be abandoned. Those three categories were reflected in the Special Rapporteur’s third proposal, but in an order which he did not consider satisfactory. The proposal was nonetheless an improvement over the existing draft articles, which dealt only with the third category of obligations. Lastly, he endorsed Mr. Ferrari Bravo’s and Mr. Economides’ comments on the fourth proposal. He reserved the right to come back to the question once the working group had taken a decision.

39. Mr. ROSENSTOCK thought that the Special Rapporteur’s proposals should be approached with an open mind. It would, however, be inadvisable to proceed on the basis of the deletion of the words “in place of article 19”. It should not be forgotten that the majority of the Commission’s members were in favour of deleting article 19 and that only a minority wanted it to be maintained. Reaching agreement in plenary would not be easy and the Commission might have to resort to a vote.

40. He had no strong views on the first and fifth proposals and could not see the point of the criticism of the first proposal.

41. The problem was to find a solution to the questions arising mainly as a result of the third proposal that would be neither radically incompatible with the fact that the Commission was dealing with secondary rules, not with primary rules, nor totally unacceptable to those who thought that work on the topic formed part of a continuum in the field of State responsibility for wrongful acts and was not concerned with qualitative distinctions. Obligations *erga omnes*, for example, did not involve qualitative distinctions, but differences in terms of scope.

42. Mr. Sreenivasa RAO said that no compromise should be prejudicial to the convictions of those who claimed that article 19 reflected a valid concept, even if its text needed redrafting to become applicable in practice.

43. The Special Rapporteur’s third and fourth proposals caused him some concern. He had understood that the working group would explore possible links between obligations *erga omnes* and obligations deriving from a peremptory norm of international law (*jus cogens*), as well as the possible relationship between breaches of those obligations and the concept of crime as such. The second proposal was confusing and he hoped that, if the working group succeeded in identifying the consequences of breaches of obligations *erga omnes* and obligations deriving from a peremptory norm of international law (*jus cogens*), it would also explore the possibility of applying those consequences to the wider category of obligations essential for the protection of the interests of the international community as a whole, not those of individual States.

44. The working group should not be given a mandate there and then to undertake a study along the lines indicated in the Special Rapporteur’s third and fourth proposals, as that would cancel out article 19.

45. Mr. DUGARD said that he completely shared the previous speaker’s views. The work of the working group would largely depend on the interpretation given to the fifth proposal and, in that connection, he noted that the Special Rapporteur had said he would not be averse to considering whether a special study of State crimes should be undertaken. The Commission might make a recommendation to that effect to the Sixth Committee.

46. Mr. SIMMA said that he supported the Special Rapporteur’s proposals. He had no problems with the first and second ones. He understood the third and fourth, which were the essential ones, to mean that first the working group and then, of course, the Special Rapporteur would have to explore the possibility of elaborating a concept that would replace the idea underlying article 19. If those efforts failed, the debate on article 19 would have to be reopened and the Commission would probably end up taking a vote. That would undoubtedly mean the end of article 19, something he would not be sorry about.

47. Given the pressure of time, the working group would only be able to give preliminary consideration to the concept to be elaborated and the task of hammering it out would ultimately fall to the Special Rapporteur.

<sup>7</sup> See 2534th meeting, footnote 10.

48. Mr. MIKULKA said that the Special Rapporteur's proposals were a step forward towards a compromise that might finally be acceptable to all. Like Mr. Simma, he thought that the third and fourth constituted the hard core of the proposals. In the third one, it might be more logical to change the order in which the obligations were listed by referring first to obligations owed not to individual States, but to the international community as a whole (*erga omnes*), then to non-derogable obligations (*jus cogens*) and then to essential international obligations and to spell out that what was meant were international obligations for the protection of the fundamental interests of the international community. He could accept the third proposal with those amendments. He could also accept the fourth proposal subject to the deletion of the word "serious" because the Commission would have to take account of all breaches of the obligations referred to in the third proposal.

49. The first proposal was, in his view, justified, as it recalled that the Commission was abiding by the concept it had chosen, namely, that international responsibility was *sui generis* and had nothing to do with the distinctions that existed in internal law. Moreover, the proposal stated that the draft articles covered the whole field of internationally wrongful acts. The second proposal was confusing and could simply be dropped. The fifth proposal should refer to breaches of certain obligations mentioned in the third proposal being qualified as crimes rather than to "the existence or non-existence of 'international crimes of States'".

50. With those changes, the Special Rapporteur's proposals could serve as a basis for compromise.

51. Mr. AL-KHASAWNEH said that a compromise worthy of the name had to be without prejudice to the views expressed in the Commission, which were a reflection not of geographical or ideological divisions, but of deep-seated concerns and convictions.

52. With regard to the Special Rapporteur's proposals, he thought that the fifth, which gave the impression that the question of "crimes" was already settled, was not very useful. He also agreed with Mr. Ferrari Bravo's point that it was not necessary to say that State responsibility was neither "criminal" nor "civil", even if that was only a restatement of the position adopted by the Commission in 1976.

53. The third and fourth proposals were the most important and he understood them in the same way as Mr. Simma. In order to achieve a true compromise, it was necessary to elaborate a new concept and see where it could lead. In the meanwhile, the Commission could not start from the assumption that article 19 would be deleted; nothing in the replies received from Governments or in statements made in the Commission warranted that deletion and, besides, such a step would require a formal decision by the General Assembly.

54. The Special Rapporteur's proposals were, on the whole, good even if they did not reflect his own feelings and some points required redrafting for the sake of clarity. The Commission had to arrive at a compromise; its reputation was at stake.

55. After a procedural discussion in which Messrs CRAWFORD (Special Rapporteur), GOCO, HAFNER, MELESCANU and SIMMA took part, the CHAIRMAN suggested that the discussion on the Special Rapporteur's proposals should be continued the next day, first in the Commission in plenary and then in the working group chaired by Mr. Simma.

*It was so agreed.*

*The meeting rose at 6.15 p.m.*

## 2540th MEETING

*Wednesday, 3 June 1998, at 10.10 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

**State responsibility<sup>1</sup> (*continued*) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>2</sup> A/CN.4/490 and Add.1-7,<sup>3</sup> A/CN.4/L.565, A/CN.4/L.569)**

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited members to consider a revised version of the proposal submitted by the Special Rapporteur (2539th meeting), reading:

"1. The Commission should proceed with its second reading of the draft articles on State responsibility on the basis that the field of State responsibility is neither 'criminal' nor 'civil', and that the draft articles cover the whole field of internationally wrongful acts.

"2. On that basis, the draft articles should not seek to address the issue of the possible criminal liability of

<sup>1</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>2</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>3</sup> *Ibid.*

States, or the substantive penalties or procedural mechanisms that any such liability would entail.

“3. On the other hand, the draft articles need fully to reflect the consequences within the field of State responsibility of the basic principle that certain international obligations are essential, are non-derogable (*jus cogens*) and are owed not to individual States but to the international community as a whole (*erga omnes*).

“4. Consequently, in the course of the second reading the Commission will, in place of article 19, seek systematically to take account of serious breaches of the obligations referred to in paragraph 3 above. In the first instance this could be done through a working group to be convened in New York in the second part of the session.

“5. Consideration would be given to a suitable saving clause, making it clear that the draft articles are without prejudice to the existence or non-existence of ‘international’ crimes of States.”

2. Mr. HAFNER said that the Special Rapporteur deserved thanks for his proposal on further work in relation to article 19 (International crimes and international delicts). He could go along with the main thrust of the proposal, despite certain doubts in connection with paragraphs 3 and 4. It would appear that paragraph 3 established three categories of international obligations, namely, those which were essential, those which were non-derogable (*jus cogens*) and those which were owed not to individual States but to the international community as a whole (*erga omnes*), while paragraph 4 introduced the additional concept of “serious breaches” of those obligations. Recalling that Mr. Mikulka (2539th meeting) had proposed deletion of the word “serious” and that the Special Rapporteur had been seen to nod in agreement, he asked whether it would be the working group’s task to deal with the consequences ensuing from all breaches of the three categories of international obligations listed in paragraph 3 or only with “serious” breaches. Further, was the list of criteria in paragraph 3 cumulative or alternative? In other words, was the working group to address the question of breaches of any one category of obligations or only of such acts as breached all three categories?

3. Mr. CRAWFORD (Special Rapporteur) pointed out that many of the suggestions made thus far could be discussed other than in the context of the Commission in plenary. The initial question, as he saw it, was whether the Commission was by and large satisfied with the proposed formulation based on a compromise. As for the second question, which concerned the precise nature of the proposed working group’s work, he agreed with the point made by Mr. Simma (*ibid.*) that the working group’s efforts would only be of an indicative nature and that it would be helpful if, in addition to the mandate set out in paragraph 4 of his proposal, the working group were to produce some preliminary reflections on other issues arising out of part one of the draft. As to Mr. Hafner’s question, the notions of *jus cogens* and obligations *erga omnes*, although cognate, were not identical, the latter concept being perhaps narrower than some members had

suggested. It would be for the working group to ask the relevant questions about different categories of obligations and, where necessary, to identify their potential consequences in the field of State responsibility.

4. Mr. LUKASHUK said that the proposal seemed to him to contain a sound idea for a compromise. However, besides rightly saying that State responsibility was not a matter of either criminal or civil law, the Commission should make it clear from the outset that it was speaking about responsibility under public international law. He saw no need to discuss the issue of criminal responsibility at the current stage, the concept of “crime” having been used to denote the most serious breaches simply because no better term had been available. Paragraph 3 was, in his opinion, unnecessary because not all serious breaches of international obligations were connected with the rules of *jus cogens*, and paragraph 5 could be dispensed with for the same reason. That would leave only the category of the most serious breaches, which was quite sufficient.

5. Mr. YAMADA said that he, too, welcomed the Special Rapporteur’s proposal, which should not be seen as an invitation to either side to abandon its positions of principle but rather as a method of work or a working hypothesis designed to facilitate the second reading of the draft. That basic objective would not be achieved if members persisted in defending their own points of view. Leaving aside the drafting aspect, which could indeed be dealt with in the Drafting Committee, the proposal appeared to be based upon broad agreement within the Commission. Paragraph 1 established the basis for future work. Paragraph 2 was important in that it clearly indicated that the current exercise did not encompass the question of criminal liability. Paragraphs 3 and 4 constituted the key element of the proposal, and while he was somewhat apprehensive about the reference to *jus cogens* in paragraph 3, he was prepared to leave that question for discussion in the working group. The reference to article 19 in paragraph 4 was essential, although he was prepared to be flexible about the precise form of language employed. What mattered was to make it clear that the Commission did not propose to talk about article 19 until it completed the work outlined in paragraphs 3 and 4. Lastly, he had no difficulty in accepting the saving clause in paragraph 5.

6. Mr. BROWNLIE said that, having regrettably been unable to take part in the debate hitherto, he would state his views by way of comments on the Special Rapporteur’s proposal, which he regarded as a move towards compromise that did not necessarily reflect the Special Rapporteur’s own views. The harsh things he was about to say were therefore not addressed to the Special Rapporteur but, as it were, *urbi et orbi*. The proposal before the Commission appeared to create much greater problems than those arising from article 19 taken in isolation.

7. In the first place, the proposal encompassed the whole area of international public order, whereas the Commission’s original mandate was, and had been for several decades, State responsibility, a fairly familiar category both in the doctrine and in the practice of tribunals and States. He did not believe that the mandate included *jus cogens* or obligations *erga omnes*, categories which were common to both State responsibility and the law of treaties. He was therefore a little surprised to see those

categories, even if one of them was apparently set aside, dealt with under the topic of State responsibility. However, that point was perhaps only organizational.

8. Paragraph 1 of the proposal, on the other hand, was so disturbing as to have brought him close to tears. He sometimes thought that, in addition to pursuing its task of codification of international law and the progressive development thereof, the Commission seemed to be in danger of inventing a third category, that of progressive deterioration of international law. State responsibility, like the law of treaties, was an important, useful and familiar category. In paragraph 1 of the proposal, if taken at its face value, it became a kind of *tertium quid* and was placed on a completely new normative plane, a step that would lead to enormous confusion, if not among professional international lawyers, then among the many non-professional users of their products. The proposition that the status of State responsibility should thus be placed on a curious “third plane” that was neither criminal nor civil seemed to him appalling. Together with many others, he had always thought that the field of State responsibility was essentially “civil”, even if standards of conduct might vary and the process of reparation might sometimes have quasi-penal elements.

9. As for paragraph 4, his main objection to article 19 was not its content but, rather, its location. The article related to problems of crimes of State and for that reason stood outside the field of normal State responsibility. Lastly, if the Commission did not wish to appear negative in the eyes of the Sixth Committee, the proviso in paragraph 5 was sufficiently clear. For that reason, paragraph 5 was the only part of the proposal he liked.

10. Mr. CRAWFORD (Special Rapporteur) said that the proposition contained in paragraph 1 was to be found in the commentary to article 19<sup>4</sup> and had been affirmed by both opponents and supporters of that article. The proposal as a whole was being put forward in a spirit of compromise, but he personally would be happy if the Commission could agree that the field of State responsibility was indeed “civil”. Obligations *erga omnes* could, he believed, still find their place in the area of State responsibility seen as “civil”. However, the term implied an analogy to which some members were allergic.

11. As to Mr. Brownlie’s reference to a supposed “third plane”, the only plane envisaged in paragraph 1 was that of international law and its regular compartment of State responsibility. He was, of course, in agreement with Mr. Brownlie on the subject of crimes of State; the concept no doubt existed in embryo in relation to a very few rules, and there was a case for taking it up as a new topic. He would have no objection to deleting the words “that the field of State responsibility is neither ‘criminal’ nor ‘civil’”, from paragraph 1, in the hope of making progress. With regard to paragraph 3, he regretted that Mr. Brownlie had been absent from the previous meeting, at which he had made the point that the concept of *jus cogens* came from outside the field of State responsibility but could have consequences within it. The concept of obligations *erga omnes* had been defined by ICJ in the framework of State responsibility and was reflected in

article 40 (Meaning of injured State) of the draft. In the light of the debate which had taken place, he very much doubted that the Commission as a whole would be persuaded to proceed by consensus on the basis of Mr. Brownlie’s views.

12. Mr. LUKASHUK said that the view of State responsibility as a matter of civil responsibility, although well-known in British legal writings, was at variance with elementary logic and, as could be seen from many of the comments and observations received from Governments (A/CN.4/488 and Add.1-3), was firmly rejected by those who held public international law to represent a special system of law.

13. Mr. HE said that he appreciated the Special Rapporteur’s coordinating efforts to deal with a difficult and complex issue and appealed to all members to help the Special Rapporteur accomplish the tremendous task facing him as the Commission was entering upon the critical second reading stage. For his part, he could accept the revised proposal and agreed that efforts should be concentrated on paragraph 3 and the idea of setting up a working group. The concept of international law should be separated from that of criminal responsibility under domestic law, since a State could not be punished by others without detriment to the principle of the sovereign equality of States. If the penal implications of the term were to be avoided, there was no reason why the term “crime” should be used at all in the law of State responsibility. To speak of breaches of obligations *erga omnes* would be more appropriate. Paragraph 5 was unnecessary, as it might create more problems than it would resolve.

14. Mr. GOCO said he commended the Special Rapporteur’s proposal on article 19 as a compromise that reflected the Commission’s deliberations on a highly controversial subject. He shared the view that it was an issue which should have been thrashed out by the Working Group before coming before the Commission.

15. If paragraph 1 was meant as an indication of sentiment to the Working Group, it could very well be discarded. Otherwise, he proposed deleting the phrase “is neither ‘criminal’ nor ‘civil’”, since it might be viewed as provocative. As paragraph 2 was premised on paragraph 1, it should also be deleted.

16. The word “principle”, in paragraph 3, should be replaced by “premise” and the reference to *jus cogens* and *erga omnes* omitted, inasmuch as it opened up a wide area of discussion and tied the Commission’s hands in the process. The reference to article 19 in paragraph 4 should be deleted and the remainder of the sentence modified in the light of his proposed amendment to paragraph 3. Lastly, he would delete the reference to the existence or non-existence of “international” crimes of States in paragraph 5.

17. Mr. GALICKI said that the Special Rapporteur’s proposal was a reasonable compromise which incorporated the main elements of the discussion and made a valiant effort to find common ground among sharply conflicting views.

18. Paragraph 1 was particularly constructive. Although he acknowledged the existence of dissenting views such

<sup>4</sup> See 2532nd meeting, footnote 17.

as those of Mr. Brownlie, he agreed with the Special Rapporteur's finding that the Commission had already identified and emphasized the specific character of State responsibility. Paragraph 2 followed on logically from paragraph 1.

19. In his view, article 19 was the worst enemy of the concept of crimes of State. With all due esteem for his predecessors who had drafted the article, he could not help concluding that its structure, whatever its substance, was outmoded. An even more serious objection was that, while paragraph 2 of article 19 treated every breach of an essential international obligation as a crime, paragraph 3 placed only serious breaches in that category.

20. Paragraphs 3 and 4 of the proposal were particularly commendable for differentiating between two issues likely to have implications for State responsibility: the characteristics of obligations and the characteristics of breaches of those obligations. It was an approach that would prove far more profitable than arguing about terminology. The Commission could salvage the substantive ideas underlying article 19 while discarding its structure.

21. Mr. SIMMA said that, with reference to Mr. Brownlie's anguished response to the proposal, he, on his part, would be driven to tears if State responsibility was designated a civil responsibility. Although State responsibility owed a great deal to civil responsibility and was somewhat similar in structure, the entire premise of the draft articles was based on something radically different, namely a structure that he termed objective and which Mr. Pellet had referred to orally and in a number of publications. The former Special Rapporteur, Mr. Roberto Ago, had been credited with a stroke of genius when he had "emancipated" State responsibility from the even more civil pattern that had then prevailed.

22. He would agree to deletion of the phrase "that the field of State responsibility is neither 'criminal' nor 'civil'" in paragraph 1, since it only added to the confusion.

23. Mr. PELLET said he thought the Special Rapporteur's statement that *jus cogens* did not form part of the concept of responsibility was unsound. Responsibility consisted of breaches of rules which could fall under such headings as peremptory, *erga omnes*, customary or treaty-based, the last two having been wisely dismissed as unimportant by the Commission. While *erga omnes* obligations had not been referred to by name in the draft articles, article 40 had nevertheless touched on the problem. The same applied to *jus cogens*. It seemed reasonable to address the question of whether breaches of such rules had specific consequences—indeed, paragraph 3 of the proposal seemed to go no further than that—and it would be regrettable if the matter was shelved.

24. Mr. Brownlie's statement had taken the Commission back to square one, as though the discussion which had generated the spirit of compromise reflected in the Special Rapporteur's text had never taken place. Acceptance of Mr. Brownlie's position would constitute not so much a progressive deterioration of international law as an absolute regression. All the recent advances would be undermined and all that was needed was a challenge to article 1 (Responsibility of a State for its internationally

wrongful acts) of the draft in order to bring back the good old days when international law was perceived as a mere bundle of bilateral relations.

25. When interrupted at the previous meeting by what he viewed as a regrettable procedural manoeuvre, he had been trying to make proposals in a constructive spirit to improve a text which, on the whole, seemed to be sound. After being denied the opportunity to speak, he had listened to, and wholeheartedly supported, a number of suggestions made by Mr. Mikulka, who had not been impolitely censured by Mr. Rosenstock. He had been particularly taken by the proposal to omit the reference to article 19 in paragraph 4. For the purposes of a calm discussion in the Working Group as to whether article 19 would ultimately be retained or deleted, the best course would be to say nothing at all in the proposal. He also agreed with the suggestion to delete the expression "serious breaches", which, as noted by Mr. Hafner, had been the source of much confusion. The Working Group should address the question of whether certain breaches of obligations—whether *erga omnes*, *jus cogens* or breaches which by their nature were particularly serious—had specific consequences. Afterwards it would be seen whether the concept of crime was to be kept or rejected.

26. He also fully supported Mr. Mikulka's proposal to replace the words "existence or non-existence of 'international' crimes of States" in paragraph 5 by a reference to the "characterization" as crimes of breaches of the obligations mentioned in paragraph 3. The point at issue was not whether a thing existed or not, but whether it was to be called a crime.

27. He would not participate in the Working Group, because it was not for Mr. Rosenstock to decide on the membership of a working group of the Commission and allocate the right to speak. However, he reserved the right to respond to whatever emerged and to propose amendments if necessary.

28. Mr. ADDO said he commended the Special Rapporteur on his success in reconciling entrenched positions and making the seemingly impossible possible. Although he was unhappy with the phrase "neither 'criminal' nor 'civil'", he was prepared to go along with it in order to move the discussions forward. He was comforted, on the other hand, by the phrase "that the draft articles cover the whole field of internationally wrongful acts". Paragraph 2 was acceptable as a corollary of paragraph 1. Again, he was somewhat hesitant to accept the reference to *jus cogens* and *erga omnes* principles in paragraph 3, but assumed that the matter would be fully discussed in the Working Group and he was therefore prepared to let it stand. He had no objection to paragraphs 4 and 5.

29. Mr. PAMBOU-TCHIVOUNDA said he was thankful to the Special Rapporteur for coming up with a compromise text that would allow the Commission to resolve the deadlock created by a head-on collision of two opposing schools of thought. The dialectics of conflict should create the conditions for reaching a new synthesis. There was nothing to be gained from an obstinate adhering to entrenched positions.

30. It had already been acknowledged that the title “State responsibility” was itself one of the causes of the existing deadlock. Accordingly, paragraph 1 of the Special Rapporteur’s proposal should be redrafted to read: “The draft articles on the international responsibility of States arising from an internationally wrongful act cover the entire set of acts—actions or omissions—attributable to States”. That would make clear from the outset what the subject of the draft articles was and would obviate the need for paragraph 2. Paragraph 5 should also be deleted, as it added very little, and paragraphs 3 and 4, which contained the essence of the Special Rapporteur’s conclusions, should be rewritten to lend greater precision to the description of *jus cogens* and *erga omnes* obligations and of serious breaches of such obligations.

31. The proposals in paragraphs 3 and 4 were aimed at getting away from the binary structure of article 19, namely, the distinction between crimes and delicts. The disturbing thing for both sides in the Commission, or rather, for those who opposed the idea of State crimes, as it posed no difficulty for those in favour of that idea, was how to take account of the spectre of unlawfulness. A formulation was needed that would break through the terminological problems in article 19 yet preserve the conceptual underpinnings. He would therefore propose that paragraphs 3 and 4 of the Special Rapporteur’s proposal be combined to read:

“The draft articles should incorporate in the regime of the international responsibility of States, on the one hand, a series of provisions defining the basis and purpose of specific internationally wrongful acts that affect—or potentially affect—the interests of the international community of States as a whole and, on the other hand, a second series of provisions organizing the machinery to respond to breaches of such acts.”

32. The paragraph would continue with a second sentence, to read: “This task will require the establishment of an appropriate structure (working group) to perform it in implementation of the Commission’s mandate.”

33. That proposed amendment was offered with a view to removing a number of ambiguities in paragraphs 3 and 4. For example, it was not a matter of fully “reflecting” the consequences of certain principles in the draft articles, but rather, of ordering the way the international community acted and reacted. The comments made by Mr. Ferrari Bravo had been directed along those very lines. Even if the distinction between crimes and delicts was no longer preserved and no reference to crimes was made, the concerns set out in paragraphs 2 and 3 of article 19, which the Special Rapporteur had attempted to reflect in paragraphs 3 and 4 of his proposal, must be preserved.

34. Paragraph 4 of the proposal introduced the extraneous and contentious notion of serious breaches of *jus cogens/erga omnes* obligations. But that subject was more than problematic. Where was one to place the threshold between breaches of obligations and “serious” breaches of them?

35. To sum up, therefore, his proposal contained, in paragraph 1, a statement of the nature of State responsibility and of the objective pursued by the draft articles. Para-

graph 2 outlined the content of the future draft article and specified the structure and direction for the Commission’s work on it.

36. Mr. ROSENSTOCK said that Mr. Pellet had been both rude and incorrect in commenting that he had been trying to impose upon the Commission a certain membership of the Working Group. He had simply been trying to avert a point-by-point debate on the Special Rapporteur’s proposal, in response to a plea made by the Special Rapporteur himself, but had subsequently abandoned that effort as he had received no support. He remained convinced, however, that the current discussion of how to pursue the discussion on the proposal was not very useful.

37. He himself was not greatly enamoured of the proposal. For the reasons cited by Mr. Brownlie, he did not like paragraph 1, although he could accept Mr. Simma’s variation thereon. He had no strong feelings as to whether paragraph 2 should be retained or not, although in his opinion it served no purpose. Paragraph 3 was fundamentally flawed: to regard *jus cogens* obligations in the context of State responsibility as anything other than a subset of *erga omnes* obligations was a serious and potentially totally unacceptable error.

38. He was appalled at the objections to proceeding with the Special Rapporteur’s proposal as a working hypothesis and to taking account of serious breaches in place of article 19. The objections showed a lack of good faith on the part of those who preferred article 19 but expected others to proceed on the assumption of a qualitative distinction while they retained their original position. He was indifferent to the fate of paragraph 5, which made no great difference one way or the other.

39. The discussion should not be pursued in the current form, either in the Commission or in a working group. The Special Rapporteur had heard all he needed to hear of the various views and should currently go back to the drafting board and produce a new formulation before the session was resumed in New York. As things stood, the Commission was uselessly debating the Special Rapporteur’s expressed intentions: let him put those intentions into tangible form, and then the Commission could look at them.

40. Mr. CRAWFORD (Special Rapporteur) said he partly agreed with Mr. Rosenstock. His proposal had been intended to enable a working group to assist him in doing the drafting work strongly recommended by Mr. Rosenstock. A significant number of members of the Commission—more than half of those who had expressed their views—did not believe in a qualitative distinction between crimes and delicts in the field of State responsibility. Other members, however, strongly believed in it. The working group was to help him delve into the implications of such a distinction and, on the basis of that discussion, he would draft proposals which he hoped would prove broadly acceptable. His proposal had been termed a working hypothesis and that was a reasonable description. He had already received a great amount of assistance from the Working Group chaired by Mr. Simma. At the second reading stage, it was not the personal views of particular special rapporteurs that needed to be brought into the discussion, but rather, proposals that could command wide

support and were faithful to the sources and the doctrine. Mr. Mikulka had made a number of very useful suggestions in writing. If the Commission agreed, the Working Group could be convened and he could summarize the proposals before it with a view to making progress. In particular, the aim should be to work out collectively the implications of the distinction or distinctions to be made between crimes and delicts.

41. Mr. AL-BAHARNA said that the Special Rapporteur's proposal should be amended in some ways. The phrase "that the field of State responsibility is neither 'criminal' nor 'civil' and" should be deleted from paragraph 1. The whole of paragraph 2 should be deleted. The phrase "to the international community as a whole (*erga omnes*)", in paragraph 3, should be replaced by "they represent the interests of the international community as a whole.". In paragraph 4, the phrase "in place of article 19" should be omitted and paragraph 5 in its entirety should be deleted.

42. If the Commission was to take a decision to delete article 19, he would object, as it was a political decision going far beyond the Commission's mandate, which for the past 30 years had been to codify the whole corpus of State responsibility in the field of general international law. Responsibility for internationally wrongful acts certainly included the category of international crimes. The Commission had no specific mandate to delete article 19 and should seek a mandate to do so in the form of a resolution by the General Assembly. As he had already proposed, the Commission should specifically address to the General Assembly a question about deleting article 19 from the body of work on the topic of State responsibility.

43. Mr. CRAWFORD (Special Rapporteur) said that, if Mr. Al-Baharna wanted a vote, he could have one on the deletion of article 19. His suggestion was partisan and unacceptable. The Commission was trying to find a way to move forward in a spirit of compromise. What the Commission had done in the draft articles on first reading it could redo, change, amend, alter or add to on second reading. It did not take detailed instructions on that process from the Sixth Committee, but certainly listened to it, and would continue to do so.

44. The CHAIRMAN said that he was not in favour of having a vote.

45. Mr. PELLET said the Special Rapporteur had made two suggestions. The first was that his proposal should be redrafted in a working group; that did not seem to be necessary any more and in that connection he agreed with Mr. Rosenstock, for such a course would be pointless. The Special Rapporteur's other suggestion was contained in paragraph 4: a working group to be convened on the matters set out in paragraph 3, that is to say, on breaches of *erga omnes, jus cogens* and other obligations. He endorsed that idea and would join such a working group, for a different issue was involved. If the Commission decided to proceed in that manner, when would it do so? It seemed somewhat premature to start on the work that morning. Also, had the afternoon meeting of the Working Group on the long-term programme of work been cancelled?

46. The CHAIRMAN said that it was no longer possible to convene the Working Group on the long-term pro-

gramme of work in the afternoon; Mr. Brownlie had requested another date.

47. Mr. SIMMA said he shared Mr. Pellet's concern, because it was not clear what the task of the proposed working group should be. He had thought it would be to revise the working method for dealing with article 19, but according to Mr. Rosenstock, that could be done by the Special Rapporteur himself, who had heard many comments by members. On the other hand, it would make sense for the working group to take up the various points and redraft the statement currently before the Commission. If the working group was to meet immediately and go into problems of obligations *erga omnes, jus cogens* and so on, he agreed with Mr. Pellet that such a course would be premature. In fact, paragraph 4 expressly stated that such would be the task of a working group to be convened in the second part of the session in New York. The substantive work on developing an alternative to article 19 should not be started in the current part of the session. Members needed enough time to prepare for what was a very difficult task.

48. Mr. CRAWFORD (Special Rapporteur) said he had assumed that, in the light of the discussions, an open-ended working group would produce a statement on the comments made. There was no need to come back for detailed instructions or to redraft the text in plenary. He respected Mr. Simma's opinion that the working group might not be in a position to make substantive progress until the second part of the session in New York, although he would regret that. He was in a position to give guidance to the Working Group in the meantime. It was worth noting that in the previous quinquennium substantial progress had often been made in working groups even on issues which seemed to be deadlocked in plenary. Although he did not think that the Working Group could complete its work at the current session, he saw no reason why it should not begin, namely by deciding on where the debate currently stood and seeking to embark upon the substantive work.

49. Mr. Sreenivasa RAO said the problem was that the proposal created a certain mandate and set a firm tone. Further discussion should indeed take place in a working group. The matter the working group was being asked to settle was whether, as part of the study of State responsibility, the Commission needed to focus on *erga omnes* and *jus cogens* obligations and to see whether or not they would entail certain consequences in the field of State responsibility. The point had been made that it might be worth while to look into that question, and the group might even provide a solution to the bigger problem of how to deal with article 19.

50. Mr. GOCO said he endorsed the proposal to refer the matter to a working group.

51. Mr. CRAWFORD (Special Rapporteur) said that it would be difficult and probably unproductive to seek agreement on the proposal he had circulated. Since the text was designed not as a decision by the Commission to replace article 19 but as a working hypothesis, agreement on it would not have taken the Commission very far. Clearly, the Commission was not in a position to take a definitive decision on article 19. He was opposed to a vote, which would be divisive. There seemed to be con-

siderable agreement that it would be constructive for a working group, and not the Commission, to consider what the implications would be in the draft articles of the notions he had tried to describe in paragraph 3 of the proposal.

52. The idea was that the Working Group chaired by Mr. Simma would have its mandate marginally extended to consider, currently at the Geneva, and later at the second part of the session in New York, what those implications might be. That would help him in producing his second report, which would examine the matter, *inter alia*, in the context of article 40, because there was the major question of what the terms of article 40 were to be. The Commission should first take note of all the views expressed, which the Working Group would take into account, and the Working Group should start that afternoon by considering the essential question identified in paragraph 3, on the understanding that progress could be made on the basis of the working hypothesis, without prejudice to the views expressed in the Commission about whether to retain article 19. The Commission would revert to the question in due course in the light of the results of the Working Group's work, the consideration of his second report, article 40, and so forth. In the meantime, it would proceed, first, with the work on part one and, secondly, with the work of the Working Group chaired by Mr. Simma, which would engage in the process generally indicated in paragraph 3. There appeared to be broad consensus in favour of such a course.

53. The CHAIRMAN said that it was his understanding that the Special Rapporteur's proposal was acceptable to the Commission.

54. Mr. PELLET said that he warmly supported the Special Rapporteur's proposal, but there was one small point of concern. The Working Group would basically be considering paragraph 3. At the same time, the intention was to discuss the articles in part one. The two exercises would inevitably overlap somewhat. He had always considered that article 19 was actually the cherry on the cake, but that no effort had been made, not even in part one, to give thought to its potential implications. However, if the Commission discussed obligations *erga omnes*, exceptionally serious violations or breaches of the rules of *jus cogens*, he was not sure that, for example, the provisions on circumstances precluding wrongfulness could be examined without addressing those various types of violation. The most logical approach would be to begin with the results of the Working Group's work and then see how to take them into account, including in the drafting of article 1. He asked the Special Rapporteur how he intended to deal with that problem, on the understanding that members could pose questions when they thought that a problem arose. He did not want to be told later that he did not have the right to raise certain points in plenary because it was being treated in the Working Group: problems would then be forgotten, causing a disastrous mess like the one in part two and in the absurd articles on the consequences of crimes. It was important to deal with everything at the same time.

55. Mr. CRAWFORD (Special Rapporteur) said he agreed with Mr. Pellet that it was possible and even probable that basic distinctions between categories of norms

rather than more, edible. In any event, it was clear that article 19 was an add-on and had been so treated in part two. It was unlikely the Commission would finish with chapter II (The "act of the State" under international law) at the current session, although it might be able to start chapter III (Breach of an international obligation) of part one. It certainly would not reach chapter V (Circumstances precluding wrongfulness), which would need to be examined, because that was an area in which notions of *jus cogens* would have an impact. However, it was not the only area, and he would refer, in introducing the chapters, to distinctions which might need to be drawn, for example in connection with article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity). He hoped that that was precisely what the Working Group chaired by Mr. Simma would begin by doing and that it would repeat, in respect of the implications of those notions, the useful task it had already performed in providing him with an initial idea of views in the Commission on problems in other draft articles.

56. Mr. SIMMA said he agreed with both Mr. Pellet and Mr. Crawford in their description of how they saw the work of the Working Group, namely, that in exploring the implications of the concepts contained in paragraph 3 of the Special Rapporteur's proposal, it was important to bear in mind the possible impact on the provisions of part one.

*The meeting rose at 12.45 p.m.*

## 2541st MEETING

*Thursday, 4 June 1998, at 10.10 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

**Reservations to treaties (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,<sup>1</sup> A/CN.4/L.563 and Corr.1)**

[Agenda item 4]

### THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. PELLET (Special Rapporteur), introducing the report on reservations to treaties (A/CN.4/491 and

<sup>1</sup> Reproduced in *Yearbook* . . . 1998, vol. II (Part One).

Add.1-6), said that, contrary to what he had originally thought, the topic currently seemed more and more delicate and difficult from the point of view of legal technique. That explained why the report was not yet entirely complete and why it would probably be impossible to complete all of its parts and distribute them in all the working languages of the Commission until the next session. The following documents were available, at least in French: A/CN.4/491, which was a general introduction and summary of the Commission's earlier work on the topic; A/CN.4/491/Add.1, concerning the definition of reservations in the 1969 Vienna Convention, the Vienna Convention on Succession of States in Respect of Treaties (hereinafter referred to as the "1978 Vienna Convention") and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter referred to as the "1986 Vienna Convention"); A/CN.4/491/Add.2, concerning the establishment of the Vienna definition in doctrine and in case law; and A/CN.4/491/Add.3, which had been issued informally as ILC(L)/INFORMAL/11 and was designed to serve as the main basis for the discussion, contained the text of eight draft guidelines which were to constitute the nucleus of the Guide to Practice planned by the Commission; as well as ILC(L)/INFORMAL/12 contained a recapitulation of the Vienna definition and the eight draft guidelines.

2. The introduction to the third report did not require lengthy comment. It was divided into two sections. In section A, he described the earlier work of the Commission on the topic, as well as its previous decisions as he had interpreted them, and referred to the two main decisions. First, in principle and subject to an unlikely "state of necessity", the Commission would not call into question the provisions of the 1969, 1978 and 1986 Vienna Conventions on reservations to treaties and would simply try to fill the lacunae and, if possible, remedy the ambiguities and clarify the obscurities in them. Secondly, the work would lead to the preparation of a Guide to Practice, a set of guidelines which would be grafted on to the existing provisions and would, if necessary, be accompanied by model clauses on reservations which the Commission would, as appropriate, recommend to States for inclusion in treaties or in certain categories of treaties they would conclude in future. ILC(L)/INFORMAL/11 illustrated his concept of a "positive" definition of reservations: a definition of reservations as such, separate from the unilateral statements that States could make when expressing their consent to be bound by a treaty.

3. In section A.2 of the introduction, he reported as fully as possible on the action taken on the second report on reservations to treaties<sup>2</sup> and on the principal reactions to its conclusions, which were not revolutionary, but certainly innovative.<sup>3</sup> The debate in the Sixth Committee showed that States did not a priori and in advance close their minds off to all innovations (A/CN.4/483, sect. B). The result was less clear-cut as far as the substance was concerned. In that connection, he recalled that, at its forty-ninth session, the Commission had been divided on the

preliminary conclusions on reservations to normative multilateral treaties including human rights treaties<sup>4</sup> and that there had been two schools of thought.<sup>5</sup> All members of the Commission had endorsed the preliminary conclusions, which had been adopted without a vote, but some members—indeed, a clear majority—had felt that the Commission had gone as far as it could and that, in recognizing that human rights monitoring bodies were competent to comment on and express recommendations with regard to the permissibility of reservations by States (para. 5 of the preliminary conclusions) and in calling on States to cooperate with monitoring bodies and to give due consideration to their recommendations (para. 9 of the preliminary conclusions), it had already taken a big step forward. The other members of the Commission would have liked the Commission to go even further and recognize that those monitoring bodies had the right to draw conclusions from their findings, as the European Court of Human Rights had done in the *Belilos v. Switzerland* case.<sup>6</sup>

4. The views of States in the Sixth Committee had also been divided, but along quite different lines. Among the 50 or so States which had expressed their views on that point, about half had approved the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties, while the other half had expressed reservations on the ground that only States were competent, not only to draw consequences from the possible impermissibility of a reservation, but even to find a reservation to be impermissible. He said that no State had clearly expressed the wish that the Commission should go further in any direction. Like others, however, he was convinced that it was part of the Commission's role to suggest progressive alternative solutions to States if those solutions corresponded to trends that were desirable and had already taken reasonable shape. He nevertheless drew the attention of the Commission and, more particularly, of those members who had regretted what they regarded as his excessively timid approach, to the opposition shown by almost all States to the breakthroughs being recommended in respect of human rights treaty bodies. The Commission would have to take that fact into consideration when it resumed its consideration of that point. It would be in a good position to do so because it would by then have received the reactions of the bodies in question, which had also been consulted and which would perhaps adopt different positions. The persons chairing the human rights treaty bodies had considered the Commission's preliminary conclusions at their ninth meeting, convened at Geneva from 25 to 27 February 1998, but had not yet officially announced the results of their work.<sup>7</sup> Only the Chairperson of the Human Rights Committee had sent in her preliminary comments in a letter dated 9 April 1998, in which she referred only to paragraph 12 of the preliminary conclusions. The essential passage from those comments was reproduced in paragraph 16 of the third report: in substance, the Human

<sup>4</sup> For the text, *ibid.*, para. 157.

<sup>5</sup> *Ibid.*, paras. 148-156.

<sup>6</sup> European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 132, *judgment of 29 April 1988* (Registry of the Court, Council of Europe, Strasbourg, 1988).

<sup>7</sup> See A/53/125, paras. 17-18.

<sup>2</sup> *Yearbook . . . 1996*, vol. II (Part One), document A/CN.4/477 and Add.1 and A/CN.4/478.

<sup>3</sup> *Yearbook . . . 1997*, vol. II (Part Two), chapter V.

Rights Committee felt that regional bodies should not be given a special place and that universal monitoring bodies also contributed to the development of practice and of applicable rules.

5. The members of the Commission were, of course, free to react as they wished to the information on that point which appeared in the third report, but he considered it premature to reopen the debate on the substance of the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties adopted at the forty-ninth session. They were only preliminary in nature and the Commission would have to consider them again, but, before doing so, it would do well to await the comments from human rights bodies and States which it had requested, even if that meant reiterating the request in the report of the Commission to the General Assembly on the work of its current session. It should also wait until the consideration of the question of the permissibility of reservations and of the question of reactions to reservations had been completed before going back to the preliminary conclusions.

6. With regard to requests for comments and observations on the preliminary conclusions, he said that he was worried by the wording of General Assembly resolution 52/156, in which the reference in paragraph 4 to "treaty bodies set up by normative multilateral treaties . . . , including human rights treaties", was, at first glance, ambiguous. That wording was esoteric and had been laboriously negotiated at the insistence of Tunisia, which had argued that, in addition to human rights monitoring bodies, the Commission should also consult monitoring bodies set up under other multilateral instruments. He was not intellectually opposed to that approach, but he did not see exactly which treaties and bodies were meant and would appreciate it if the members of the Commission could enlighten him.

7. He had nevertheless been very favourably impressed by the apparent interest which States had shown in the Commission's work on the topic of reservations to treaties and which was illustrated not only by the large number of statements made in the Sixth Committee, but also by the work done on the subject by the Asian-African Legal Consultative Committee, whose Secretary-General, Mr. Tang Chengyuan, had addressed the Commission (2537th meeting), and by the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, which had established a group of specialists on reservations to international treaties (paras. 27 to 30 of the third report).<sup>8</sup> The relatively large number of replies to the questionnaires<sup>9</sup> received from States and international organizations and of comments on the preliminary conclusions which some States had already transmitted to the Secretariat were also proof of such interest. He would, however, like an even larger number of international organizations and States to reply to the questionnaires. As far as the former were concerned, he regretted the silence of the European Communities, which

were not only depositaries of treaties, but also parties to quite a few multilateral treaties on which they had made unilateral statements; he intended to keep after them. As for States, 32 of the 185 Member States had replied, and that was a more than honourable result compared to the average, but still short of the mark. Although he was aware that the members of the Commission did not represent their Governments, he invited them, where necessary, to draw their Governments' attention to the importance of replying to the questionnaires.

8. Before he went on to introduce chapter I, which dealt with new problems of a much more technical nature, he would appreciate any comments that the members of the Commission might wish to make on the introduction.

9. Mr. HAFNER, referring to the Special Rapporteur's comment on the failure of the European Communities to respond, asked whether the Chairman could get in touch with them personally in order to request the desired information.

10. The CHAIRMAN said that he could indeed, especially since a representative of the European Communities would be present in New York in August.

11. Mr. LUKASHUK, noting that the definition of reservations proposed by the Special Rapporteur (ILC(L)/INFORMAL/12) was based on conventions that had been drafted at a time when the critical issue of reservations had resulted in a certain lack of precision and a considerable degree of latitude, suggested that the words "or named" in draft guideline 1.1 should be deleted. When a State formulated a reservation, it should state clearly that it constituted a reservation. That would make it possible not only to resolve the very complex issues relating to the difference between an interpretative declaration and a reservation, but also to bring greater clarity into legal relationships between States.

12. Mr. Sreenivasa RAO asked, without pressing the point, whether it might not also be desirable to get in touch with national human rights bodies and organizations which were doing admirable work in the countries where they existed and enjoyed considerable credibility.

13. Mr. SIMMA said that, while he was sure that national human rights bodies would welcome the opportunity to comment, he feared that they would be unable to provide legal answers to the questions with which the Commission was concerned, namely, whether domestic or international monitoring bodies were competent to decide either on the validity of a reservation or on the divisibility of a multilateral treaty.

14. Mr. GOCO, referring to the reply of the Chairperson of the Human Rights Committee to the "preliminary conclusions" that had been communicated to the human rights treaty monitoring bodies, said he thought that it was important to await the reaction of regional bodies.

15. Mr. BROWNLIE pointed out that the nature and functions of the monitoring bodies varied considerably: the European Court of Human Rights, for example, was an independent judicial organ vested with at least implied power to assess the validity of a reservation and the divisibility of a treaty, whereas other bodies were little more

<sup>8</sup> See Council of Europe, Committee of Ministers, 612th meeting of the Ministers' Deputies, document CM(97)187, para. 15; and decision 612/10.2 (16 December 1997).

<sup>9</sup> See *Yearbook . . . 1997*, vol. II (Part Two), pp. 44 and 46, paras. 48 and 64.

than joint committees representing the parties to the treaties in question. The Commission should therefore be careful not to generalize. In addition, while it was desirable to consult such bodies, it should be borne in mind that, in many cases, the majority of their elected members were not specialists in international law.

16. Mr. PELLET (Special Rapporteur), replying to the comments by the members, said he thought that the question raised by Mr. Lukashuk was premature, since it was a point that he intended to take up in detail in due course. With regard to Mr. Sreenivasa Rao's comment on the possibility of consulting national human rights monitoring bodies, the observations of such bodies, as well as those of non-governmental organizations, would certainly be welcome, but the Commission should, in his view, avoid "short-circuiting" Governments by making direct contact with them. With regard to Mr. Goco's remark, regional bodies had already been approached, but no official reply had as yet been received. As to Mr. Brownlie's comments, he agreed that human rights monitoring bodies varied considerably, but vigorously challenged the assertion that the European Court of Human Rights had authority to assess the divisibility of the European Convention on Human Rights. It was an authority that it had arrogated to itself, but that any of the States concerned could legitimately challenge. Moreover, the fact that the majority of the members of human rights treaty monitoring bodies were not international lawyers made their reaction all the more interesting, since they could inform the Commission of their practical requirements.

17. Turning to chapter I of his third report, he drew attention to its general structure, as summarized in paragraphs 47 to 49. As the sections dealing, respectively, with "reservations to bilateral treaties" and "alternatives to reservations" were not available in all working languages, they could not be considered until the second part of the session in New York. He would therefore concentrate on section A, which was also the most significant in terms of quantity and quality and dealt with the definition of reservations and of interpretative declarations, that is to say, both with the definition contained in the three Vienna Conventions of 1969, 1978 and 1986 and with the shortcomings and ambiguities of that definition.

18. In accordance with the working method on which there seemed to be broad agreement, he had taken as his starting point the definition of reservations in the three Vienna Conventions and, to begin with, that contained in article 2, paragraph 1(d), of the 1969 Vienna Convention, which he read out. The *travaux préparatoires* which had led to the adoption of that definition and which were summarized in paragraphs 50 to 67 of the report, called for only three comments. First, the question of the definition of reservations had not given rise to lengthy discussion and had cropped up only at distant intervals both in the Commission and at the United Nations Conference on the Law of Treaties itself.<sup>10</sup> Secondly, having taken as its point of departure, with the Special Rapporteur, Mr. James Brierly, a contractual definition of reservations,<sup>11</sup> which were understood as "offers" to other contracting

parties, the Commission had proceeded rapidly and with little discussion to the idea of a unilateral statement. Thirdly, whereas reservations had initially been defined in relation to interpretative declarations and reactions to such declarations, the latter had eventually been dropped and the last Special Rapporteur of the period, Sir Humphrey Waldock, had omitted them deliberately on the grounds that they belonged in the chapter relating to interpretation and not in that relating to reservations.<sup>12</sup> That was actually one of the reasons why he himself had decided to deal with the "positive" definition of reservations first and separately and to leave the question of interpretative declarations for a later stage.

19. However, the 1969 Vienna Convention had deliberately left aside certain problems, including the question of treaties concluded by international organizations and, as explicitly stated in article 73, that of State succession. But it had come to light, when those two subjects were being codified, that they had implications for the definition of reservations itself. That was fairly obvious in the case of treaties concluded by international organizations, since it had been recognized that international organizations were entitled to formulate reservations to treaties to which they were parties and that was why article 2, paragraph 1(d), of the 1986 Vienna Convention had taken that possibility into account, adding "formally confirming" to the excessively long list of circumstances in which reservations could be formulated, since formal confirmation was equivalent in the case of international organizations to ratification in the case of States.

20. It had been less obvious, however, that the preparation of the 1978 Vienna Convention would have an impact on the definition of reservations, but that was what had happened. In considering the matter the former Special Rapporteur, Sir Humphrey Waldock, had realized that, when a successor State expressed the desire to be bound by a treaty, it could and should be able to formulate reservations to or to modify those of the predecessor State.<sup>13</sup> Hence the explanation in article 2, paragraph 1(j), of the 1978 Vienna Convention that the expression "reservation" meant a "unilateral statement . . . made by a State . . . when making a notification of succession to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty . . .".

21. In his view, the result of the various contributions was that none of the three Vienna Conventions gave a comprehensive definition of reservations and that, in order to arrive at such a definition, those contributions must be combined or, in other words, a composite text must be drafted, and that was what he had tried to do in paragraph 81 of his report. It was what he called, for convenience's sake, the "Vienna definition" and it was, of course, based on the text of the 1969 Vienna Convention, although the law of treaties was not limited to it. The proposed composite definition appeared to have the advantage of taking that into account. If the members of the Commission so agreed, it was the text of that definition which he intended to put at the beginning of chapter I of

<sup>10</sup> See 2526th meeting, footnote 17.

<sup>11</sup> *Yearbook . . . 1950*, vol. II, pp. 238-239, document A/CN.4/23, para. 84.

<sup>12</sup> See *Yearbook . . . 1965*, vol. II, p. 49, document A/CN.4/177 and Add.1 and 2, para. 2.

<sup>13</sup> See *Yearbook . . . 1970*, vol. II, p. 50, document A/CN.4/224 and Add.1, commentary to article 9, particularly paras. (9) et seq.

the Guide to Practice on definitions, the first section of which was contained in ILC(L)/INFORMAL/12.

22. The Vienna definition had been adopted without significant doctrinal or political debates and was very widely accepted, as indicated in chapter I, section B, concerning the definition of reservations tested in practice, judicial decisions and doctrine. True, the three Vienna Conventions did not provide a general definition to be applied in all cases and their respective articles 2 were all entitled "Use of terms" rather than "Definitions" to show clearly that the definitions were used "for the purposes of the present Convention", as indicated in the *chapeau* of paragraph 1 of each of those articles. But the fact remained that judicial decisions and State practice had confirmed that definition without establishing a direct link with the Vienna Conventions. In other words, States, international courts and arbitral tribunals had used the definition as a basis without worrying whether the 1969 and 1978 Vienna Conventions were actually applicable in the situations in which they used that definition. In the case of the practice of States and international organizations, it was a fact that not only had the definition in the 1969 Vienna Convention been used *mutatis mutandis*, with hardly any discussion, in 1978 and 1986, but also that States sometimes invoked it explicitly in their practice *inter se*, particularly when converting an interpretative declaration into a reservation. Some States had also done so in their pleadings in contentious cases. Judicial decisions were entirely unambiguous and, to his knowledge, in every case when the problem of the definition of reservations had arisen, the court or the judges had always, implicitly or, more often explicitly, relied on the Vienna definition. That had been the case, for example, with the arbitration tribunal in the Franco-British dispute of 1977 in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (English Channel case)*;<sup>14</sup> with the European Commission on Human Rights in 1982 in the *Temeltasch* case;<sup>15</sup> and with the Inter-American Court of Human Rights in its 1983 advisory opinion.<sup>16</sup>

23. With regard to judicial decisions, writers, or at least those who had written monographs on reservations to treaties, never failed to give qualified approval to the Vienna definition of certain reservations, whereas international law "generalists" simply reproduced the Vienna definition, as demonstrated by the fairly long list of references contained in the last footnote to paragraph 103 of the report. The "specialists" discussed, but did not dispute, the fact that the Vienna definition had currently acquired its letters of nobility and constituted the obligatory starting point for any consideration of the definition of reservations. Contemporary doctrine was very differ-

ent from that which had prevailed before 1969 and which was summarized in paragraphs 90 to 98 of the report. At the time, the definition had usually varied from one author to another. Today, the Vienna definition had on the whole silenced any doctrinal differences and, while some writers, particularly Imbert,<sup>17</sup> proposed their own definition, they were nevertheless taking as a basis the definition contained in article 2, paragraph 1 (*d*), of the 1969 Vienna Convention.

24. Chapter I, section B.2, which was currently available as ILC(L)/INFORMAL/11, was much more important than the purely descriptive chapter I, section B.1, since its aim was to describe "persistent problems". It was in that area that the Commission could do useful work by refining and supplementing the Vienna definition, something that would also lead it to engage in drafting work and thus to re-establish the Drafting Committee. It was striking to note that, since the 1920s, nearly all writers had taken the view that any definition of reservations must include both formal and substantive components. The Vienna definition itself contained three positive formal components: *primo*, the "unilateral statement"; *segundo*, the "moment when the State or international organization expresses its consent to be bound by the treaty"; *tertio*, "its wording or designation"; and a substantive element, which was that the reservation was intended to "exclude or to modify the legal effect of certain provisions of the treaty". He would analyse each of those components.

25. A reservation did not necessarily have to have the formal nature of a unilateral statement. The first Special Rapporteur on the topic, Mr. Briery, had had what might be termed a "conventional" or "contractual" conception of reservations, believing that they represented an agreement among the parties through which they limited the effects of the treaty in its application to one or some of them. That conception was obviously incompatible with the Vienna regime and had been rightly omitted from the definitions given in the conventions. Curiously, the relevant articles were silent on the form that the statement must take, but there was no doubt that it had to be written, and article 23 common to the 1969 and 1986 Vienna Conventions said as much. An unduly formalistic approach to the "unilateralism" of reservations was not appropriate, however. In the first place, even when formulated unilaterally, reservations were often "coordinated". States with special ties of solidarity among themselves formulated identical or very similar reservations. The former Eastern European countries had habitually done so and that continued to be the practice in the Nordic countries and among the member States of the European Union. The procedure presented no problem whatsoever and it seemed unnecessary to devote a guideline to it, but there was also the case when a reservation was formulated jointly by several States. That possibility was currently taking shape in the European Union, for example, whose member States had already made, if not reservations, at least interpretative declarations and joint objections. It would undoubtedly be useful to indicate in the Guide to Practice that that was not incompatible with the definition of reservations. And that was the purpose of draft guide-

<sup>14</sup> Decisions of 30 June 1977 and 14 March 1978 (UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 3-271), in particular p. 40, para. 55.

<sup>15</sup> Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Application No. 9116/80, *Temeltasch v. Switzerland*, vol. 31 (Strasbourg, 1983), pp. 138-153, in particular p. 146, para. 69.

<sup>16</sup> *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83 of 8 September 1983, Series A: Judgments and Opinions, No. 3, para. 60.

<sup>17</sup> P.-H. Imbert, *Les réserves aux traités multilatéraux* (Paris, Pédone, 1978), p. 18.

line No. 1.1.1, as contained in document ILC(L)/INFORMAL/12.

26. The second formal component of the Vienna definition, namely, the moment when a reservation was formulated, was reflected in a long list (“when signing, ratifying, accepting, approving or acceding . . .”) that was hardly felicitous. It had been pointed out that a reservation could be made at other moments. That was true if the treaty so provided, but there was no need to mention that, since the Guide to Practice as well as the Conventions themselves had only a residual function and States were perfectly free to depart from them. Perhaps that could simply be mentioned at the end of the Guide to Practice. The very fact that the information had been included in the definition had been criticized. It was true that that procedure was not very rigorous and that there was an element in it that related more to the legal regime of reservations than to their definition, but the Commission had established the principle that it would modify the Conventions only if it found a serious hidden defect in them. Even if the wording used was not very logical, it placed the emphasis within the definition itself on the moment when a reservation could be made and, accordingly, it had a legitimate function, which was to prevent the potential parties to a treaty from formulating reservations at any time at all, something that would not work in practice and would make the depositary’s task impossible.

27. The expression used was, however, cumbersome, long and awkward. Still worse, the list corresponded neither to the “means of expressing consent to be bound by a treaty”, which was the subject of article 11 of the 1969 and 1986 Vienna Conventions, that phrase being much broader and more general in that it also provided for the exchange of instruments of ratification; nor to the likewise broader reference to “any other means if so agreed”, which was also contained in article 11. There was no indication that a specific problem had already arisen in that connection, but, to be safe and to ensure consistency, it would undoubtedly be useful to mention in the Guide to Practice that the list in article 2, paragraph 1 (*d*), was the same in spirit as that in article 11. That was the purpose of draft guideline No. 1.1.2.

28. He referred in passing to draft guideline 1.1.3, which covered the much more specific, but very practical problem, of a “territorial reservation” which could be made at the time of the notification that the application of a treaty extended to a territory. There again, specific wording that would do no more than to establish a practice that had so far not given rise to any objection would be welcome.

29. The third and final formal component of the Vienna definition related to the condemnation of “legal nominalism” reflected in the phrase “however phrased or named”. In fact, neither States nor judicial decisions took heed of it, which proved that the Vienna definition had been established in practice. There was therefore no reason to revise or supplement the definition on that point. However, it went without saying that that component should have a counterpart in interpretative declarations, which also could not be defined on the basis of the name that their authors tacked on to them.

30. Referring to the fourth component of the Vienna definition, the substantive element, which he considered to be the most important and complex, namely, that the reservation of a State or an international organization “purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization”, he said that a detailed analysis was contained in paragraphs 27 to 108 of ILC(L)/INFORMAL/11, but it was important to stress the technical, and hence arid, aspect of the question, which made it interesting not only for legal experts, but also, concretely, for States which wanted a detailed clarification of the regime of reservations, including their definition. Putting it simply, it might be said that that substantive element was “teleological” because it related to the purpose of the reservation. It gave rise to two sets of problems.

31. The first set of problems was created by the expression “certain provisions”. A well-known public law specialist had criticized the use of the word “provisions” and had proposed that it should be replaced by the word “obligations”. To be sure, a reservation, which was a unilateral instrument, did not change the provision or provisions to which it referred, but “their effect” according to the Vienna definition. The term “certain provisions” lent itself to a discussion and was not without ambiguity. Taken literally, it was not consistent with practice, as in the case of “transverse” reservations, that is to say, reservations which related not to any particular provision, but to the way the State or international organization which had formulated it intended to implement the treaty as a whole. That type of reservation was very common and did not give rise to any objections, a circumstance which it would be useful to indicate in the Guide to Practice and which was the purpose of draft guideline 1.1.4.

32. The second set of problems created by the teleological aspect of the definition was much more difficult. From a general point of view, case law and legal doctrine both recognized that the expression “to exclude or to modify the legal effect” of a treaty meant that, by definition, a reservation had an invalidating effect. That was what distinguished it from an interpretative declaration and from statements presented as reservations, but which were in reality neither interpretative declarations nor reservations, such as certain “reservations relating to non-recognition”, which were very common when States signed or ratified a convention. They were not interpretative declarations quite simply because they did not interpret anything and they were still not reservations because sometimes the State formulating them did not aim to produce any kind of effect on the treaty itself. That was the case when the State confined itself to recalling that its participation in the treaty did not imply any recognition of another contracting party which it did not recognize, but nevertheless did not rule out the application of the treaty in relations which it might have with that other party, even when it expressly agreed to it.

33. A statement did, however, constitute a genuine reservation when the State formulating it stated that consequently, it did not accept any contractual relation with the entity it did not recognize because such an act then had a direct impact on the application of the treaty as between the two States. That practice also posed, albeit marginally, the problem of the formulation *ratione temporis* of reser-

ventions, since such statements must be able to be, and indeed were, formulated when the non-recognized entity became a party to the treaty, that is to say, often after the expression by the formulating State of its definitive consent to be bound. That was what draft guideline 1.1.7 tried to express, although perhaps too succinctly, because it should be specified that such a reservation relating to non-recognition could not, after all, be formulated at any time once the non-recognized entity became a party to the treaty. The Drafting Committee might therefore be instructed to consider more precise wording.

34. Unlike many authors, he thought that the statements which had been considered at some length in paragraphs 63 to 71 of ILC(L)/INFORMAL/11, under the heading "Reservations having territorial scope", were genuine reservations and he was therefore submitting draft guideline 1.1.8 to the Commission for its consideration.

35. With regard to the more general and very sensitive problem of the precise contours of the expression "to exclude or to modify" in the Vienna definition, he referred the members of the Commission to paragraphs 72 to 78 of ILC(L)/INFORMAL/11, which contained many examples of reservations intended to *exclude* the application, not of the treaty as a whole, of course, but certain of its provisions. In paragraphs 79 to 88, he had attempted to identify the main types of reservations intended to "limit" the effect of the treaty's provisions for the State or international organization formulating it. Although the classification might lend itself to controversy and the interpretation of those reservations was sometimes difficult, there was no doubt in his mind that they were in fact reservations within the meaning of the Vienna definition.

36. There was, however, some doubt about whether the expression "to modify the legal effect of certain provisions of the treaty" could cover an "extension" of that effect and justify the existence of "extensive reservations". On that point, the debate in the literature was rather obscure because all writers did not have the same understanding of that notion. If it was taken in the strict sense of a unilateral commitment entered into by the formulating State to go beyond what was imposed on it by the treaty, such a commitment was valid, but it did not constitute a reservation within the meaning of the Vienna definition because its possible binding force was not based on the treaty and was in no way linked to it. In actual fact, ratification, signature or accession were merely an opportunity for the State which made the statement to enter into a unilateral commitment and, if it was bound, it was only for the reasons put forward by ICJ in the *Nuclear Tests* cases. That idea was reflected in draft guideline 1.1.5, whose objective was to put an end to a controversy which dated back to the early 1950s and which had come to light on a number of occasions in the Commission itself, including at the forty-seventh session. The purpose of draft guideline 1.1.6, which was its counterpart, was to make it very clear, however, that there was nothing wrong with a State or international organization seeking, by means of a reservation, to limit the obligations imposed on it by the treaty and, as a corollary, to limit the rights which the other contracting parties derived from the treaty. Although a State could not unilaterally impose obligations on other States and, in the current instance, could not impose a new obligation in respect of

the obligations of general international law on other parties to the treaty, through its reservation, the reserving State could nevertheless certainly revert to the general rule, namely, to deny other States parties to the treaty the rights which they had, not under general international law, but solely by virtue of the treaty. That was very common practice and did not constitute an "extensive reservation". On the other hand, the State could not "legislate" and attempt, by means of a reservation, to impose obligations on other States which did not stem from general international law. That conclusion, which was expanded on in paragraph 108 of ILC(L)/INFORMAL/11, was the reason for the title of draft guideline 1.1.6.

37. In closing, he proposed that, if it found them interesting, the Commission might refer the eight draft guidelines of the Guide to Practice in ILC(L)/INFORMAL/12 to the Drafting Committee; that did not appear to be necessary for the consolidated Vienna definition.

38. Mr. GALICKI said that he wondered about the Special Rapporteur's very conservative and somewhat "casuistic" approach to the definition of reservations, especially with regard to the definition's "time" elements. In particular, he did not see why, instead of adding elements taken from the 1978 and 1986 Vienna Conventions to the long catalogue of the 1969 Vienna definition, he did not replace that list with the more general wording "when the State expresses its consent to be bound by the treaty". The advantage of that "progressive" solution was that it would avoid new additions to the list in future.

39. Noting that the definition did not say anything about the form, whether in writing or oral, that a reservation could take, he thought that it would be wise to include the condition laid down in article 23 of the 1969 Vienna Convention, namely, that a reservation must be formulated in writing. The advantage of that was that it would create a balance of sorts between the reservation and the treaty, which was, pursuant to article 2, paragraph 1 (a), of the 1969 Vienna Convention, "concluded... in written form", and would make a clearer distinction between reservations and certain interpretative acts.

40. Mr. PAMBOU-TCHIVOUNDA noted that, on the basis of the notion of "joint reservations", the Special Rapporteur focused on the role of solidarity between States and the political context of any initiative in respect of reservations. The Special Rapporteur having spoken of composite statements and coordinated reservations, he wondered what might have been the point of taking that aspect of practice into consideration in the definition. Referring to the Special Rapporteur's criticism of "legal nominalism", he said that such flexibility, which he welcomed, was the extension and reflection of the flexibility allowed in respect of the designation of treaties in article 2, paragraph 1 (a), of the 1969 Vienna Convention. In his view, however, the previous speaker's proposal that States should be directed towards the standardization of reservations in written form might help channel that flexibility so as to avoid any confusion.

41. The CHAIRMAN said that, for the further consideration of the topic, he planned to organize the discussion on a "guideline-by-guideline" basis.

*The meeting rose at 1.05 p.m.*

## 2542nd MEETING

Friday, 5 June 1998, at 10.05 a.m.

Chairman: Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

### Reservations to treaties (*continued*) (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,<sup>1</sup> A/CN.4/L.563 and Corr.1)

[Agenda item 4]

#### THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN asked the Special Rapporteur to continue his presentation of the draft guidelines contained in the Guide to Practice (ILC(L)/INFORMAL/12).

#### GUIDE TO PRACTICE

##### DRAFT GUIDELINE 1.1.1

2. Mr. PELLET (Special Rapporteur) said that draft guideline 1.1.1, which bore a provisional title, read:

##### “1.1.1 *Joint formulation of a reservation*

The unilateral nature of reservations is not an obstacle to the joint formulation of a reservation by several States or international organizations.”

As he had already largely introduced draft guideline 1.1.1 at the previous meeting, it was unnecessary to present it once again at any great length. Needless to say, and his remark applied to all of the draft guidelines, he had proceeded on the basis of the definition in the 1969 Vienna Convention, in keeping with the method agreed upon in the Commission, although a number of members, in particular Mr. Lukashuk and Mr. Galicki (2541st meeting), had made him wonder whether there really was agreement on that method.

3. It was to be hoped that no one would challenge the fact that a reservation was a unilateral statement and not a contractual instrument. In practice, however, that unilateral character was somewhat nuanced. First of all, States sometimes consulted each other before formulating a reservation in identical terms. That had long been the case

for the Eastern European countries, and it was the case today for the Nordic countries and for the European Union. However, he had seen no point in devoting one of the guidelines in the Guide to Practice to that phenomenon, because first, it did not seem to cause any problems, and secondly, it did not appear to have any impact whatsoever on the definition of reservations. As Mr. Pambou-Tchivounda had rightly pointed out (*ibid.*), it was an aspect of the political context in which reservations were formulated and had no legal consequences.

4. On the other hand, that was not the case with jointly formulated reservations, that is to say, those which appeared in a single instrument signed by or emanating from two or more States or international organizations. As he had said, he had not found any clear examples of joint reservations, but as early as 1962, at least one member of the Commission, Mr. Paredes, had referred to that possibility.<sup>2</sup> But failing examples of joint reservations as such, there were joint objections to reservations and, above all, joint interpretative declarations, which could often be regarded as veritable reservations. The practice of joint interpretative declarations by the European Community and its member States was quite abundant. It seemed inevitable that the problem would arise of a reservation which had not only been jointly concerted but also jointly formulated. It would be better to make provision for that eventuality—after all, the purpose of the Guide to Practice was not only to intervene as a sort of firefighter once problems appeared, but to suggest conduct for dealing with future events or problems.

5. The Commission would be excessively formalistic if it were to rule out the possibility of joint reservations, which, like joint declarations, joint interpretative declarations and joint objections, simplified matters for reserving States and international organizations, for the depositary and above all for other parties to the treaty, which then had to react not several times, but just once. From the standpoint of legal theory, he agreed with Mr. Rodríguez Cedeño that in any case, a single act emanating from several States joining forces could be regarded as a unilateral act. That was enough to justify, if not the drafting, at least the spirit of draft guideline 1.1.1.

6. Mr. ROSENSTOCK said it was important to make it clearer that, as between State A which was a party to a treaty and States B and C which filed a joint reservation, the legal and other relations between B and C were irrelevant to A and could not affect the obligations of A towards B and of A towards C. He had the feeling that with the suggestion of the joint activity having a certain concrete meaning, there was a risk of embroiling other States in the legal relations among those party to the joint activity. He therefore wondered whether it was reasonable or useful to speak of the joint activity as in some way legally different from a reservation by a single State and to what extent it was possible to argue that the rights of another State could in any way be affected. That seemed to raise the same sorts of questions that could arise if it was claimed that domestic illegality had some impact on another State party to a convention. Hence, he was somewhat concerned that the Commission did not sufficiently

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>2</sup> See *Yearbook . . . 1962*, vol. I, 651st meeting, p. 146, para. 87.

deny the possibility of any consequences flowing from the joint activity vis-à-vis States which were parties to the treaty in question without being participants in that joint activity.

7. Mr. LUKASHUK said he agreed with Mr. Rosenstock about the joint formulation of reservations. Although States could make joint reservations, they signed and ratified them individually, and thus he did not think that such reservations could constitute a legal phenomenon, but merely a political statement. He did not believe the Commission should embark upon that path.

8. The Special Rapporteur had, in paragraph 23 of ILC(L)/INFORMAL/11, reformulated the 1969 Vienna Convention when he had stated that a reservation might be formulated by a State or an international organization when that State or that organization expressed its consent to be bound (draft guideline 1.1.2). But under the 1969 Vienna Convention, the State had a right to formulate a reservation when it signed a convention. As he saw it, the 1969 Vienna Convention was more convenient for practice.

9. Again, it was said that a reservation could exclude or modify a provision of the treaty. It could not do so in a general treaty. A reservation modified a provision in terms of the relations between two States, one of which had made the reservation and the other which recognized it. If that was not changed, would it be possible to change obligations too? Obligations derived from provisions, and if it was not possible to change the provision, it would not be possible to change the obligation either.

10. Mr. BENNOUNA noted that, according to the Special Rapporteur, joint reservations to treaties would simplify matters. If that was merely a formal matter, he had no objection. He wondered, however, whether the formulation of a joint reservation did not go beyond the purely practical aspect of the question. For example, in the European Community's agreements with the outside world, its member States often committed themselves individually. Was it compatible to have individual commitments by States and a joint reservation at the same time? If the commitment was unilateral, would that not create difficulties in dealing with a reservation? That might complicate things for the depositary. In any case, the commitment of an international organization was for the organization itself. Assuming there was a difference in conduct from one State to another, had thought been given to the possible effects on the reservation itself or the objection to the reservation?

11. The other question, which Mr. Rosenstock had also raised, was whether the joint reservation actually stemmed from the state of the relations between the reserving States. For example, if the joint reservation was a function of certain positions of the reserving States, either in the framework of an international organization or elsewhere, would that state of relations impose itself on third States? Clearly, that concerned only the countries in question, but through their reservation they would be jointly imposing a position upon a third State. He could endorse the idea itself if it really could simplify matters and was only technical in nature, but he wondered

whether the Commission had considered all of the legal implications of such an innovation.

12. Mr. HAFNER said he was not sure whether it emerged from the current reading, but in any case it must be understood that the unilateral nature of reservations was retained despite the fact that a reservation had been jointly formulated.

13. Mr. GOCO inquired what the effect would be of a withdrawal from a joint reservation by one of the parties, as authorized by article 22 of the 1969 Vienna Convention. Would it result in the withdrawal of the other parties? He thought that there would be ramifications in the context of the 1969 Vienna Convention.

14. Mr. ECONOMIDES said that draft guideline 1.1.1 constituted a new rule which could prove useful: in the past, there had been cases of several States which had each individually formulated the same reservation in exactly the same terms, although they could very well have formulated an identical joint reservation. In principle, he had no objection to draft guideline 1.1.1, which offered a new possibility for formulating a reservation. A joint reservation meant that each State made a reservation individually, which was then presented jointly. It was not a collective reservation, but one in which each State committed itself separately. The act itself was always unilateral. Thus, if a State wanted to withdraw from a joint reservation, it made a declaration to that effect, and the other States retained their reservation. He did not think that that would pose any difficulties for the depositary.

15. In the matter of drafting, he proposed replacing the word "or" by "and/or", so that the last phrase would then read "several States and/or international organizations". After all, it was also possible to conceive of the case of two or more international organizations wanting to formulate the same reservation. In his view, draft guideline 1.1.1 would constitute a valuable addition to the subject.

16. Mr. MELESCANU said that, in practice, States formulated reservations to multilateral treaties if they were unable to secure modification of some of its provisions. The reserving State did not want to modify the legal effect of the treaty as far as it was concerned, but only to modify that of a particular provision. Technically, it was clear that the reservation had a legal effect only for the State that formulated it. Assuming that a large number of States was formulating the same reservation, even if each one did so unilaterally, it was worth considering whether that could be regarded as an attempt to modify the legal effect of the treaty in their regard, or whether it was actually a clear expression of the idea that there was a large number of States for which the treaty had another value or for which certain provisions should be interpreted differently. The last part of the definition in draft guideline 1.1.1 was entirely correct, and it was the only approach the Commission should accept, but the idea of States that formulated reservations was to send a message as to how certain provisions should have been drafted. The fact that a minority had been unable to impose its point of view could sometimes be expressed by one State. He wondered whether the notion of joint reservations might not lead to situations in which in reality there were, for certain provisions, two major approaches concerning the substance of

the treaty in question. He said that he was greatly in favour of including in the Guide to Practice matters pertaining to withdrawal from a reservation to a multilateral treaty.

17. Mr. PELLET (Special Rapporteur) said he had thought that the problem was purely a drafting matter and did not or ought not to have any legal implications: for instance, it would be more convenient for the 15 States in the European Community—after all, it was essentially for the Community that the problem arose—to present a single document. One could cite as an example the joint declaration which each member State of the Community had made, in an identical text, in respect of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.<sup>3</sup> His idea was meant solely as a practical simplification. Listening to the remarks of his colleagues, he began to wonder whether he was not tampering with the very definition of reservations, which was not at all his intention.

18. As to Mr. Hafner's remark, it had been his fundamental intention to retain the reservation's unilateral character. The presentation that he had just given had been awkwardly put, and he did not plan to use it in the commentary, because on no account did he consider such a reservation to be a joint act. When he had said that, basically it could be regarded as a unilateral act as understood by Mr. Rodríguez Cedeño, he realized, in listening to the comments by members, that he had made a serious mistake. In his mind, it was not a unilateral act, but simply the formulation, in a single document, of several unilateral acts. He gathered that the members of the Commission were prepared to accept that aspect of the matter, but were reluctant to consider that the act itself could be joint. He appreciated the concern which had been voiced; perhaps the problem was just one of drafting. On the other hand, he would not want to leave out from the Guide to Practice the guideline's underlying practical concern, because he believed that it would simplify matters considerably. He hoped, however, it was clear that in no way was he suggesting a change in the legal nature of reservations. In any case, he had understood the message a number of members of the Commission had given.

19. While recognizing that the wording of the 1986 Vienna Convention was unduly cumbersome in some respects, he did not care for the "and/or" formulation and had tried to avoid it. If the Commission decided to use that formulation after all, the decision would, he thought, have to be explained in a special final clause or note, or at the very least, in the commentary. He was pleased to note that Mr. Lukashuk had taken the 1986 Vienna Convention as the basis for his observations, but could not see how the draft guideline "rewrote" article 23 of the Convention. It merely indicated the procedure for the formulation in writing of a reservation. In reply to Mr. Melescanu, he said that his current proposals, far from signalling the end of the exercise, represented only its beginning. Matters would be taken up point by point.

<sup>3</sup> See *Multilateral Treaties Deposited with the Secretary-General* (United Nations publication (Sales No. E.98.V.2), document ST/LEG/SER.E/16), pp. 890-892.

20. Lastly, with reference to the comment by Mr. Goco, the joint formulation proposal in no way affected the regime governing the withdrawal of reservations. A State which had used the joint method of formulating its unilateral declaration could withdraw that declaration either separately or jointly with others. He regretted having failed to make that clear, and undertook to make the requisite changes in draft guideline 1.1.1.

21. Mr. PAMBOU-TCHIVOUNDA suggested that the point just made by the Special Rapporteur in reply to Mr. Goco's observation might be included in the commentary, if it was the Special Rapporteur's intention to produce one.

22. Mr. PELLET (Special Rapporteur) said that he certainly intended to draft a commentary to the Guide to Practice, but was not sure that it would suffice for the current purposes. In his opinion, the draft guideline needed to be appropriately reworded in the Drafting Committee.

23. Mr. HE thanked the Special Rapporteur for his excellent third report on reservations to treaties (A/CN.4/491 and Add.1-6). While he did not think that joint formulation of a reservation could as yet be said to represent State practice, he had no objection to including a reference to it in the proposed Guide to Practice. Like Mr. Goco, he thought that the position with regard to the withdrawal of reservations should be clearly spelled out.

24. Mr. PELLET (Special Rapporteur) confirmed that joint formulation of a reservation by several States or international organizations was a purely formal arrangement from which every State or international organization could withdraw separately. As already stated, the text of the guideline would be expanded accordingly. As for the point that joint formulation was not part of State practice, he did not entirely agree. The practice might be new in the case of reservations to treaties but it already existed with regard to interpretative declarations.

25. Mr. YAMADA said that he had no objection to referring draft guideline 1.1.1 to the Drafting Committee but wondered whether there was to be no further discussion on draft guideline 1.1 (Definition of reservations). In particular, he would point out that the words "by a State", which appeared in square brackets in the composite text proposed in paragraph 81 of the third report, was no longer placed in square brackets in the text of draft guideline 1.1 currently before the Commission. Did that mean the Special Rapporteur intended the text to cover not only the succession of States but also the succession of international organizations, such as had taken place when the League of Nations had become the United Nations or when PCIJ had become ICJ?

26. Mr. PELLET (Special Rapporteur) said that, following his detailed presentation of the proposed composite text (2541st meeting), he had not imagined there would be any need for further discussion, as all the components were to be found in the relevant Vienna Conventions. The words referred to by Mr. Yamada were new and had, for that reason, been placed in square brackets. The explanation he had already given—namely, that the addition of those words was necessitated by drafting considerations—had emboldened him to omit the square brackets without first consulting the Commission. As to

Mr. Yamada's other question, that of succession between international organizations, he agreed that the problem existed but did not think it needed to be discussed in the current context. Perhaps Mr. Mikulka, the Commission's chief expert in matters of succession, could be asked to take it up at some later stage.

27. Mr. ECONOMIDES said that Mr. Yamada deserved thanks for reopening the discussion on guideline 1.1, in respect of which some suggestions had been made at the previous meeting. He had doubts about the suggestion regarding the possible acceptance of oral reservations and thought that the matter could be dealt with more appropriately in the context of the form, rather than the definition, of reservations. On the other hand, he did feel that there was a case for inserting the word "limit" between the words "exclude" and "modify" in guideline 1.1. He also agreed with the observations on guideline 1.1.2 made by Mr. Galicki at the previous meeting to the effect that the reference to article 11 of the 1969 and 1986 Vienna Conventions could be consigned to an explanatory footnote. The paragraph would then read: "A reservation may be formulated by a State or an international organization when that State or that organization expresses its consent to be bound by the treaty." Such a text would be considerably clearer for the reader.

28. Mr. BROWNLIE, after congratulating the Special Rapporteur on his excellent work, said that if the Commission accepted the underlying premise that the exercise consisted in clarifying and not in revising the Vienna Conventions, he saw no reason why the first two of the proposed guidelines should not be transmitted to the Drafting Committee without further discussion. The Special Rapporteur would doubtless take up in the commentary some of the points made in the discussion that had already taken place.

29. Mr. PELLET (Special Rapporteur) said he wished to make it very clear once again that there was no question of modifying the text of the Vienna Conventions unless absolutely necessary. He was quite prepared to amend the proposed composite text, but not to tamper with the wording employed in the Vienna Conventions. Unlike Mr. Economides, he thought that the modification proposed by Mr. Galicki would be disastrous and would turn the clock back to the 1960s. True, the Vienna Conventions were not holy writ, but the Commission was bound by a moral contract not to change them. It was free to interpret the Vienna Conventions but not to replace them.

30. Mr. MIKULKA said he agreed with Mr. Brownlie that it would be best to leave drafting matters to the Drafting Committee. The point raised by Mr. Yamada was well taken but was perhaps too technical to be discussed in the current context. He entirely agreed with the Special Rapporteur that the Commission's mandate was only to clarify any points not made sufficiently clear by the 1969, 1978 and 1986 Vienna Conventions and that there was no point in discussing definitions or formulations already to be found in those Conventions.

31. Mr. GALICKI said he deeply regretted that the Special Rapporteur viewed his proposal, put forward in a constructive spirit, as a monster of Frankenstein proportions. It was simply his perception that the attempt to combine

all the definitions contained in the Vienna Conventions had led to unwieldiness and certain logical inconsistencies.

32. Mr. AL-BAHARNA suggested that, in the interests of clarity, the phrase "or by a State when making a notification of succession to a treaty" should be incorporated in a separate sentence or clause.

33. Mr. PELLET (Special Rapporteur) referred Mr. Al-Baharna to the definition contained in the 1978 Vienna Convention, which contained exactly the same phrase. If the Commission was unhappy with a composite definition, it was welcome to reject his proposal, but he resolutely refused to tamper with the work of his predecessors.

34. Mr. LUKASHUK said that Mr. Al-Baharna had not been suggesting an amendment to the Vienna Conventions but making the point, which he supported, that the wording needed to be simplified without changing the substance. If the idea was to provide practical guidance, an unduly broad definition was inappropriate. He proposed starting with a brief definition of reservations as a unilateral statement and following up with a clause containing the other details.

35. Mr. PELLET (Special Rapporteur) said he disagreed with any proposal that amounted to redrafting a definition which was currently in force and had been accepted by a large number of States. If it attempted to do so, the Commission would be exceeding its mandate.

36. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to take note of draft guideline 1.1 and draft guideline 1.1.1 and to refer them to the Drafting Committee, on the understanding that all remarks made by members would be taken into consideration.

*It was so agreed.*

#### DRAFT GUIDELINE 1.1.2

37. The CHAIRMAN invited the Special Rapporteur to introduce draft guideline 1.1.2, which read:

##### *"1.1.2 Moment when a reservation is formulated*

A reservation may be formulated by a State or an international organization when that State or that organization expresses its consent to be bound in accordance with article 11 of the 1969 and 1986 Vienna Conventions on the Law of Treaties."

38. Mr. PELLET (Special Rapporteur) said he was gratified to note that Mr. Galicki, who had accused him (2541st meeting) of adopting a casuistic and anti-progressive approach, had reached precisely the same conclusion by approaching the matter from what he presumably thought was the opposite direction, namely that the *ratione temporis* element in article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions was not to be interpreted in a narrow and formalist sense and that a reservation could, in general, be formulated by a State or international organization when it expressed its definitive consent to be bound.

39. While oral reservations to a multilateral treaty were, in his view, inconceivable, he agreed in substance with Mr. Galicki that reservations should in all cases be formulated in writing, something which, again, he had himself pointed out at the previous meeting. He did not, however, share the view that a specification regarding written form needed to be included in the definition of a treaty, as had been done in article 2, paragraph 1 (a), of the 1969 Vienna Convention, since it was recognized that oral treaties could exist.

40. The draft did not rule out the possibility of entering a formal reservation to a treaty at the time of signing. However, as stipulated in article 23, paragraph 2, of the 1969 Vienna Convention, it must be formally confirmed at the time of ratification. A reference to that possibility was not necessary in guideline 1.1.2 and could be made in the commentary. The guideline supplemented and constructively interpreted the Vienna Conventions and did not synthesize them. He drew the Drafting Committee's attention in that connection to paragraphs 14 to 23 of ILC(L)/INFORMAL/11.

41. Mr. GALICKI, supported by Mr. MIKULKA, proposed adding a reference to article 20, paragraphs 1 and 2, of the 1978 Vienna Convention to the reference to article 11 of the 1969 and 1986 Vienna Conventions, so as to provide for the case of notification of succession to a treaty.

**International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (*continued*)\* (A/CN.4/483, sect. D, A/CN.4/487 and Add.1,<sup>4</sup> A/CN.4/L.556, A/CN.4/L.568)**

[Agenda item 3]

PROPOSAL BY THE SPECIAL RAPPORTEUR

42. Mr. YAMADA (Chairman of the Working Group on prevention of transboundary damage from hazardous activities) said that the Working Group, composed of Mr. Sreenivasa Rao (Special Rapporteur), Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Hafner, Mr. Rosenstock and Mr. Simma, had met four times between 15 and 28 May 1998 to assist the Special Rapporteur in preparing draft articles on the prevention of transboundary damage from hazardous activities. It had reviewed draft articles 3 to 22 adopted by the Working Group at the forty-eighth session of the Commission.<sup>5</sup> In the light of the proposed amendments and new elements, the Special Rapporteur had prepared the draft articles contained in document A/CN.4/L.556. No decision had been taken on them, but he could safely say that they enjoyed the Working Group's broad support. He trusted that the Commission would take note of the articles and refer them to the Drafting Committee together with any observations members wished to make.

43. Mr. Sreenivasa RAO (Special Rapporteur) said that the draft articles had been reviewed to assess whether any amendments or additions were required in the light of the current scope of the topic and such important developments as the adoption of the Convention on the Law of the Non-Navigational Uses of International Watercourses, to make their presentation more systematic, to eliminate duplication and to group them under more appropriate headings.

44. Draft articles 1 and 2 had already been referred to the Drafting Committee. New draft articles 3 to 16 covered previous draft articles 3 to 22.

45. Article 3 of the draft articles at the forty-eighth session had been deleted. One of its constituent ideas was reflected in new article 4 (Cooperation) and the second idea had merely been a statement of the obvious.

46. Former article 4 (Prevention), became new article 3 and had been redrafted to address the question of prevention rather than a situation in which harm had already occurred. A further important modification had been to change the words "prevent or minimize" to read "prevent, and minimize" in new article 3 and throughout the draft in order to reinforce the underlying obligations.

47. Former article 5, concerning liability, had been deleted as being outside the scope of the topic and new articles 4 and 5 (Implementation) were broadly similar to former articles 6 and 7, respectively.

48. It had been felt that former article 8 (Relationship to other rules of international law) which had been redrafted and became new article 6 was somewhat inadequate as a saving clause and that the Commission should re-examine the new version after a decision was taken on the form of the draft articles.

49. There was broad consensus within the Commission and elsewhere that no hazardous activity should be embarked upon without prior authorization. Former article 9 (Prior authorization) had been reworded in new article 7 in such a way as to express that idea more clearly. The idea for paragraph 2 had been taken from former article 11, which had been deleted.

50. The title of new article 8, formerly article 10, had been changed to "Impact assessment" from "Risk assessment" because it referred essentially to environmental impact assessment. The more focused wording would, in his view, achieve the objective of ensuring that any decision on prior authorization would be linked to a careful evaluation of its possible adverse impact on the persons, property and environment of other States. Paragraph 2, based on former article 15, was designed to ensure that the general public was properly informed about the issues involved. The phrase "likely to be affected by an activity" extended that obligation, where appropriate, to the general public in other States, a provision strongly advocated in the literature on the topic.

51. Former article 12, concerning non-transference of risk, had certain implications regarding liability and had been deleted.

\* Resumed from the 2531st meeting.

<sup>4</sup> See footnote 1 above.

<sup>5</sup> See 2527th meeting, footnote 16.

52. As to the other important aspects of the duty of prevention, namely notification and information, new article 9 (Notification and information) was based on former article 13, with certain minor modifications. The phrase “pending any decision on the authorization of the activity” had been added to make it perfectly clear that if the assessment referred to in new article 8 indicated a risk of causing significant transboundary harm, the State of origin must postpone giving such authorization. Paragraph 2 stressed that the response from the States likely to be affected must be provided within a reasonable time: in the earlier version, it had been the State of origin that had indicated the time-frame in which it expected a response. The new formulation was intended to reconcile better the interests of the two States by allowing the affected State to indicate, on the basis of its particular circumstances, the time-frame it deemed reasonable.

53. New article 10 (Consultations on preventive measures) drew on former article 17 and was based on the idea of consultations as a basic requirement and as something that any State could request in order to achieve an equitable balance of interests. The most important change was in paragraph 3, where the phrase “may proceed with” an activity had been replaced by “in case it decides to authorize” the activity. That made it clear it was not the State but a separate operator that carried out the activity, something which was true in most cases.

54. New article 11 (Factors involved in an equitable balance of interests), was formerly article 19. The factors themselves remained unchanged in the new version. He had received various suggestions as to how the listing of those factors might be reorganized, but thought that was a matter best dealt with by the Drafting Committee.

55. Former article 18 had been extensively recast to produce new article 12 (Procedures in the absence of notification). The new article spelled out the stages involved when there had been no notification and when authorization for an activity was being requested or had already been provided, but the State likely to be affected felt the need for additional information or consultation or did not concur with the State of origin’s assessment of the amount of significant risk involved. In redrafting former article 18, he had taken into account the language of a similar article in the Convention on the Law of the Non-Navigational Uses of International Watercourses.

56. New article 13 (Exchange of information) was largely unchanged from former article 14. Former article 15 had been deleted and the content transferred to new article 8, paragraph 2. New article 14 (National security and industrial secrets) took up the subject dealt with in former article 16, for which an exception could be made in responding to a request for information. It was mostly unchanged from the earlier version.

57. New article 15 (Non-discrimination) dealt with the principle of non-discrimination in the context of prevention and was drawn from former article 20, which had focused on compensation or other relief after the damage had occurred. Article 21 of the draft at the forty-eighth session, concerning the nature and extent of compensation or other relief, had been deleted. Former article 22, on factors for negotiations, had likewise been deleted

because such matters were to be considered in the context of liability.

58. In response to suggestions received, he had added an article, new article 16 (Settlement of disputes), again borrowing from the experience gained in the drafting and adoption of the Convention on the Law of the Non-Navigational Uses of International Watercourses. He had used a much simpler and more economical formulation, however, to get across the idea that if, in respect of a problem concerning the interpretation or application of the articles, States could not reach agreement by using the dispute-settlement machinery they themselves had chosen, they would be required to appoint an independent and impartial fact-finding commission. That idea was part of the progressive development of international law, as indeed was much of the material in the draft articles being recommended.

59. He believed such development was essential and would meet the best interests of all States. The draft articles were forward-looking, while containing important elements of existing obligations in law and practice such as notification and the obligation to consult and to permit the operation of dispute-settlement mechanisms. With those thoughts, he was submitting the draft articles to the Commission with a request that they be referred to the Drafting Committee for further refinement.

60. Mr. HAFNER said there was always some uncertainty involved when dealing with customary international law, as the Commission was. Nevertheless, so much uncertainty surrounding the programme of work, especially now, with the first part of the session drawing to a close, was unfortunate. Even with the best of wills, which most members of the Commission showed, it was hard to keep pace with all the reverses and changes in scheduling the work. He did not mean to imply that the Chairman should be held accountable for the changes. He was simply expressing the wish for greater stability in implementing the programme of work.

61. He commended the Chairman of the Working Group on prevention of transboundary damage from hazardous activities on the outcome of the Working Group’s deliberations and congratulated the Special Rapporteur on his willingness to elaborate the draft articles, which were an important step in the right direction. Certainly, they constituted progressive development of international law.

62. Members of working groups did not normally comment on their efforts, but he felt compelled to do so in order to place on record his understanding of the draft articles and the report of the Working Group. In his view, the articles did not apply to those activities that entailed no risk of significant harm and whose existence must therefore be tolerated by possibly affected States, nor to those activities, on the opposite side of the spectrum, which entailed a high risk of great damage and which were already prohibited under existing international law. The articles dealt exclusively with activities that fell in between those two categories, namely those activities which entailed either a low risk of high damage or a high risk of small but nevertheless significant damage. The articles sought to apply to those activities a regime derived from the shared resources regime, as was evident

from the duty of achieving a balance of interests, for instance, in new article 10, paragraph 2. Previous Special Rapporteurs had cited in that connection cases that dealt with the particular problem of shared resources. Hence it could be said that the concept applied in particular to the grey area of activities whose prohibition by international law was open to doubt. They certainly became prohibited activities if the State of origin did not comply with the duties incumbent upon it under the regime set out in the draft.

63. He interpreted new article 5 as potentially giving rise to a duty to provide for a monitoring system and, in particular, to establish adequate procedures to ensure that individuals could participate in the relevant decision-making. The need to provide access for individuals had already been confirmed in a number of international instruments, for example, principle 10 of the Rio Declaration.<sup>6</sup> In citing that Declaration, he did not wish to imply that he considered it as binding or as reflecting *opinio juris*. It did, however, show a certain tendency that had been agreed upon by the world community and which it was worthwhile to take into account in dealing with the progressive development of international law.

64. The precautionary principle must also be reflected in the draft, and the most appropriate place to do so would be in new article 11, on factors involved in an equitable balance of interests. He was prepared to submit an appropriate formulation to the Drafting Committee. The principle had been confirmed in a great many instruments of a non-binding nature, including the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, the Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks and the United Nations Framework Convention on Climate Change. The principle had also been referred to in a number of cases before international courts, including the pleadings in the *Gabčíkovo-Nagymaros Project* case.

65. He greatly regretted that it had not been possible to include a reference to the “polluter-pays” principle, which was mentioned in principle 16 of the Rio Declaration. The Institute of International Law, at its 1997 session held at Strasbourg, in its resolution on Responsibility and Liability under International Law for Environmental Damage, had also referred explicitly to that principle. To illustrate the necessity of such a principle, one could take the case of a State that set up a nuclear power plant on its very border, something that would enable it to transfer to the other State half of the costs of the preventive measures, which was certainly not what the Commission intended with its draft.

66. It had been argued that that was an economic, not a legal, principle. He could not share that view, since the question of sovereignty was involved: specifically, the issue of how to achieve the coexistence of the sovereignties of two States and to distribute the burdens and the benefits of activities in an appropriate manner. That issue

must be reflected in the draft, and the best place to do so would be in new article 11.

67. His comments had been made exclusively for the purpose of placing on record his views: they should by no means be understood as a critique of the draft articles, quite the contrary. He greatly appreciated the work done by the Working Group and the Special Rapporteur, but thought additions along the lines he had set out should be considered.

68. The CHAIRMAN said he entirely agreed with Mr. Hafner’s initial remarks about the organization of the work of the Commission, a task that was proving very difficult. He was sure he had the support of all members, particularly the Special Rapporteurs, in his efforts to achieve a programme of work that would be respected.

69. Mr. ROSENSTOCK said he joined the Chairman in agreeing entirely with Mr. Hafner’s opening remarks, including his statement that the problem originated, not with the Chair, but elsewhere. The notion of the officious intermeddler in tort law in common-law countries might usefully be borne in mind. If one was walking past a body of water in which someone was drowning, one was not obliged to intervene. However, if one did intervene, the action had to be effective: otherwise, one could be held responsible. Some overtones of that problem appeared to be present at certain levels of the Commission’s work.

70. He was slightly concerned about Mr. Hafner’s conclusion that because—as he had rightly said—there were three categories of dangerous activities, only one of which was covered in the draft, the Commission was saying something about the permissibility or impermissibility of other categories. That conclusion was not necessarily wrong, but it was overly hasty and one for which there was no basis in the previous work of the Commission.

71. Mr. ECONOMIDES said he, too, wished to thank the Chairman of the Working Group, of which he had been a member, and the Special Rapporteur, for their endeavours and the presentation of the draft articles. The work done had greatly improved on the previous articles, resulting in an excellent product that could be referred to the Drafting Committee.

72. In the matter of substance, if consultations on preventive measures under new article 10 did not yield results, and if the State of origin decided to authorize the continuation of the activity and the other State requested an independent and impartial investigation, the activity should not be pursued, pending the conclusion of the investigation. That was the logical inference to be drawn from the existing draft article, but perhaps it could be underlined further in the Drafting Committee.

73. Mr. LUKASHUK said Mr. Hafner had used the phrase “non-binding” documents, but it was more accurate to refer to “legally non-binding” documents. The draft proposed by the Working Group and the Special Rapporteur was in general quite satisfactory. In new article 12, paragraph 3, the phrase “the State of origin shall, if so requested by the other State, arrange to suspend the activity in question for a period of six months” was of some concern, because the activity in question could be linked with significant financial outlays, for example,

<sup>6</sup> Ibid., footnote 8.

construction work. He urged the Special Rapporteur to take that problem into consideration and to deal with it, perhaps in the commentary.

74. Mr. Sreenivasa RAO (Special Rapporteur) said he was most grateful for the initial reaction to his efforts to move the articles forward to the Drafting Committee. Many valuable comments had been made and would be studied further. He agreed with Mr. Rosenstock that no aspect of the topic was being endorsed or rejected by the mere fact of being covered in the draft and that matters which were not covered were subject to the normal application of international law. The view had frequently been expressed that many other areas impinged upon the consideration of the topic, and they must not be adversely affected by any excessively specific formulations in the draft: some constructive ambiguity was helpful. The commentaries to the draft articles had been adopted by the Working Group at the forty-eighth session, not by the Commission, and had been of great assistance, particularly in connection with article 2 (Use of terms). They would be scrutinized very carefully in the future work on the draft.

75. If the articles, which appeared to be generally acceptable, were referred to the Drafting Committee, the prospects for adoption by the Commission at the current session were excellent.

76. Mr. GOCO said he joined the chorus of congratulations to the Chairman of the Working Group and the Special Rapporteur. His only comment related to the settlement of disputes. It was apparent from the second sentence of new article 16, that an impasse would be created if one of the parties did not wish to accept the intervention of an independent and impartial fact-finding commission. That was true even though the sentence mentioned a time period of six months after which the party was obligated to accept such intervention.

77. Mr. Sreenivasa RAO (Special Rapporteur) said that the difficulty had not gone unnoticed, but the expectation was that the ultimate form of the draft would influence the way the problem was handled. If it was a convention, then certain obligations, including that of observance of an article containing provisions on dispute settlement, were immediately incumbent upon any State that became a party to the convention. If it proved to be a recommendation adopted first by a few and then by more and more States on the basis of a certain amount of practice, then it was hoped that the experience of States with fact-finding commissions would be sufficiently positive to persuade other States to submit to such machinery.

78. In response to a further question by Mr. GOCO, he said fact-finding commissions were becoming more common. Generally, the decisions of such commissions were non-binding, for they were intended to aid the parties in appreciating the facts in the same way. Disputes, it was thought, were in most cases based on an inability by States to do so, and the theory was that once the facts were established by a third party, States would be willing to accommodate each other much more quickly.

79. Mr. ROSENSTOCK added that the decision to include a reference to fact-finding institutions in the Convention on the Law of the Non-Navigational Uses of

International Watercourses had been based on extensive indications in the literature that, in the environmental field, fact-finding was a particularly effective dispute-settlement mechanism. A very great many cases could be cited, including the ones between the United States and Mexico and the United States and Canada.

80. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer the draft articles to the Drafting Committee.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

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## 2543rd MEETING

*Monday, 8 June 1998, at 10.15 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock.

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### Unilateral acts of States (*concluded*)\* (A/CN.4/483, sect. F, A/CN.4/486,<sup>1</sup> A/CN.4/L.558)

[Agenda item 7]

#### REPORT OF THE WORKING GROUP

1. Mr. CANDIOTI (Chairman of the Working Group on unilateral acts of States), introducing the report of the Working Group (A/CN.4/L.558), said that it had held two meetings and had based its work on the first report of the Special Rapporteur on unilateral acts of States (A/CN.4/486), as well as on the discussion in plenary.

2. As indicated in paragraph 7 of its report, the Working Group had agreed that, according to the Commission's usual practice, the Special Rapporteur and the Commission should prepare draft articles with commentaries, without prejudice to the final form it might decide to give

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\* Resumed from the 2527th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1998, vol. II (Part One).

to the results of the work on the codification and progressive development of the topic. Accordingly, the Working Group had looked into the content of some possible initial draft articles which would be designed, first of all, to define the scope of the draft, in accordance with the general plan outlined in the first report of the Special Rapporteur on unilateral acts of States and the discussions in the Commission, that is to say, to identify the unilateral acts that would be taken into account and those that would be ruled out and to what extent; and, secondly, to provide a definition of unilateral acts for the purposes of the draft articles (para. 8).

3. With regard to the definition of scope, the Working Group considered that article 1 might be based on, and paraphrase, article 1 of the 1969 Vienna Convention, providing that the draft articles applied to unilateral acts of States. Another article might be based *mutatis mutandis* on article 3 of the 1969 Vienna Convention and refer to unilateral acts not covered by the draft articles, stating, for example, that the draft articles did not apply to unilateral acts governed by other specific legal regimes, such as the law of treaties, the law of the sea, the law of international arbitral or judicial procedure, the rules relating to neutrality and war, without prejudice to the legal force of such unilateral acts and the application to them of the rules set forth in the draft articles to which they would be subject under international law, independently of the draft articles, and to the extent that the specific regimes in question did not contain any special rules on particular aspects.

4. In considering the question of scope, the Working Group had also discussed the question whether the draft articles should relate only to unilateral acts which States issued in respect of other States or to acts intended to produce legal effects in respect of other States or other subjects of international law or, in general, to acts of an *erga omnes* nature. Views on that point had been divided and the Working Group had considered that that question had to be analysed in depth by the Special Rapporteur and the Commission and further clarified in due course (para. 6).

5. The Working Group had held a lengthy discussion on the question of the definition of a unilateral act for the purposes of the draft articles on the basis of the wording contained in paragraph 170 of the Special Rapporteur's first report. It had considered several amendments which had been proposed by its members and on the basis of which the Special Rapporteur had then submitted draft definitions to it. The discussion had shed light on various theoretical aspects of the problem, but had also shown that it would currently be difficult to give a sufficiently exhaustive and entirely satisfactory definition, it being understood, however, that, at the current initial stage, it would be a good thing to have a provisional draft definition to serve as a working hypothesis and that the definition would take shape as the substantive work on the rules applicable to unilateral acts progressed.

6. Following the discussion in the Commission, the Working Group had considered the question whether, in accordance with the mandate entrusted to it by the Commission, the draft articles should include a definition of a unilateral declaration only, as the Special Rapporteur was proposing, or a more general definition of a unilateral act. The preferences expressed in the Commission had been

stated again in footnote 2 of the report of the Working Group. In any event, the Working Group had agreed on the basic constituent elements of a definition, which were the following: an autonomous expression of the will of a State, that is to say, an expression of will which stood by itself and, in order to establish the unilateral act, did not have to be accompanied by another separate expression of will for the same purpose, that is to say, consent or acceptance by another subject of international law; and the creation, by the expression of will, of international legal effects. It had considered that the unequivocal, notorious nature of that expression of will was a necessary condition for the unilateral act.

7. Paragraph 9 of the report referred to another question which had been considered by the Working Group, that is to say, whether the possible effects of a unilateral act must be stated in detail in the body of the definition or whether they should be dealt with in separate articles. The predominant idea had been that the definition must be short and contain only a general reference to the production of international legal effects or the intention of producing international legal effects and that such effects must be defined further on in the draft articles.

8. As it had indicated in paragraph 10 of its report, the Working Group had suggested, taking account of the views expressed in the Commission, that, in due course, the Special Rapporteur should consider how rules on the functioning of estoppel and perhaps also on the effects of silence could be formulated in the context of unilateral acts of States and make proposals in that regard.

9. The Working Group had also expressed the opinion that the Special Rapporteur should indicate in detail how he intended to organize his second report. The Special Rapporteur had explained that he intended to deal immediately with the question of the formulation of unilateral acts and conditions for their validity, that he might submit the outline to the Commission at the second part of its fiftieth session in New York and that, in the meantime, he would welcome with satisfaction any comments and suggestions that the members of the Working Group might make in that regard.

10. In conclusion, the Working Group was recommending that the Commission should invite the Special Rapporteur to submit draft articles in his second report on the scope of the topic and the definition of a unilateral declaration or unilateral act on the basis of the comments made at the current session in the Commission and in the Working Group; and to explore the various aspects of the topic concerning the elaboration and conditions of validity of unilateral acts of States and to submit draft articles which, in his opinion, reflected the international law on the topic (para. 11).

11. He thanked the Special Rapporteur and the members of the Commission who had taken part in the work of the Working Group for their interest and contributions; he also thanked the secretariat for its cooperation.

12. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that, judging by the report of the Working Group, the work on the topic of unilateral acts of States had progressed well, both in terms of its delimitation and in terms of the preparation of a definition of a unilateral act of a

State. Apparently, the preference was for the preparation of articles with commentaries, without prejudice to the final form that the result of the Commission's work would take. The codification and progressive development of the rules applicable to that category of acts might nevertheless lead to the preparation of a draft convention, a matter on which the Commission would have to take a decision at the appropriate time.

13. The Working Group had reached the conclusion, with which he fully agreed, that a unilateral act was an autonomous and clear-cut expression of the will of a State for the purpose of producing legal effects. It was an act of a State, it being understood that the question of its addressee would be considered and settled later.

14. With regard to future work, he intended, in his second report, to submit the first three draft articles, together with commentaries; the first would deal with the definition and the others with scope of the draft articles based on the model of articles 1 and 3 of the 1969 Vienna Convention, on the understanding that, in order to avoid too broad an interpretation, the acts in question would be very specific and well defined. At the Commission's next session, he intended to submit a study on the elaboration of acts, which would relate to the attributability of an act, conditions of validity, the form of the expression of consent and the sensitive issue of reservations, that is to say, the question whether a State could or could not formulate reservations or make a unilateral act subject to conditions without actually entering the treaty sphere. He would also discuss the questions of revocability, the length of the commitment made (extinction) and the modification, suspension and nullity of an act, as well as the even more difficult question of entry into force and that of acts which a State could perform through the intermediary of officials empowered to bind it in international relations in the light of the requirements of internal law, particularly constitutional law.

15. It was true that there had been no unanimity on the question whether the formal act was the declaration, the unilateral legal act whose operation could be governed by rules, but there had been no opposition on that point either. That was why he continued to believe that a declaration as a formal act had to be a unilateral legal act. That position seemed to be justified, at least as far as the elaboration of the act was concerned. It was admittedly slightly less certain in the case of the formulation of rules on effects which had to take account of the various material acts that the unilateral act could contain and which were, for example, promise, renunciation, recognition and protest and which, without any doubt, produced different legal effects, as the Working Group had pointed out.

16. Those would be the main elements of the study he intended to submit at the fifty-first session of the Commission and on which he would like to receive guidelines from the members of the Commission.

17. Mr. GOCO, referring to the discussion in the Commission, said that he would like the difference between a political act and a unilateral act which produced legal effects to be clearly explained. He would also like the Commission to consider whether a State which had performed a unilateral act could unilaterally go back on that

act or renounce it, thereby wiping out the legal effects produced. He hoped that the Special Rapporteur would clarify those two points in his second report.

18. Mr. BROWNLIE, noting that, in practice, many unilateral acts were performed by diplomats without any publicity, said that the notorious expression of the will of a State was a sufficient, but not necessary, condition for the production of legal effects.

19. Since the Special Rapporteur intended to consider the question of the elaboration and conditions of validity of a unilateral act on the basis, *mutatis mutandis*, of the law of treaties, he said that, in the latter case, the effects of acts performed by a contracting party or a potential contracting party were also directly related to the status of the acts in question in internal constitutional law. It would therefore be advisable to determine whether a given act was valid under the internal constitutional law of the State concerned, but it was very doubtful whether its international legal effects could be subject to such validity.

20. Mr. PAMBOU-TCHIVOUNDA said that he would like clarifications with regard to the term "purely non-legal nature" in the second sentence of paragraph 5 and the word "compactness" in paragraph 7.

21. As to substance, he agreed with the idea stated in paragraph 8 that the Special Rapporteur might already be in a position to produce a number of draft articles and thought that he should be encouraged to do so. In that connection, the Special Rapporteur should probably start at the beginning and consider the question of the various bodies which were empowered to perform unilateral acts on behalf of the State. That raised the question of competence and of capacity to bind the State unilaterally at the international level, which was one of the most basic issues that the Special Rapporteur should look into, together with the other aspect of the topic on which the Commission expected him to make proposals, namely, the scope of a unilateral act.

22. Mr. CANDIOTI (Chairman of the Working Group) said that the second sentence of paragraph 5 referred to acts which had no legal effects and were not of a legal nature; the word "purely" was therefore unnecessary. In paragraph 7, the word "compactness" duplicated the term "conciseness" that preceded it and was actually superfluous.

23. As to the substantive comments, the question of which State organs were competent to bind a State unilaterally at the international level was one of the most difficult, but also one of the most important to be decided.

24. Mr. CRAWFORD said that he was worried about the possible restrictive effect of the phrase "for the purpose of producing international legal effects" in the first sentence of paragraph 5. If the Commission restricted the topic to acts which were intended for the purpose of producing international legal effects at the time they were issued, it would be excluding most of the sensitive issues and its work, which was modelled on that relating to the law of treaties, would be only of limited interest. The members of the Commission who wanted the topic also to apply to unilateral acts which produced international legal effects, such as estoppel, did not intend to accept that

narrow interpretation. It might well be, of course, that, when it issued a unilateral act, a State could expressly indicate that that act was a purely political declaration on which no one could rely and it was then justifiable to say that that act would not produce legal effects. However, when a State merely issued an act during negotiations, without expressly ruling out the possibility that that act might produce legal effects, it could not subsequently claim that it had not intended to enable other States to base themselves on that declaration. The topic of the study should therefore be defined more objectively because, although, as the Chairman of the Working Group had said, the exclusion of political acts from the scope of the topic could be justified, that is to say, of those which were objectively incapable of producing legal effects, the corollary of that decision must be that the topic should include acts which were objectively capable of producing legal effects, either because of the intention of their author at the time when they had been issued or because of other relevant circumstances.

25. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that the comments which had been made showed how important the nature of the act was above all, at the beginning. It was, however, correct that, in many cases, it was initially not clear whether a declaration by a State was of a legal or of a political nature and that the intention of the State could be established only subsequently, after the declaration had been interpreted. It was at that point that the rules which were to be formulated and would be applicable to that declaration would come into play. The limitation of the topic to legal acts, that is to say, acts whose purpose was to produce international legal effects, was nonetheless important if the Commission was not to get bogged down in uncertainty.

26. Mr. CANDIOTI (Chairman of the Working Group) said he agreed with the Special Rapporteur and with Mr. Crawford that the basic elements studied by the Working Group had been the expression of the autonomous will of the State and the production of legal effects. It was, however, correct that the intention of the State might not be apparent at the time the act was performed, but could become apparent afterwards, when its effects could be objectively analysed.

27. Mr. BROWNLIE, referring to the point rightly raised by Mr. Crawford and to the question of the relevance of the internal validity of a unilateral act, said the underlying principle was that the act in question could not be “self-characterized” by the author State. As to the validity of the opinion that a political act could not have legal effects, his own view was that, in any event, it was not up to the author State to take the final decision on the characterization of its own act.

28. Mr. GOCO said that the Special Rapporteur’s second report should contain some guidelines for States because unilateral acts would probably take on considerable importance in international law as a result of their legal consequences or effects. In that connection, intention was a decisive factor and warranted the extra caution a State exercised when it formulated its declaration. In the *Nuclear Tests* cases, for example, ICJ had attributed to France a public declaration for which it had had to assume responsibility. It would therefore be extremely useful if

States could have some guidelines for avoiding mistakes and having the unfortunate surprise of having to assume responsibility for a declaration made unwisely.

29. Mr. Sreenivasa RAO said that he would like some clarifications, by way of examples, with regard to the words “Opinions . . . *erga omnes*” at the beginning of paragraph 6. Although he fully trusted the Special Rapporteur’s judgement, he was not sure whether, in dealing with a very general and complex topic, it might not be premature to prepare draft articles and whether it would not be more productive to formulate some conclusions that could later be turned into draft articles. In the third sentence of paragraph 8, the word “notorious” was quite likely to give rise to misunderstandings and he was sure that the Commission could find a more appropriate term. In the second sentence of paragraph 9, the words “opposability or not opposability” should be explained, perhaps in a footnote.

30. Mr. CANDIOTI (Chairman of the Working Group) said that the reference in paragraph 6 to a distinction between the addressees of a unilateral act could be explained by the rather unexpected turn taken by the discussion in the Working Group, in which some members had been of the opinion that such a distinction should be drawn, while others, including himself, had been of the opinion that the distinction was not possible. In any event, it had been asked whether unilateral acts of States issued in respect of subjects of international law other than States belonged in the Commission’s study or not and the question had still not been answered. That was unimportant, however, because everything depended on the concrete and specific circumstances of each act, but, since the matter had been raised, it should be referred to in the report.

31. As to whether it was enough at the current stage to arrive at some conclusions in the Working Group, the dominant opinion had been that, despite the difficulty of the task and the rather abstract nature of the concept, some draft articles had to be put down in black and white, even on a very preliminary basis, so as to delimit the scope of the definition and then derive rules applicable to unilateral acts from customary law and the general principles of law.

32. The word “notorious” had been used because the validity of a unilateral act did not always depend on it being public; the important thing was that it should be known to the addressee. Since the term had that meaning in Spanish and in English, according to the English-speaking members of the Working Group, it had been considered appropriate, even if, as Mr. Lukashuk had indicated, it should be avoided in the English text because it also had another meaning. Any proposal for more suitable wording would be welcome, provided that it made the meaning clear.

33. With regard to “opposability” and “non-opposability”, the aim was to characterize the particular effect of unilateral acts. In some cases, a State declared that some legal situations or some conditions were “opposable” to it, that is to say, that it recognized them and they had a legal effect for it, whereas, in others, it could say that they were not “opposable” to it, as, for example, in the case of pro-

test. Those were the two categories of unilateral acts to which reference was being made.

34. Mr. CRAWFORD, referring to the question of the addressee of a unilateral act, said that some such acts obviously had specific addressees and could even be intended for a single addressee, whereas others could simply be declarations, whether public or not, which did not contain any indication that no claim could be made in respect of them. If they were made in the context of the international relations of a State, they could, in his opinion, have legal effects and should therefore come within the scope of the topic under consideration, which should, as already stated, not be confined to declarations having specific States as addressees. However, the legal effects of such declarations could be taken into account only if they concerned other States. Like the Chairman of the Working Group, he was also of the opinion that the problems involved would become clear only during drafting and he therefore urged the Special Rapporteur to start that process, despite the problems to which some wording would give rise.

35. The term “notorious” was frequently used in common law legal systems and it meant both “known” and “public”. It should therefore be enough, as Mr. Brownlie had indicated, since some unilateral acts could be issued during negotiations and thus be known only to their addressee.

36. Mr. MIKULKA said that, contrary to what Mr. Brownlie had said, the last sentence of the report of the Working Group referred not to the validity of unilateral acts of States under constitutional law, but, rather, to their validity under international law. In his opinion, what was involved were questions such as defects of consent, since it could be asked whether a unilateral act performed by the representative of a State who had been subjected to pressure by another State had legal consequences, as, for example, in March 1939, when the Czechoslovak head of State had had to declare the submission of the Czechoslovak lands as a result of threats by the German Reich.<sup>2</sup> An act could, moreover, be issued on behalf of a State, but by persons who had no authority to do so, an example being the famous letter sent to the representative of the former Union of Soviet Socialist Republics (USSR) in 1968 by some Czechoslovak Communist Party leaders inviting the Warsaw Pact armies to intervene in Czechoslovakia.<sup>3</sup>

37. Mr. ECONOMIDES said he agreed with Mr. Mikulka that “conditions of validity of unilateral acts” meant “conditions of validity under international law”. However, those conditions included the condition that the act should be lawful under internal law, as provided for in the 1969 Vienna Convention. That difficult question, which, as Mr. Brownlie had rightly pointed out, might not be relevant in all cases of unilateral acts, should therefore

be discussed, but speedy progress should not be expected because of its extreme complexity.

38. Mr. CANDIOTI (Chairman of the Working Group) said that account would be taken in subsequent work of the very pertinent comments made, *inter alia*, by Messrs Brownlie, Mikulka and Economides and that the Special Rapporteur would try to structure the study of the various conditions of validity by classifying them according to their nature, since they could, for example, relate to the capacity of State organs to perform unilateral acts, to the possibility of an abuse of power, to the purpose of the act—its lawfulness—and to defects of consent.

39. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that he welcomed the suggestions and indications on such a complex topic and would take them into account. In his view, draft articles with commentaries might be an interesting solution for the work to be done for the fifty-first session. In his second report, he would submit proposed texts on conditions of validity of unilateral declarations, as well as the first two or three draft articles.

40. Mr. GOCO said that, in order to avoid any ambiguity, the word “notorious” should be replaced by the words “open and public”, on the basis of the distinction between action *in personam* and action *in rem*, which could be likened to declarations addressed to the whole world.

41. Mr. CRAWFORD said that he would object to any limitation of the topic to “open and public” acts.

42. Mr. CANDIOTI (Chairman of the Working Group) said that, regardless of the term to be used, the idea to be expressed was that the will of a State had to be made clear and susceptible of being known to the addressee, according to modalities suited to the circumstances of each act.

43. Mr. ADDO said that “notorious” was a very precise legal term and should therefore be maintained.

44. Mr. ECONOMIDES said that the word “notorious” could be replaced by the word “public” in the case of a general declaration and by the words “known to its addressee” in the case of a special declaration of a bilateral nature; the words “public or known to its addressee” would thus cover all possibilities. The question was nevertheless of entirely relative importance because it had to be considered in greater depth.

45. Mr. HAFNER said that he did not agree with the wording which had been proposed by Mr. Economides to replace the term “notorious” and which would give rise to problems. The term “notorious” had been chosen for the sake of conciseness to express the fact that such a declaration must not be issued secretly and must be known to all or to its addressee if it was intended for a particular State. It would therefore be better to refer to a declaration addressed to all (*erga omnes*) or to a particular State.

46. Mr. ROSENSTOCK said that, in view of the problems that had been referred to, it might be better to keep the term “notorious” for the time being and leave it to the Special Rapporteur to look at that question more closely when conditions were considered in depth.

47. Since the Special Rapporteur had also expressed some concern about reservations, he thought that that question was sufficiently non-autonomous to be excluded from the scope of the study. The question of reservations to treaties could probably be dealt with in connection with

<sup>2</sup> See “The end of Czecho-Slovakia: A day-to-day diary”, *The Bulletin of International News* (The Royal Institute of International Affairs, London), vol. XVI, No. 6 (25 March 1939), pp. 255 et seq.

<sup>3</sup> See “Exchange of letters between certain Warsaw Pact countries on the situation in Czechoslovakia—Warsaw, 15th-19th July, 1968”, in particular, No. 2, “Czechoslovak Communist Party to five Warsaw Pact Countries, 19th July, 1968” (*British and Foreign State Papers, 1967-68*, vol. 169 (London, H. M. Stationery Office, 1976), pp. 982 et seq.).

the concept of estoppel, but that would make the scope of the topic too broad.

48. Mr. BROWNLIE said that the explanations that the Chairman of the Working Group had given about the term “notorious” showed that the problem was of a drafting nature because the word “notorious” was very strong and meant not only “public”, but also “widely known”. It would be regrettable to use a term such as “public”, as had been proposed, because that would unjustifiably restrict the scope of the study. The fact that a declaration was public could be sufficient, but, as practice currently stood, it was certainly not necessary.

49. Mr. HE said that, at the current stage, the word “declaration” in square brackets in paragraphs 8 and 11 should be deleted.

50. Mr. BENNOUNA said that the biggest problem was the limitation of the scope of a unilateral act in the legal sense of the term. Paragraphs 8 and 9 should be regarded as a provisional conclusion and a preliminary approach to the sensitive issue of delimitation. The words “autonomous and notorious expression of the will of a State” did not refer to just any expression of the will of a State because, when it took part in a treaty, a State also expressed an autonomous will. If the Commission was to stay within the realm of a unilateral act, it should have used the words “autonomous expression of the will of a State intended in itself to produce international legal effects”. When there was a meeting of wills, what was involved was no longer a unilateral act, but an agreement, even if it could be reached by means of the meeting of two unilateral acts in terms of form. That was apparently the question with which the Special Rapporteur should deal in his second report.

51. Distinguishing between a unilateral act *stricto sensu* and agreement and custom was an extremely complex task because custom could, as case law had shown, also be bilateral and restricted and there could also be conduct and customary acts of concern to only two or three States. He did not think that the theory of estoppel should have been referred to at the current stage because it was a principle borrowed from a particular legal order, that of the common law, even though it had been interpreted by international legal decisions on many occasions, particularly in the *North Sea Continental Shelf* cases.<sup>4</sup> No one knew exactly whether estoppel was a kind of adaptation of custom. The theory of estoppel must in any event be handled with a great deal of care in order to be adapted to the international level. In paragraph 10 of its report, the Working Group cautiously stated that the Special Rapporteur should examine the question of estoppel and the question of silence; the wording was very vague and it should be taken for what it was, namely, as not involving any kind of commitment because, in his view, silence had no place in the study of unilateral acts, except as the tacit conclusion of an agreement, when it was characterized.

52. The CHAIRMAN said that, despite the comments made and doubts expressed on some specific points, the Commission appeared to endorse the report of the Working Group on unilateral acts of States and should therefore be able to adopt it.

*The meeting rose at 11.40 a.m.*

## 2544th MEETING

*Tuesday, 9 June 1998, at 10.10 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Al-Baharna, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

### Nationality in relation to the succession of States (A/CN.4/483, sect. A, A/CN.4/489,<sup>1</sup> A/CN.4/L.557 and Corr.1)

[Agenda item 5]

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR AND REPORT OF THE WORKING GROUP

1. Mr. MIKULKA (Special Rapporteur), said he wished to introduce briefly his fourth report on nationality in relation to the succession of States (A/CN.4/489), which had served as the basis for the discussions of the Working Group on nationality in relation to the succession of States. Though titled “Fourth report on nationality in relation to the succession of States”, the report dealt only with the second part of the topic, namely the nationality of legal persons. The Commission had decided that that part would be taken up once its work on the first part, the nationality of natural persons, had been completed.

2. The General Assembly, in paragraph 5 of resolution 52/156, had invited Governments to submit comments and observations on the practical problems raised by the succession of States affecting the nationality of legal persons in order to assist the Commission in deciding on its future work on that portion of the topic. It might therefore be useful for the Commission to give preliminary consideration to the directions for its future work on the second part of the topic. That was why he was submitting his fourth report, which summed up the debate on the second part of the topic in the Commission and in the General Assembly. He drew attention to chapter II, which set out a number of issues the Commission might explore. Paragraph 30 of the report contained a recommendation that the Commission should assign preliminary examination of those issues to the Working Group.

3. Speaking as Chairman of the Working Group on nationality in relation to the succession of States, he said he also wished to introduce the report of the Working

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

Group (A/CN.4/L.557). He said that the Working Group had been established, with him as Chairman, by a decision of the Commission on 14 May 1998.<sup>2</sup> The Working Group had discussed the issues outlined in chapter II of the fourth report in the course of two meetings, held on 14 May and 2 June 1998, and had agreed on a number of preliminary conclusions. The first conclusion was that, as the definition of the topic currently stood, the issues involved in the second part were too specific and the practical need for their solution was not evident. Obviously, the Commission could recommend to the General Assembly that, at the current time the work on the nationality of natural persons had been completed, consideration of the topic should be concluded and the nationality of legal persons should not be taken up. The Working Group had nonetheless wished to examine alternative approaches. It had agreed that there were, in principle, two options for enlarging the scope of the study of problems falling within the second part of the topic. Both of them would require a new formulation of the Commission's mandate for that part.

4. The first option would consist in expanding the study of the question of the nationality of legal persons beyond the context of the succession of States to the question of the nationality of legal persons in international law in general. The Working Group had tried to determine the advantages and disadvantages of such an approach, one benefit being that it would contribute to clarification of the general concept of the nationality of legal persons in international relations. A difficulty that might be encountered was that, owing to the wide diversity of national laws, the Commission would be confronted with problems similar to those that had arisen during the consideration of the topic of jurisdictional immunities. Other potential difficulties were a certain overlap with the topic of diplomatic protection, the highly theoretical nature of the study and the enormity of the task, which should not be underestimated.

5. The second possibility would consist in keeping the study within the context of the succession of States, but going beyond the problem of nationality to include other matters, such as the status of legal persons and the conditions of operation of legal persons flowing from the succession of States. Accordingly, the study might focus on how the States concerned should treat legal persons which, owing to the succession of States, changed their nationality (preservation of conditions for the operation of legal persons during the interim period before they could comply with the requirements applicable to foreign persons). It might address the question of how far the Commission could go in dealing with related issues such as property rights and contractual rights and duties of legal persons. In the Working Group's view, the benefits of such an approach would be that it would help clarify a broader area of the law of State succession. The problems the Commission might encounter would arise from the diversity of the relevant national laws and the difficulty of establishing a new delimitation of the topic.

6. Irrespective of which option was chosen, if the Commission decided to continue at all with its consideration of the second part of the topic, a number of issues would

have to be addressed. First, should the study be limited to the problem of the nationality/status of legal persons in public international law? The answer seemed to be obvious, but was it possible to limit the study strictly to public international law and avoid even partly entering into the field of private international law? Which substantive problems might be studied? Secondly, to which legal relations should the study be confined? It had been stressed in debates in the Commission that, unlike natural persons, legal persons did not necessarily have the same nationality in all their legal relations. The Commission would therefore have to decide to which legal relations the study should be limited.

7. Thirdly, which categories of legal persons should the Commission consider? Contrary to natural persons, legal persons could assume various forms. Legal personality could be possessed by corporations, both private and State-owned, State organs, departments or other "instrumentalities", transnational corporations, and international organizations. It would make no sense to cover transnational corporations and international organizations in a study of the impact of the succession of States on nationality. They should, however, be included if the object of the study was broader and extended to questions such as the conditions of operation of legal persons following State succession. Finally, what could be the possible outcome of the Commission's work on that part of the topic, and what form could it take?

8. The Working Group had regarded its discussions as preliminary in nature, because the Commission was not asked to take a final decision at the current session on the future direction of its work. An appropriate time to take that decision would be at the fifty-first session. The Working Group had thought it might be useful, however, to identify the type of problem that could be raised by examining the nationality of legal persons and to draw them to the attention of Governments, which were to provide, before the end of October 1998, their comments on practical issues of interest to them in connection with the second part of the topic. In the light of those comments, the Commission could, at its fifty-first session, return to the Working Group's preliminary conclusions and adopt a final decision on the future direction of work on the second part of the topic. In the absence of positive comments from States, the Commission would have to conclude that States were not interested in a study of the second part of the topic and, accordingly, it should not undertake one.

9. Mr. BENNOUNA said he was not convinced of the need to establish a Working Group at the current time or of the efficacy of its work as set out in the report. Far from shedding light on what should be the Commission's future course of action, the report only obscured matters. He had already drawn attention to the problems connected with the succession of legal persons in respect of investment, acquired rights and the status of private property, among other things.

10. The first option presented to the Commission did not fall within the topic at all, for the possibility of considering the nationality of legal persons in international law had never been raised. It would bring the Commission into the realm of diplomatic protection, namely the opposability of nationality in the event of violation of the rights

<sup>2</sup> See 2530th meeting, para. 60.

of legal persons or the impact of a legal person's nationality link on the State of nationality's relations with the host country, a subject on which a report would be presented to the Commission at the next session. Alternatively, it might draw the Commission into consideration of the conduct of transnational corporations, on which an ineffectual code had been produced.<sup>3</sup> Such conduct could entail non-compliance with domestic legislation when the corporation engaged in "intra-corporation trade" in a number of countries. In order to study the nationality of legal persons, the law would have to be consolidated, and an attempt made to see whether such a concept existed in legislation. That was the work of special conferences and fell into the domain of private international law.

11. The second option was the only appropriate subject of the Commission's inquiry: the status, or fate, of legal persons in a case of State succession. States should be asked for their comments on problems in that regard, which were likely to be less critical than in the case of natural persons. If, after all, no problems were mentioned, then work on the second part of the topic should be abandoned and the Commission's efforts deemed to have been limited to the study of the effects of State succession on the nationality of natural persons.

12. Since the death of the second part of the topic was being foretold, he would have preferred a much more exhaustive elaboration of the numerous relevant issues. For example, the problem of the wide diversity of national laws, mentioned in the first sentence of paragraph 9 of the report of the Working Group, could have been analysed. In passing it might be said that the phrase "the fact that the Commission would be confronted with" was superfluous and should be deleted.

13. The main question, however, was what happened to the bond between a legal person and a given legal order in the event of a change in the territorial bases of that legal order. That bond was usually of a formal nature, entailing recognition of a legal person by the legal order. But many other problems might also be uncovered. It might be useful to look at national legislation or international agreements regulating State succession in relation to legal persons and to see how any problems that arose in such situations were dealt with. Quite clearly, the Commission's future work should focus on the second option put forward in the report of the Working Group.

14. Mr. BROWNLIE thanked the Chairman of the Working Group for his conscientious efforts. Both the subject of nationality of legal persons in international law and the relation of legal persons to the succession of States were topics that satisfied the criteria referred to in the report of the Commission to the General Assembly on the work of its forty-ninth session.<sup>4</sup> However, in view of the problems of defining the nationality of legal persons it would be illogical to focus on the State succession aspect, without first studying the nationality of legal persons. The definition should, he believed, include universities, for example, and not just corporations. The subject was thus precisely at the stage when the Commission's interest was

warranted: it was not totally undeveloped, but was not entirely stable either.

15. Mr. ROSENSTOCK said that his initial reaction to the topic of the nationality of legal persons had been that it was a good way of developing primary rules which would be of enormous help to those dealing with secondary rules, such as in the case of diplomatic protection. Then, however, he had been somewhat dissuaded by what was described in the report as the wide diversity of national laws. Increasingly, he had begun to wonder whether the Commission could produce anything coherent on such a diverse concept as legal persons and to think that perhaps it was dealing with a false analogy between the nationality of natural persons and the nationality of legal persons and was drifting from a manageable topic to one which was exceedingly broad.

16. Again, the status of legal persons in relation to State succession involved a variety of national practices which raised questions about whether or not it was a practical issue to undertake and one from which principles of general application could be easily derived. Paragraphs 10 and 11 of the report of the Working Group shared those concerns with the General Assembly, noted that States had apparently not shown as much interest in that part of the topic, and therefore rightly raised the question whether or not the topic should be continued. There was a certain ambiguity in paragraph 11 in that it assumed that, if the Commission did not hear from States, it signified they did not care and did not want the topic continued. That was reasonable enough, but a qualifier might be appropriate to the effect that if States favoured continuation of the topic, either in the form set forth in the first or in the second option, they should indicate how the nationality of legal persons was determined, what kind of treatment was granted to legal persons which, as a result of the succession of States, became "foreign" legal persons, and so on.

17. On the whole, it had been worth looking at the question of the utility of continuing with the topic at the current time. The matters discussed had been valid and did raise the issue of whether or not the Commission could produce something containing useful general comments, given the near infinite variety of the subject matter.

18. Mr. MELESCANU said that he agreed with Mr. Bennouna. Most of the participants in the Working Group had been opposed to the first option, because the Commission did not have a mandate from the General Assembly to address the subject of the nationality of legal persons in international law exhaustively, and most members had preferred the second option, namely to study the status of legal persons in relation to the succession of States, on the understanding that the Commission should not confine itself solely to questions of succession.

19. The form of language employed being somewhat esoteric, it would be difficult for outsiders to understand what the Commission's point of view had been and it might therefore be useful to indicate in a more direct manner the fact that most members had been in favour of the second option.

20. He sympathized with Mr. Rosenstock's suggestion to ask States their opinion and not to leave the Commis-

<sup>3</sup> E/1991/31/Add.1.

<sup>4</sup> *Yearbook* . . . 1997, vol. II (Part Two), p. 71, para. 238.

sion's later activities unclear. It was too vague and undiplomatic to say in paragraph 11 that, in the absence of positive comments from States, the Commission would have to conclude that they were not interested in a study of the second part of the topic. Instead, States should be asked for their comments on the usefulness of the Commission's effort and the future approach; the Commission could then decide how to proceed. He agreed with Mr. Brownlie; it was a very interesting subject which was perhaps ripe for codification.

21. Mr. CRAWFORD said that, of the two options presented in the report of the Working Group, it seemed clear that only the second was viable within the framework of a study focusing on State succession. He agreed with other members that the subject of the nationality of legal persons might be worth a study in its own right and could be considered by the Working Group on future topics. But the nationality of legal persons as a general subject went well beyond anything to do with State succession. The problem of dealing with it in the framework of State succession—the present framework and clearly one that ought not to be enlarged—was that a view still had to be formed about the notion of the nationality of legal persons and how it operated, because the nationality of legal persons was only remotely analogous to the nationality of physical persons, that is to say, individuals, in international law. Many countries did not attribute nationality to their corporations, and such nationality had to be attributed *ex lege* by international law for the purposes of diplomatic protection.

22. Another reason for not taking up the first option was the overlap with the subject of diplomatic protection. He agreed with the Special Rapporteur and the Working Group that to study merely the question of the effects of State succession on the nationality of legal persons would be unduly arid and that if the topic was to be considered at all, a broader formulation was desirable. The problems of finding such a formulation were twofold: the first being the practical problem of discerning whether it was useful. That was in the hands of the Special Rapporteur. If he recalled correctly, the literature did not say very much on the subject, but it would be interesting to know to what extent recent cases of State succession had presented actual difficulties. That was something Governments might tell the Commission, but again they might not, because in theory the Governments most likely to tell the Commission were those which had experienced the difficulties, yet they might not be enthusiastic about disclosing them. Hence, it would be helpful if the Special Rapporteur could provide a brief outline of the problems in his next report, something which would be valuable in itself, irrespective of whether the Commission then proceeded to a full-scale study.

23. The second difficulty was knowing where to stop. He felt instinctively that the Commission would not simply be dealing even with the question of the continued status of legal persons; in other words, the moment after the succession was deemed to have occurred. Apart from anything else, that moment was a construct, which at the time would be very unclear. The Commission would more likely start to trench upon the difficult problems of the principle of acquired rights and the continuity of acquired rights upon a succession in the case of legal persons, and

that was an aspect of a broader topic about acquired rights on succession which lay outside the scope of the Special Rapporteur's mandate.

24. Mr. Melescanu and Mr. Brownlie were right to say that the subject was of general interest. Whether it was of practical concern and whether a sufficiently precise formulation of what was to be studied could be reached was another matter. Rather than submit to States the negative wording in paragraph 11, it might be better to be more proactive and suggest to them that a problem did exist and ask not only for guidance but also for information. The Special Rapporteur might also provide the Commission with further details, so that it would be in a better position to take a decision at its fifty-first session as to whether and how to proceed with the topic. But it seemed clear that, if the Commission did go ahead with it in the context of the present topic, then it must be on the basis of some refinement of the second option.

25. Mr. ECONOMIDES said he endorsed Mr. Melescanu's remarks in support of the second option, which the vast majority in the Working Group had supported, while criticizing the first. The same had been true of the members of the Commission, a fact that should be reflected in the report to show the Sixth Committee that both possibilities had been considered and the second was preferred.

26. The list of advantages might then state that a study conducted on the basis of the second option would provide the Commission with useful information about international practice in cases of State succession in regard not only to the nationality of legal persons but also to other questions pertaining to the status of such legal persons that might be affected by a succession of States. Recent international practice was not well known and it would be very useful to have more information on it. A decision would then be taken on whether to follow up the topic. He therefore agreed with Messrs Bennouna, Brownlie, Crawford and others that the second option should be presented in a more positive fashion.

27. Mr. MIKULKA (Chairman of the Working Group on nationality in relation to the succession of States) said he had encouraged the Working Group to focus also on the first option because, when the Working Group had taken up the second part of the topic, for the first time, several members of the Commission in its previous composition had displayed an interest in it, but, the only examples they had cited had concerned the nationality of legal persons in general and had no bearing whatsoever on State succession. The same situation had repeated itself in the Sixth Committee.

28. Accordingly, in view of the interest shown by some members of the Commission and by some delegations in the question of the nationality of legal persons as such, but not necessarily in the context of a State succession, he had recognized that there were two possibilities for enlarging the subject. He could not imagine what could usefully be done under the current mandate, which specified that the Commission should focus on nationality of legal persons in the context of State succession. As the concept of nationality of legal persons did not exist at all, in some legal systems it seemed that the subject matter was too

specific. The preference in the Working Group and in the Commission was for the second option, but that was not nearly so clear as far as States were concerned. The fact that two or three delegations in the Sixth Committee had said it would be useful to know more about the question of the nationality of legal persons did not clearly demonstrate that the international community was really interested in the topic. It had seemed to him that the best course was to encourage the discussion in the Sixth Committee and to say that, if it really wanted a study of the second part of the topic, it should at least indicate to the Commission which problems it had in mind and what the appropriate framework for the second part should be.

29. The best approach at the current time would be to follow the usual procedure and state in a few paragraphs in the report of the Commission to the General Assembly on the work of its fiftieth session that the Working Group had examined a number of issues. The report of the Working Group could be annexed to the report of the Commission and, if the Commission so wished, the matters raised in the current discussion could be mentioned in order to show Governments on which specific points the Commission would like to have their comments.

30. The CHAIRMAN suggested that account should be taken of the last proposal and that the report should be recast for a decision to be taken on Friday, 12 June. He said that, if he heard no objection, he would take it that the Commission agreed to that course of action.

*It was so agreed.*

**Diplomatic protection (concluded)\* (A/CN.4/483, sect. E, A/CN.4/484,<sup>5</sup> A/CN.4/L.553)**

[Agenda item 6]

REPORT OF THE WORKING GROUP

31. Mr. BENNOUNA (Chairman of the Working Group on diplomatic protection) said that the Working Group which had met on two occasions, had taken into account his preliminary report as Special Rapporteur on the topic of diplomatic protection (A/CN.4/484).

32. After recalling that customary law on the subject must serve as the basis, the Working Group had reaffirmed the secondary nature of the rules in question as compared to primary rules, that is to say, rights and obligations relating to the status of foreigners. Needless to say, the primary rules would be referred to whenever it was necessary to clarify a particular secondary rule. The same approach had been advocated by Mr. Crawford, Special Rapporteur for the topic of State responsibility. Hence, they were in agreement on the secondary rules approach.

33. Paragraph 2 (c) of the report of the Working Group was essential in the framework of the discussions to which his preliminary report had given rise. The right of the State to exercise diplomatic protection was distinct

from the rights and interests of those of its nationals for whom it was taking action. But those two elements of diplomatic protection complemented each other perfectly, since the State, in exercising diplomatic protection, was duty-bound to take account of the rights and interests of its nationals. The State had the right to take action at international level, and its nationals enjoyed rights which the host State had an international obligation to respect.

34. On a drafting point, he said that the words “in the exercise of this right”, in the second sentence of paragraph 2 (c), should be changed to read: “In such exercise”, so as to bring the sentence into accord with the first. He hoped that the Secretariat would take note of that change and issue a corrigendum.

35. In paragraph 2 (d), the Working Group stressed the important development of international law in increasing recognition and protection of the rights of individuals and providing them with more direct and indirect access to international forums to enforce their rights. That evaluation should be examined in the light of State practice. The right of the State to exercise diplomatic protection was viewed by the Working Group as a discretionary right which Governments could, however, undertake under their domestic laws to exercise in respect of their nationals (para. 2 (e)). In paragraph 2 (f), the Working Group suggested that the Commission should request Governments to provide it with certain documentation, for instance, national legislation and decisions by domestic courts, and in paragraph 2 (g) it recalled the Commission’s earlier decision to complete the first reading by the end of the current quinquennium.

36. In paragraph 3, the Working Group suggested that his second report as Special Rapporteur should concentrate on the issues raised in chapter I of the outline proposed at the previous session.<sup>6</sup> Lastly, he thanked the members of the Working Group for their spirit of cooperation and open-mindedness, which had made it possible to lay the foundations for the preparation of future reports on the topic.

37. Mr. PAMBOU-TCHIVOUNDA, referring to paragraph 2 (e) of the report of the Working Group, said that he would prefer the second half of the first sentence to read: “does not prevent it from defining the conditions and modalities of the right of its nationals to diplomatic protection”. The current wording, which spoke of the State “committing itself to its nationals to exercise such a right”, seemed to him to be somewhat confusing, especially when read in conjunction with the second sentence of the paragraph. However, he would not press the point.

38. Mr. AL-BAHARNA suggested that the first sentence of paragraph 2 (e) should be redrafted to indicate that the discretionary right of the State to exercise diplomatic protection did not stand in the way of its duty to espouse its nationals’ legitimate claims to diplomatic protection.

39. Mr. BENNOUNA (Chairman of the Working Group on diplomatic protection) said that in drafting the paragraph, the Working Group had had in mind state-

\* Resumed from the 2523rd meeting.

<sup>5</sup> See footnote 1 above.

<sup>6</sup> See 2522nd meeting, footnote 8.

ments by some members indicating that their national constitutions went a long way towards recognizing the right of nationals to diplomatic protection by their State. The Working Group had thought that a reference to such practices might be useful, but had wanted to stress its purely domestic scope.

40. In reply to a question by Mr. GOCO, concerning paragraph 2 (f), he said the suggestion was not that the Commission should seek comments from Governments. It should only ask for certain relevant documents on national legislation and practice.

41. Mr. MELESCANU said that the wording of the first sentence of paragraph 2 (e) was less than perfect and an effort should be made to find a better formulation to reflect the lengthy discussion that had taken place. However, he would be reluctant to accept the proposal made by Mr. Pambou-Tchivounda, which would seem to reopen the whole delicate issue of the discretionary nature of the right of the State to exercise its diplomatic protection.

42. Mr. CRAWFORD, supported by Mr. ROSENSTOCK, said that, at the current preliminary stage of the consideration of the topic, the Commission should refrain from entering into a substantive debate on the point raised in paragraph 2 (e).

43. Mr. GALICKI said that, speaking as a citizen of one of the countries referred to in the paragraph as having recognized the right of their nationals to diplomatic protection by their Governments, he fully accepted the Working Group's formulation.

44. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to maintain paragraph 2 (e) as it stood and to refer the report of the Working Group to the Drafting Committee with a view to formally adopting it on Friday, 12 June.

*It was so agreed.*

*The meeting rose at 11.35 a.m.*

## 2545th MEETING

*Wednesday, 10 June 1998, at 10.10 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

## Reservations to treaties (*continued*)\* (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,<sup>1</sup> A/CN.4/L.563 and Corr.1)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPporteur (*continued*)\*

GUIDE TO PRACTICE (*continued*)\*

DRAFT GUIDELINE 1.1.2 (*concluded*)\*

1. The CHAIRMAN invited the Commission to resume its consideration of draft guideline 1.1.2, "Moment when a reservation is formulated", as proposed by the Special Rapporteur in ILC(L)/INFORMAL/12.

2. Mr. HAFNER recalled that article 23 of the 1969 Vienna Convention, which dealt with the procedure regarding reservations, provided that a reservation could be formulated at the time of the signature of the treaty and then must be confirmed when the reserving State expressed its consent to be bound by the treaty. He therefore suggested that the beginning of draft guideline 1.1.2 should be amended to read: "The reservation may be formulated or confirmed by a State".

3. Mr. PELLET (Special Rapporteur) said that the text under consideration was based on what was commonly called the Vienna definition, which did not refer to confirmation. However, the amendment proposed by Mr. Hafner was entirely acceptable and the Drafting Committee would probably agree with it.

4. Mr. ECONOMIDES said that the draft guidelines did not refer to the relatively frequent case of late reservations. It could happen that a State forgot to deposit the reservation it had intended to formulate, even though it had been approved by its parliament. Experience showed and the Treaty Section of the United Nations Office of Legal Affairs confirmed that, in such a case, all contracting parties were asked whether they agreed to consent to a kind of "catch-up" procedure. That was a useful solution which existed in practice. Perhaps it should be formalized in the Guide to Practice.

5. Mr. PELLET (Special Rapporteur) confirmed that the situation referred to by Mr. Economides did exist and referred to the case of Egypt, which had forgotten to formulate the reservation it had intended to make when it had signed the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. Two years later, it had wanted to remedy that oversight, but by making a "statement",<sup>2</sup> and that had caused an outcry from the other States parties. The case thus deserved to be taken into account in the Guide to Practice, but it should probably be settled not in the context of definitions, but in the part which would follow on procedures for the formulation of reservations.

\* Resumed from the 2542nd meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1998, vol. II (Part One).

<sup>2</sup> See *Multilateral Treaties* . . . (2542nd meeting, footnote 3), p. 924, footnote 5.

6. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.1.2 to the Drafting Committee.

*It was so agreed.*

DRAFT GUIDELINES 1.1.3 AND 1.1.8

7. Mr. ECONOMIDES said that, since draft guidelines 1.1.3 and 1.1.8 dealt with the same subject matter and had the same title, “Reservations having territorial scope”, they should perhaps be considered at the same time.

8. Mr. PELLET (Special Rapporteur) said that the two provisions were quite close. He had submitted them separately for pedagogical reasons to show that the first should be seen from the *ratione temporis* point of view and the second, from the *ratione loci* point of view.

9. The CHAIRMAN invited the Commission to consider draft guidelines 1.1.3 and 1.1.8 at the same time.

10. Mr. PELLET (Special Rapporteur), explaining draft guideline 1.1.3, said it could happen that a treaty was not applied throughout the territory under the jurisdiction of the State which signed it. Article 29 of the 1969 Vienna Convention dealt with that case *a contrario*. However, that State could decide to extend the application of the treaty to a territory to which the treaty had not formerly applied. On that occasion, it could attach a new reservation relating to the territory in question to the notification of extension. Two examples of that situation (Macao and Hong Kong) were referred to in paragraph 25 of ILC(L)/INFORMAL/11. The practice was not only relatively frequent, but also relatively old, since it related to what had been called the “colonial clause”. Its principle had never given rise to any problem. The definition of a reservation, which could, as those examples showed, be formulated at the time of the “notification of territorial application”, as well, moreover, as at the time of the notification of succession, therefore had to be amended slightly. In that connection, he referred to the excellent article by Renata Szafarz.<sup>3</sup>

11. Draft guideline 1.1.8 was intended to answer the question whether a unilateral statement purporting to exclude part of the territory of a State from the scope of a treaty could be characterized as a reservation. Legal writers were not sure, as shown by the work of Frank Horn,<sup>4</sup> who was one of the best authors on the question. In his own view, however, the answer was definitely yes.

12. The starting point for that reasoning was article 29 of the 1969 Vienna Convention. When a State excluded or limited the application of a treaty which normally applied to the entire territory of each party in accordance with that article, it was seeking “to exclude or to modify the legal effect” of the treaty, and that was the definition of a reservation. That was so obvious that it had perhaps not even

been necessary to draft a guideline on that point. There might, however, be some doubts about the words “regardless of the date on which it is made” at the end of the proposed text. That type of reservation by means of a unilateral statement of exclusion could take place only at two moments: when the State expressed its consent to be bound by the treaty and when it made a notification of territorial application. The words in question could therefore be replaced by a reference to those two moments. The Drafting Committee might look into that question.

13. Mr. BENNOUNA said that he welcomed the explanations the Special Rapporteur had given on such a fundamental aspect of the topic. Those explanations were, however, not entirely convincing.

14. In the first place, there was the fact that the limitation of the territorial application of a treaty would be characterized as a reservation. That related to a basic rule of international law according to which a State bound its population and its territory, that is to say, all its components, when it bound itself, according to the definition of international commitment. A reservation relating to a particular territory was thus not a reservation to a provision of the treaty, whose application could be modified; it was a reservation to the full commitment of the State. Such a restriction had to be negotiated at the time of the drafting of the treaty. The opposite would be dangerous because it was conceivable that, in view of the problems involved in the application of the treaty to a certain part of its territory, a State might later be anxious to formulate a reservation *ratione loci*.

15. Secondly, draft guideline 1.1.3 referred to the “territory in question”. It was not clear which territory was meant. The Special Rapporteur had explained the difference he saw between the jurisdiction and the sovereignty of a State over a territory, but, if the reservation related to a part of a territory, such as a Non-Self-Governing Territory or an overseas territory, which did not have exactly the same status as the rest of the territory of the State, then a substantive problem existed. The Special Rapporteur had referred to the “colonial clause”, but there was no longer a colonial clause because there was no longer any colonialism. If the State had jurisdiction to treat a territory in a particular way, it must be asked on what basis. In modern-day law, if a State could not bind itself internationally for part of its territory, there first had to be a discussion of the problem of that territory from the point of view of the principle of the right of peoples to self-determination. The problem thus went far beyond that of an ordinary reservation.

16. Thirdly, draft guideline 1.1.8 merely stated that the unilateral statement “purports to exclude” the application of the treaty, whereas draft guideline 1.1.3 said that it “purports to exclude or to modify”. Did the word “modify” mean that at some moment—and at which moment—a State could go back on its commitment by means of a statement excluding a particular part of its territory from the scope of the treaty as a whole? That situation could also not be regarded as an example of an ordinary reservation. It could even be considered that such a statement was “contrary to the object and purpose of the treaty”, since it modified the overall commitment by the State which was, as he had said before, the very

<sup>3</sup> R. Szafarz, “Reservations to multilateral treaties”, *Polish Yearbook of International Law*, vol. III (1970) (Warsaw, Ossolineum, 1972), p. 293.

<sup>4</sup> F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, The Hague (Amsterdam, Oxford, North-Holland, 1988).

essence of a treaty. The question was fundamental and it could not be settled so quickly and easily.

17. His conclusion was that the two draft guidelines under consideration could not be referred to the Drafting Committee as they stood. They required further work, which would explain their exact meaning.

18. Mr. HAFNER said that the two draft guidelines gave rise to more or less the same problems.

19. The basic principle was that, if an act was characterized as a "reservation", the regime of reservations automatically applied to that act. That was not the case of a statement on territorial scope which undeniably required the consent of the other States and could not be of a unilateral nature unless the treaty expressly so provided. Moreover, when a treaty actually contained such an explicit provision, the question whether a statement to that effect could be characterized as a reservation was all the more important in that, if the answer was yes, the possibility of any other reservation was, according to the provisions of the 1969 Vienna Convention, automatically ruled out. For example, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency was totally silent on reservations, but explicitly provided for the possibility that States might declare that they did not consider themselves to be bound by certain provisions on civil liability. There was no denying the fact that, if a State made a statement under that optional exclusion clause and it was regarded as a reservation, the possibility of any other reservation to that Convention would automatically be ruled out, although that had certainly not been the intention of its authors. The Commission must therefore clearly determine whether the statements referred to in draft guidelines 1.1.3 and 1.1.8 were intended to become reservations within the technical meaning of the 1969 Vienna Convention or whether they should be taken as establishing a regime separate from that of the reservations applicable to the treaty in question. In that connection, he shared the opinion of Horn, as referred to in the third report of the Special Rapporteur on reservation to treaties (A/CN.4/491 and Add.1-6).

20. Mr. ECONOMIDES said that, in view of the effect of the statements referred to in draft guidelines 1.1.3 and 1.1.8, those statements constituted reservations within the legal meaning of the term, on condition that the treaty provided for a possibility of such statements. If there was no permissive clause in the treaty, there would be a wrongful act. The question whether that had to be stated in the two draft guidelines was one that should perhaps be settled by the Drafting Committee.

21. At the technical level, he was not sure whether, in the case of draft guideline 1.1.3, it was really legally impossible to exclude the application of the entire treaty, as provided for in draft guideline 1.1.8, and why it was not made clear in draft guideline 1.1.3, as in draft guideline 1.1.8, that, in the absence of such a statement, the treaty would be applicable to the entire territory. There was, moreover, a difference between the two draft guidelines in terms of the date of the act, about which the Special Rapporteur himself had expressed some doubts. He therefore wondered whether, since the two draft guidelines were very closely related to one another, the possibility of

a merger might not be considered, although he was aware that that would involve work not yet done.

22. Mr. ROSENSTOCK said he fully agreed with Mr. Economides that what the Commission was doing was not to determine whether a particular reservation was permissible, but to define the actual frameworks in which reservations could be formulated, assuming that they were otherwise valid. He could therefore not endorse the comments made by Mr. Hafner.

23. He also thought that there should be a distinction between the concepts expressed in draft guidelines 1.1.3 and 1.1.8, the first relating to "when" and the second to "what"; they could, however, be two subparagraphs of the same guideline. In draft guideline 1.1.8, the words "regardless of the date on which it is made" should be retained because, in the "what" context, the time element was not decisive.

24. Mr. MIKULKA said that he shared Mr. Bennouna's doubts about the two draft guidelines under consideration. Unlike Mr. Rosenstock, he did not understand why the problem was dealt with twice and did not see the point of the words "regardless of the date on which it is made", which came at the end of draft guideline 1.1.8 and which were totally confusing.

25. Draft guideline 1.1.8 also gave rise to other problems. For example, the fact that it referred to the exclusion of the application of a treaty as a whole, even if that exclusion related only to part of the territory, could not be reconciled with the definition of a reservation, which purported to exclude or to modify the legal effect of "certain provisions of the treaty". Moreover, even the exclusion of some of the provisions of the treaty to which draft guideline 1.1.8 referred did not come within the definition of reservations, since the provisions excluded in part of the territory continued to be applicable to the State in the rest of the territory. Only a restriction of the territorial base was thus involved. In his opinion, the Commission should first consider the regime of reservations and objections and come back later to the question of reservations having territorial scope in order to determine whether it was really the regime of reservations that should apply to the situations in question.

26. Mr. PAMBOU-TCHIVOUNDA said that he agreed with the comments by Mr. Bennouna and Mr. Mikulka. He also thought that there was a kind of precondition underlying the two draft guidelines which the members of the Commission did not all clearly understand and which the Special Rapporteur might explain more fully.

27. Like Mr. Rosenstock, he was of the opinion that the two draft guidelines should be kept separate; they might form two paragraphs entitled "Reservations having territorial scope *ratione temporis*" and "Reservations having territorial scope *ratione loci*".

28. Mr. BENNOUNA said he agreed with Mr. Hafner that, if there was a provision of the treaty providing for the possibility of splitting or changing its territorial scope, the type of statement under consideration might deserve to be characterized as a reservation. On the basis of what Mr. Mikulka had said, moreover, the Commission currently had an opportunity to think about how that type of reser-

vation worked in relation to the general system. Thus, when a reservation having territorial scope was formulated and an ordinary objection was made to that reservation, it could be asked what the scope of that objection was because, in that case, the objecting State could not apply reciprocity by also excluding part of its territory.

29. In view of the very particular nature of such reservations, he thought that it might be easier to deal with the question whether they were needed and how they fit into the general system of reservations at the end rather than at the beginning of the exercise.

30. Mr. SIMMA said that, like the Special Rapporteur, he was of the opinion that the reservations referred to in draft guidelines 1.1.3 and 1.1.8 constituted genuine reservations. He based that conclusion mainly on the doctrine of the Vienna School, which was represented, *inter alia*, by Kelsen and for which the territorial or personal scope of a treaty formed an integral part of the rule on the same basis as its material scope; thus, if a State modified the territorial or personal scope of the treaty by means of a statement, the rule was also modified and the statement must be regarded as a reservation.

31. The Commission would be looking at the problem the wrong way around if it considered that a statement could not be a reservation because the regime of reservations established in the 1969 Vienna Convention did not apply to that statement. The Commission should, rather, start by characterizing a statement as a reservation and then try to explain the regime. In so doing, it might find that the very modest regime provided for in the 1969 Vienna Convention was not appropriate and it would then be up to the Special Rapporteur to propose solutions. That had already happened at the forty-ninth session in the case of human rights treaties. In other words, it was not, for example, because reciprocity did not apply that the statement in question could not constitute a reservation.

32. With regard to Mr. Hafner's comment that the inclusion in a treaty of an optional exclusion clause would give rise to questions about the permissibility of other reservations, he considered it outrageous to try to apply the Vienna regime on reservations to that type of clause if it was not to be concluded that an objection could be formulated in respect of a State which used such a clause. Statements made on the basis of optional exclusion clauses must not be regarded as reservations within the meaning of articles 19 and the following of the 1969 Vienna Convention.

33. Mr. HAFNER said that, on the basis of the assumption that the Vienna regime could not be amended, the problem was to determine which acts could be characterized as reservations. Accordingly, an act could be characterized as a reservation only if it fitted in with that regime. He agreed with Mr. Simma that an optional exclusion clause was not a reservation within the meaning of the 1969 Vienna Convention, but he nevertheless noted that the statements referred to in draft guidelines 1.1.3 and 1.1.8 were very much like a statement made under such a clause because a modification of territorial application could take place only if that possibility was expressly provided for in the treaty or if the other States accepted it. The result was thus the same, whether or not reference

was made to an optional exclusion clause, and the problem was thus whether there was a unity of the regime of reservations applicable to a treaty for all statements made for the purpose of modifying its applicability, whether they related to its substance or to its geographical application.

34. Mr. SIMMA said he could not agree with the idea that, if a treaty did not provide for the possibility of a restriction of its territorial application, a unilateral statement to that effect would not be permissible. In fact, it would be necessary to resort specifically to the same criteria of permissibility as those applied to other reservations and consider whether the statement was compatible with the object and purpose of the treaty. It was entirely conceivable that statements made in accordance with draft guidelines 1.1.3 and 1.1.8 might leave the object and purpose of the treaty fully intact and not be based on any colonial motive.

35. Mr. ECONOMIDES said he thought it was wrong to say that a State could formulate a territorial limitation reservation even if the treaty did not contain a special provision to that effect; otherwise, if a State formulated such a reservation, it would have to be accepted by the other contracting States, and that would constitute an agreement amending the pre-existing agreement. If the reservation was not accepted, it would not be valid.

36. Mr. SIMMA said that, according to that reasoning, if a treaty did not contain a special provision authorizing a modification of its territorial application, a reservation to that effect would not be permissible and it would have to be authorized or accepted by the other States. Ultimately, reservations which were not permissible might become permissible if they were accepted by the other States. That point of view was hard to fit into the structure of articles 19 and the following of the 1969 Vienna Convention.

37. Mr. PELLET (Special Rapporteur) said that, first of all, the members of the Commission should not confuse problems of definition and problems of permissibility. It must be borne in mind that the Commission was defining a category entitled "reservations" and that, among the unilateral statements which it would characterize as reservations, there were some that would appear to be permissible once the Vienna rules as they would be defined had been applied to them, while there were others that would have to be found unlawful. Secondly, since the content of his report was more detailed than that of his oral introduction, he invited Mr. Bennouna and Mr. Pambou-Tchivounda to refer to paragraph 69 of ILC(L)/INFORMAL/11, which showed that the problem of Non-Self-Governing Territories was not entirely secondary and that it arose quite apart from any reference to the colonial clause.

38. With regard to the discussion between Mr. Simma and Mr. Hafner, he explained that the specific purpose of a definition and hence of the Commission's approach was to determine whether the regime of what was being defined would or would not be applicable. In that connection, Mr. Simma was right in academic and abstract terms, whereas Mr. Hafner was correct in practical terms, since the important thing was whether an act was a reservation

within the meaning of the Vienna definition, in which case the Vienna regime would apply. He was, however, not convinced by all of Mr. Hafner's arguments because, in his opinion, a complete break could not be made by asserting that all the Vienna rules would necessarily apply to all types of reservations. There were "unidentified legal objects" or "ULOs" which looked very much like reservations, but to which the legal regime of reservations was probably not fully applicable. The exercise would therefore definitely be longer and more difficult than he had thought at the beginning and, in engaging in it, the Commission would be refining the regime for the application of the various Vienna rules.

39. In such a complicated area, he was not sure that he had been able to foresee every possible detail of the outcome of decisions on a definition, but he had had to start somewhere.

40. Unlike Mr. Mikulka and Mr. Bennouna, he was of the opinion that, instead of putting aside the problem of reservations having territorial scope, the Commission should try to adopt a position and see what the implications would be, on the understanding that, since it was on the first reading, it would always be able to make the necessary adjustments. If it put the problem aside, it might forget it altogether and not take the trouble to get back to work on it when the time came.

41. The main thing he had learned from the discussion was that, at least in terms of form, if not in terms of substance, he had mixed up two types of unilateral statement having territorial scope, namely, a statement by which a State decided not to apply a particular treaty to a particular territory—or a notification of exclusion of territorial application—and the reservations that a State could make in relation to a particular territory on the occasion of a notification of territorial application. In the first case, the question was whether such a statement was or was not a reservation. In Mr. Hafner's opinion, the answer was definitely no; in his own opinion, the answer could not be so clear-cut and there could be some doubts. For example, if Denmark stated that it did not want to apply a particular treaty to the Faeroe Islands, he thought that that would be a reservation, in the sense that, if that unilateral statement had not been made, the treaty would probably apply to the Faeroe Islands. He had some doubts about Mr. Hafner's comment that, if it was agreed that that was indeed a reservation, even though it was provided for by the treaty, that would mean that, under article 19 of the 1969 Vienna Convention, all other reservations would be prohibited. On the basis of the argument he had put forward earlier, he said that, if the Commission agreed that that was a reservation, it would then systematically have to ask, in reviewing the other related provisions of the 1969 Vienna Convention, whether or not those provisions were applicable. It would then have to recognize that a mere exclusion of territorial application—which was, in his opinion, a reservation because it corresponded to the Vienna definition in all other respects—could not be considered as excluding reservations in the other sense. That appeared to be in keeping with the spirit of the 1969 Vienna Convention. In the second case, for example, Denmark made a notification that it was prepared to apply a treaty to the Faeroe Islands, with the exception of one article. In his view, that was undeniably a genuine reservation because

the purpose of that notification was to modify the application of a provision of a treaty in respect of a particular territory. That was a reservation which changed the application of the treaty as far as Denmark was concerned and which corresponded exactly to the Vienna definition. He noted that, on that point, the members of the Commission tended to share his view.

42. In reply to Mr. Mikulka's comments on the words "or some of its provisions", which were contained in draft guideline 1.1.8 and which he would like to maintain in full, he pointed out that draft guideline 1.1.4, on which his heart was set, came between draft guidelines 1.1.3 and 1.1.8, which the Commission had requested him to submit together. The Commission could therefore not adopt a position on the above-mentioned words before it had considered draft guideline 1.1.4.

43. He would like the two draft guidelines under consideration on reservations having territorial scope to be referred as they stood to the Drafting Committee, to which he might submit drafting changes.

44. Mr. MIKULKA said that, following the statement by the Special Rapporteur, he no longer had any problems with draft guideline 1.1.3. However, he continued to believe that draft guideline 1.1.8, particularly the notification of the exclusion of part of the territory of a State from the application of a treaty, was not in keeping with the Vienna definition. Even if it was agreed that such an exclusion should be interpreted as modifying the legal effects of some of the provisions of the treaty in question, it definitely modified all of the provisions of the treaty. According to the definition proposed in draft guideline 1.1, which was based on the definition contained in the 1969 Vienna Convention, a reservation was a statement which purported to exclude or to modify the legal effect of certain provisions of a treaty. He realized that his approach was formalistic and rigid and that, if the authors of the 1969 Vienna Convention had had to deal with that problem, they would have opted for slightly different wording, but he recalled that the Commission had agreed never to touch the provisions of the 1969 Vienna Convention. It currently seemed to be moving away from that agreement.

45. With regard to the comments by Mr. Simma, who believed that assuming automatically that the general regime of reservations might possibly not apply in full to that type of unilateral statement meant looking at the problem the wrong way around, he recalled that, at its forty-ninth session, the Commission had established the principle of the existence of a single regime of reservations and he was therefore surprised that, at the current session, it was taking as a working hypothesis the possibility that some categories of reservations, particularly those which related to the territorial application of a treaty, might be subject to a different regime.

46. In the light of those explanations, he accepted the Special Rapporteur's proposals as working hypotheses.

47. Mr. ECONOMIDES said that the Commission had to proceed with great caution in respect of reservations. For example, the Special Rapporteur had said that, in his opinion, the statements referred to in draft guidelines 1.1.3 and 1.1.8 were reservations in the true sense of the

term. In treaty practice, however, there were treaties which expressly prohibited any reservation: that was frequently the case of human rights instruments and even of the United Nations Convention on the Law of the Sea. Must it be concluded that exclusions of the territorial application of such instruments were automatically prohibited because they were reservations? The fact was that treaties of that kind contained special clauses on their territorial application, thus proving that notifications of territorial application or of territorial exclusion were not treated as reservations.

48. He also believed that a notification of the full exclusion of a territory from the application of a treaty was not a reservation, but a clause which had a different status. As the Special Rapporteur had indicated, however, a notification of the exclusion, limitation or modification of a particular provision of a treaty in respect of a territory was indeed a reservation.

49. Mr. BENNOUNA said that, having heard the Special Rapporteur's explanations on draft guideline 1.1.3, he could agree that it should be referred to the Drafting Committee, provided that the words "of a treaty" in the second line were replaced by the words "provided for by a treaty".

50. Draft guideline 1.1.8 raised a matter of principle, which only the Commission could decide and which could not be settled by the Drafting Committee. In substance, article 29 of the 1969 Vienna Convention provided that the territorial application of a treaty could not be modified unless that was provided for in the treaty itself, and it was not by chance that that article was contained in the section entitled "Application of treaties" and not in the section entitled "Reservations". The rule of international law, which was of course not a peremptory rule, was that a treaty applied to a territory in its entirety unless otherwise provided. Thus, before deciding whether to refer draft guideline 1.1.8 to the Drafting Committee, the Commission had to settle the matter of principle whether, in the absence of provisions to that effect in the treaty in question, a contracting State could exclude part of its territory from the application of the treaty.

51. Mr. PELLET (Special Rapporteur), referring to Mr. Mikulka's comment on the borderline between the interpretation and the modification of a treaty, said that there was, of course, no question of changing the Vienna regime. That did not, however, prevent the Commission from modernizing it and supplementing it constructively by way of interpretation, because its text had to be interpreted in the light of the development of international law and the needs that had arisen and, if it was too formalistic, the Commission would be depriving the exercise it was currently engaged in of much of its substance.

52. With regard to the different problem raised by Mr. Economides and Mr. Bennouna, he believed that there was a rather broad consensus within the Commission that reservations accompanying notifications of territorial application were genuine reservations. That was the spirit of draft guideline 1.1.3, whose wording the Drafting Committee might look at again. He continued to believe that it was the Commission's task to decide on matters of principle and the Drafting Committee's task to draft. That

being said, Mr. Bennouna had not properly stated the matter of principle underlying draft guideline 1.1.8, which was that of the exclusion of territorial application. If he had understood correctly, Messrs Bennouna, Hafner and Economides considered that exclusions of territorial application were not reservations. Mr. Hafner had explained that, if an exclusion of territorial application was provided for by the treaty, article 19 of the 1969 Vienna Convention applied and all other reservations were therefore unacceptable. In his own view, that was a problem of a special regime and, on that particular point, it must be considered that that exclusion of territorial application did not prohibit the formulation of other reservations if such reservations were compatible with the spirit of the treaty. As to Mr. Economides' plea in favour of caution, he said that he did not know of any treaty which excluded reservations, but provided for the exclusion of territorial application. He nevertheless recognized that that was not reason enough to dismiss Mr. Economides' objection because the problem could arise. Even if it did actually arise, however, it would not really be a problem because the parties to a treaty could modify the regime of reservations if they so wished. That would be a case of modification of consent to be bound to a treaty to which the future guidelines would not apply because it was the treaty itself that would so provide. That was why he was of the opinion that the arguments put forward were not so decisive as to make a case for considering that exclusions of territorial application were not reservations. He continued to believe that clauses excluding territorial application modified the effects of a treaty in their application to the State in question.

53. In reply to Mr. Bennouna, who had stressed that an exclusion of territorial application could be admitted as a reservation if it was provided for by a treaty, he said that that was self-evident, but that that was as true as it was by the rules of general international law, whose existence the Commission could not prejudice. Mr. Bennouna's counter-argument based on article 29 of the 1969 Vienna Convention and the fact that the Commission was dealing only with the consent of the parties to be bound by a treaty—consent to which reservations were related—was not entirely correct: the definition of reservations given in article 2, paragraph 1 (*d*), of the 1969 Vienna Convention also referred to the problem of the application of treaties. It would therefore be better if the Commission did not set aside the problem of exclusions of the territorial application of treaties.

54. Mr. BROWNLIE said that he fully supported the Special Rapporteur's position on the classification of restrictions of territorial application. In his view, it was better to regard them as reservations because he did not see what considerations of public order or of public policy could be put forward to explain why they should be regarded as a separate category.

55. Mr. HAFNER said that his problem in considering statements relating to territorial application as reservations was the result of the fact that he was starting from the assumption that "reservation" meant only a statement that fitted into the single regime established by the 1969 Vienna Convention and the fact that article 19, subparagraph (*b*), to which the Special Rapporteur had referred, then definitely gave rise to a problem, which was, more-

over, the main problem. He would like the Special Rapporteur to see whether it might not be possible to understand the first phrase of article 29 of the 1969 Vienna Convention as referring to a special regime that was separate from the regime of reservations or, in other words, to indicate what the content of that article would be if the words "Unless a different intention" had been left out, bearing in mind that article 26 did not contain a similar provision.

56. Mr. SIMMA said that the existence of the single regime established by the 1969 Vienna Convention did not mean that that regime was applicable or effective to the same extent in all cases. Thus, no one denied that reservations to human rights treaties gave rise to particular problems. In his opinion, the Vienna regime allowed some leeway in determining the treatment to be applied to such treaties and the same was true of reservations relating to territorial application. Some of the rules set forth in articles 20 and the following of the 1969 Vienna Convention were applicable to them, whereas others were not or were not relevant.

57. Mr. BENNOUNA drew Mr. Brownlie's attention to the fact that a rule of public order was obviously opposed to restrictions on the territorial application of a treaty, since that rule was that the Government of a State bound itself in respect of all of its territory and could not exclude one component or another. That general rule was, however, not peremptory and there could thus be derogations from it, but there had to be a basis therefor. If the Special Rapporteur provided that basis by proposing to include wording such as "in the event that the treaty or another rule of international law so provides", thereby conforming to the spirit of article 29 of the 1969 Vienna Convention, nothing would prevent statements situated in that context from being regarded as reservations.

58. Mr. PELLET (Special Rapporteur) said Mr. Brownlie had indicated that, although, in principle, a treaty applied to all of the territory of a State, there was no rule of public order, no peremptory norm, prohibiting a State from excluding the application of the treaty to part of its territory. That was what article 29 implied without saying so, contrary to what Mr. Bennouna thought, since there was no reference to rules of international law, but only to intention otherwise expressed. Mr. Bennouna's argument was therefore not entirely convincing. If an intention could be expressed, that meant, rather, that there was no rule prohibiting such a restriction. In that connection, he was thinking of the reservations made by a number of Western countries excluding the application of the Convention on the Prevention and Punishment of the Crime of Genocide to their colonies.<sup>5</sup> Such reservations were entirely indefensible not only on moral grounds, but also on legal grounds, because they were contrary to the object and purpose of that Convention. Such reservations could, moreover, be declared unlawful for various reasons and he intended to come back to that point during the consideration of the question of the permissibility of reservations.

<sup>5</sup> See *Multilateral Treaties . . .* (2542nd meeting, footnote 3), p. 91 and United Nations, *Treaty Series*, vol. 124, p. 318, vol. 713, p. 400 and vol. 732, p. 288.

59. He was still in favour of referring the problems to which draft guidelines 1.1.3 and 1.1.8 gave rise to the Drafting Committee, although he was aware that a great deal of redrafting work would have to be done.

60. Mr. BENNOUNA stressed the fact that States could not be allowed to modify the territorial application of a treaty if the treaty was silent on that point or it was not otherwise provided for. He therefore proposed, since agreement seemed to exist, that the guidelines should include a reference to, or use the wording of, article 29 of the 1969 Vienna Convention. He nevertheless continued to believe that a question of legal principle was involved and that agreement should be reached on a text in the Commission and not in the Drafting Committee.

61. Mr. SIMMA noted that article 29 of the 1969 Vienna Convention said something different from what Mr. Bennouna had indicated. Parties which did not intend to apply the treaty in question to their entire territory did not have to formulate reservations, since an interpretative declaration to that effect would be more than sufficient.

62. Mr. HAFNER said he wondered whether it was not possible to look at the regime of the 1969 Vienna Convention from the viewpoint of article 26 on the principle *pacta sunt servanda*, from which States parties could derogate only by way of reservations. On the basis of the principle "*ut res magis valeat quam pereat*", the first part of article 29, which gave rise to a problem, might be interpreted as excluding the regime of reservations from the scope of that article.

63. Mr. ECONOMIDES said that Mr. Bennouna's interpretation of article 29 was entirely correct. There was no doubt that that article established the rule that any treaty applied to the entire territory without any exclusion or limitation unless the parties had agreed on such a limitation, either in the treaty itself or possibly in a collateral agreement. In the absence of any implied or express agreement, it was therefore unacceptable that a State should be able to limit the territorial application of a treaty simply by means of a unilateral statement. In the present case, he wondered whether it should be assumed that the guidelines as a whole were to be taken as meeting the conditions laid down in the 1969 Vienna Convention or whether each one should emphasize that it was in conformity with the provisions of the 1969 Vienna Convention. That was a question of legal technique and, in his preceding statement, he had therefore implied that draft guideline 1.1.3 was in conformity with the 1969 Vienna Convention.

64. Mr. MELESCANU said that article 29 stated the principle of the application of treaties to the entire territory, but provided for two exceptions. On the basis of the first exception, the treaty itself provided for the possibility of the limitation of its application and, on the basis of the second and more interesting one, it was assumed that a different intention was otherwise established. The Special Rapporteur's examples of the colonial clause and the special legal status of some parts of the territory of a State were classical and came under the second exception provided for in article 29 because, in any other situation, that would mean giving the State excessive discretionary

power, and it was, moreover, not easy to see how it could apply.

65. Mr. PELLET (Special Rapporteur) said he reserved his position on everything that had just been said about the interpretation of article 29. With regard to the definition of reservations, he thought it had been agreed that there was no question of changing article 29 and the arguments put forward by Mr. Bennouna and Mr. Melescanu were not relevant for the purposes of the exercise the Commission was engaged in because the aim was to prepare a guide to practice in respect of reservations, not in respect of the application of the Vienna Conventions. He did not think that too much importance should be attached to the first part of article 29 simply because it was at the beginning. He was not even sure how important the current discussion was because the only argument being put forward was that the definition of reservations must not jeopardize the general Vienna regime, and that was something the Commission had already agreed on. He understood the concerns expressed, but they were beside the point.

66. Mr. HE said that he also reserved his position on the very complex question of interpretation. Since there was so little time available, the discussion should continue at the second part of the session in New York.

67. The CHAIRMAN said that, in view of the differences of opinion, it would be better to refer only draft guideline 1.1.3 to the Drafting Committee and continue the consideration of draft guideline 1.1.8 in plenary in New York.

68. Mr. ROSENSTOCK said that the problem could be solved immediately if the words “if otherwise permissible” were added to draft guideline 1.1.8., thereby making it clear that statements of exclusion of that kind were normally not permissible, but that, when they were, they constituted reservations. If that proposal was acceptable, draft guideline 1.1.8 could be referred to the Drafting Committee.

69. Mr. PELLET (Special Rapporteur) said that he fully agreed with the idea expressed in Mr. Rosenstock’s proposal because it was obvious that the statement in question had to be permissible, but he was strongly opposed to saying so in draft guideline 1.1.8 because that applied to nearly all the other draft guidelines. He therefore proposed that, in order to avoid making the text unnecessarily heavy, a draft guideline 1.1.9 could be added, to state basically that all the above-mentioned definitions were without prejudice to the permissibility of reservations.

70. Mr. MELESCANU said that such a draft guideline would have to be prepared by reference to the 1969 Vienna Convention because it would have to be in conformity with article 29 and some of the other articles of that Convention.

71. Mr. BENNOUNA said that permissibility was not the issue under consideration and the Special Rapporteur himself had indicated that there must be a clear-cut distinction between the problems involved in the definition of reservations and those of permissibility. In the present case, what was being discussed was the possibility of characterizing such a restrictive statement as a reserva-

tion; the issue was thus admissibility, not permissibility. The solution proposed by Mr. Rosenstock was entirely acceptable, but, since the Special Rapporteur objected to it, he himself could agree with Mr. Melescanu’s proposal that the Commission should opt for wording indicating basically that the definitions—that is to say, the Guide to Practice—were fully in keeping with the provisions of the 1969 Vienna Convention, possibly with an indication of the relevant articles. In any event, the Commission had to agree on what it would refer to the Drafting Committee.

72. Mr. ECONOMIDES said that, in considering draft guideline 1.1.3, the Drafting Committee might take account of some elements of draft guideline 1.1.8 that would help make things clearer without necessarily prejudging the matter of principle that had to be settled.

73. Mr. PELLET (Special Rapporteur) said that he continued to be opposed to the referral to the Drafting Committee of draft guideline 1.1.8 together with the proposed amendment. It would be better to reflect the idea expressed in that proposed amendment in a more general draft guideline 1.1.9, which he would prepare and which the Commission should, in his opinion, consider in plenary in New York. As to Mr. Melescanu’s proposal, he was not sure that it was only the 1969 Vienna Convention that had to be applied and he would like States which had not ratified that Convention to take a close look at the draft Guide to Practice.

74. After a discussion in which Mr. BENNOUNA, Mr. FERRARI BRAVO, Mr. PELLET (Special Rapporteur) and Mr. ROSENSTOCK took part, the CHAIRMAN suggested that the Commission should refer draft guidelines 1.1.3 and 1.1.8 to the Drafting Committee and inform it that the Special Rapporteur would prepare a general provision on the relationship with the 1969 Vienna Convention in order to clarify the part of the Guide to Practice on definitions.

*It was so agreed.*

*The meeting rose at 1.15 p.m.*

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## 2546th MEETING

*Thursday, 11 June 1998, at 10.10 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Thiam, Mr. Yamada.

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**Draft report of the Commission on the work of its fiftieth session**

1. The CHAIRMAN invited the Commission to consider its draft report, paragraph by paragraph, starting with chapter IV, on diplomatic protection.

**CHAPTER IV. Diplomatic protection (A/CN.4/L.552 and Add.1)**

**A. Introduction (A/CN.4/L.552)**

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.552 and Add.1)**

Paragraphs 4 and 5 (A/CN.4/L.552)

*Paragraphs 4 and 5 were adopted.*

**1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS PRELIMINARY REPORT**

Paragraphs 6 to 10

*Paragraphs 6 to 10 were adopted.*

Paragraph 11

2. Mr. BENNOUNA (Special Rapporteur) proposed that "bilateral investment promotion agreements", in the last sentence, should be amended to read "bilateral investment promotion and protection agreements". In the same sentence, "claims bodies" was a more appropriate term than "claims commissions". The Iran-United States Claims Tribunal and the United Nations Compensation Commission established under Security Council resolution 692 (1991) of 20 May 1991, which were presented in footnote 10 as examples of the developments referred to in the last sentence, fell into two entirely different categories. He therefore proposed deleting the second example and inserting as a first example the International Centre for Settlement of Investment Disputes, a World Bank body established in March 1965, to which individuals were entitled to present claims against States.

*Paragraph 11, as amended, was adopted.*

Paragraph 12

*Paragraph 12 was adopted.*

Paragraph 13

3. Mr. BENNOUNA (Special Rapporteur) proposed deleting the phrase "which it may waive", in the first sentence, since it might lead to confusion. A State could certainly waive its right to diplomatic protection, but only in the context of an agreement with another State.

4. He proposed that the second sentence should be amended to read: "In keeping with the traditional view of diplomatic protection, a State is enforcing its own right by endorsing the claim of its national".

*Paragraph 13, as amended, was adopted.*

Paragraphs 14 and 15

*Paragraphs 14 and 15 were adopted.*

**2. SUMMARY OF THE DEBATE**

**3. ESTABLISHMENT OF A WORKING GROUP (A/CN.4/L.552/Add.1)**

Paragraphs 16 to 49

*Paragraphs 16 to 49 were adopted.*

Paragraph 50

5. Mr. ECONOMIDES said that the French version of the sentence referring to the *Rainbow Warrior* incident was unclear.

6. Mr. BROWNLIE said that the *Rainbow Warrior* case was an interesting example of how claims for direct damage to the State were frequently combined with claims in respect of the interests of individuals. The Secretary-General of the United Nations, acting as mediator, had effected a settlement under which, *inter alia*, France had been required to pay New Zealand a large sum in compensation for the breach of its sovereignty and, at the same time, to compensate the family of the Netherlands photographer who had lost his life.

7. The CHAIRMAN assured Mr. Economides that the French version of the sentence would be edited to ensure greater clarity.

*Paragraph 50 was adopted on that understanding.*

Paragraph 51

*Paragraph 51 was adopted.*

*Section B, as amended, was adopted.*

*Chapter IV, as a whole, as amended, was adopted.*

**Chapter V. Unilateral acts of States (A/CN.4/L.555 and Add.1)**

**A. Introduction (A/CN.4/L.555)**

Paragraph 1

*Paragraph 1 was adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.555 and Add.1)**

Paragraph 2

*Paragraph 2 was adopted.*

**1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS FIRST REPORT**

Paragraphs 3 to 18

*Paragraphs 3 to 18 were adopted.*

Paragraph 19

8. Mr. CANDIOTI proposed that the word “study” after the words “formation of custom” should be deleted.

*Paragraph 19, as amended, was adopted.*

Paragraph 20

*Paragraph 20 was adopted.*

Paragraph 21

9. Mr. BENNOUNA proposed that the statement in the first sentence of the French version that *l'estoppel est un phénomène qui ne présente aucun intérêt pour l'étude* should be brought into line with the original English version which read: “estoppel did not constitute a phenomenon which was of direct concern to the study”.

*Paragraph 21 was adopted on that understanding.*

Paragraphs 22 to 35

*Paragraphs 22 to 35 were adopted.*

2. SUMMARY OF THE DEBATE

Paragraphs 36 to 61

*Paragraphs 36 to 61 were adopted.*

Paragraph 62

10. Mr. PAMBOU-TCHIVOUNDA proposed that the word *capables*, in the French version, should be replaced by *susceptibles*.

*Paragraph 62, as amended, was adopted.*

Paragraphs 63 to 84

*Paragraphs 63 to 84 were adopted.*

*Section B, as amended, was adopted.*

**C. Report of the Working Group (A/CN.4/L.555/Add.1)**

Paragraphs 85 to 91

*Paragraphs 85 to 91 were adopted.*

*Section C was adopted.*

*Chapter V, as a whole, as amended, was adopted.*

11. Mr. KUSUMA-ATMADJA said he was unsure whether the word “jurisprudence”, as used throughout the chapter, was intended to refer to the science or philosophy of law, the usual meaning in English, or to case law, the meaning in civil-law systems.

12. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that it referred to judicial decisions by ICJ, the Permanent Court of Arbitration and other arbitral tribunals and commissions.

13. Mr. DUGARD (Rapporteur) said he had taken the term to mean both case law and doctrine, for example in the reference to “a developed body of jurisprudence” in

paragraph 50. His impression was that the usage throughout the chapter was acceptable to English-speakers.

**CHAPTER VI. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (A/CN.4/L.554 and Corr.1 and 2 and Add.1 and Add.1/Corr.1 and 2 and Add.2 and Add.2/Corr.1)**

**A. Introduction (A/CN.4/L.554)**

Paragraphs 1 and 2

*Paragraphs 1 and 2 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.554 and Corr.1 and 2)**

Paragraphs 3 to 5

*Paragraphs 3 to 5 were adopted.*

1. PRESENTATION OF THE FIRST REPORT OF THE SPECIAL RAPPORTEUR

Paragraph 6

*Paragraph 6 was adopted.*

Paragraph 7

*Paragraph 7 was adopted with a minor editing change.*

Paragraphs 8 to 25

*Paragraphs 8 to 25 were adopted.*

2. SUMMARY OF THE DEBATE

Paragraphs 26 and 27

*Paragraphs 26 and 27 were adopted.*

Paragraph 28

*Paragraph 28 was adopted with a minor editing change.*

Paragraphs 29 to 38

*Paragraphs 29 to 38 were adopted.*

Paragraph 39

14. Mr. PAMBOU-TCHIVOUNDA said that, in order to establish a parallel with paragraph 38, which began with the words “The principles of procedure”, the words “Concerning principles of substance,” should be inserted at the beginning of paragraph 39.

*Paragraph 39, as amended, was adopted.*

Paragraphs 40 to 46

*Paragraphs 40 to 46 were adopted.*

**CHAPTER VIII. Nationality in relation to the succession of States (A/CN.4/L.559 and Corr.1)**

**A. Introduction (A/CN.4/L.559)**

Paragraphs 1 to 4

*Paragraphs 1 to 4 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.559 and Corr.1)**

Paragraphs 5, 5 bis and 6

*Paragraphs 5, 5 bis and 6 were adopted.*

*Section B was adopted.*

*Chapter VIII, as a whole, was adopted.*

**State responsibility<sup>1</sup> (continued)\* (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>2</sup> A/CN.4/490 and Add.1-7,<sup>3</sup> A/CN.4/L.565, A/CN.4/L.569)**

[Agenda item 2]

**FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)\***

15. Mr. CRAWFORD (Special Rapporteur), introducing chapter II of his first report on State responsibility (A/CN.4/490 and Add.1-7), said it had been circulated in an informal version in English and French only and was defective in that it lacked footnotes and tables. It addressed two issues relating to the draft articles on State responsibility: questions of terminology that arose in respect of the articles as a whole, and recommendations concerning the general principles set out in articles 1 to 4 of chapter I (General principles) of part one.

16. The Working Group headed by Mr. Simma had begun the process of considering the articles in part one by reference to the established concepts of norms of *jus cogens* and *erga omnes* obligations. Some issues in part one had been singled out as requiring further development, but the effort needed would be modest. The outcome of the Working Group's deliberations would be fully reflected in his second report.

17. With article 19 (International crimes and international delicts) left to one side, and with the firm intention of reverting to the issues raised during the discussion of the article, the Commission was currently entering into the substantive consideration of the articles on State responsibility on second reading. That process, which would continue more or less throughout the next three years, constituted a sort of "rolling review" of the draft. The Commission's practice was not to adopt a draft article definitively on second reading until it adopted all of the draft, for the good reason that the draft articles had to be considered as a whole, in view of possible interrelationships. Articles 1 (Responsibility of a State for its internationally wrongful acts) and 40 (Meaning of injured State),

for example, were closely tied in with each other. Thus, while each article would be addressed substantively, the possibility would be left open of returning to earlier articles if necessary. Although the Commission would be informed of progress in the Drafting Committee's work, the articles remained under the Drafting Committee's responsibility.

18. The second point about the process currently under way was that the work on the articles in part one, particularly chapters I and II (The "act of the State" under international law), was without prejudice to any conclusions that might be reached with respect to article 19. If the notion of international crimes of State in the proper sense was adopted, it would involve more extensive changes to part one than were envisaged at the current stage.

19. As to questions of terminology, a striking feature of the draft articles was that they contained no definitions clause. In his opinion none was needed, as the draft specified what the terms meant as and when required, and in an elegant fashion. But the matter could perhaps be reviewed at a later stage.

20. The phrase "internationally wrongful act" had its direct equivalent in five of the working languages of the United Nations, but Mr. Lukashuk had indicated that the Russian version was closer to "internationally unlawful act". The disparity did not seem to him to be all that great, however, and "internationally wrongful act" was well enough established in the general debate on responsibility not to warrant a change.

21. A table to be included in his first report provided the equivalents in all working languages of several key terms: internationally wrongful act, breach of an international obligation, act of a State, attribution, circumstances precluding wrongfulness, injured State, the "State which has committed an internationally wrongful act" and damage. The English word "act" did not connote both act and omission, as did the French term "fait", but article 3 (Elements of an internationally wrongful act of a State) made it perfectly clear that "act" was used in the sense of both act and omission.

22. The phrase "State which has committed an internationally wrongful act" was cumbersome and raised a problem of substance. The use of the past tense, "has committed", implied that it was clear, at the time of the dispute, which of the States was at fault. Though that might indeed be true in some instances, there were many cases, including in the field of countermeasures, when it was not. He cited the arbitral award in the *case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*<sup>4</sup> and the *Gabčíkovo-Nagymaros Project* case, in which each State had asserted that the other had committed an internationally wrongful act. In the *Corfu Channel* case, ICJ had determined that both States had committed internationally wrongful acts of different kinds. No change in terminology could resolve the problem. In many disputes about responsibility there was a genuine disagreement about the facts or the legal position, and there was a big difference

\* Resumed from the 2540th meeting.

<sup>1</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>2</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>3</sup> Ibid.

<sup>4</sup> Decision of 9 December 1978 (UNRIIA, vol. XVIII (Sales No. E/F.80.V.7), pp. 417 et seq.).

between relying on putative rights and relying on established rights.

23. One terminological change was nonetheless desirable and he was therefore proposing that the phrase “State which has committed an internationally wrongful act” should be replaced by “wrongdoing State” throughout the draft articles. First, the new phrase was much more succinct and would save about 100 words overall. Secondly, the use of the past tense implied that the wrongful act had been completed, and was in the past. However, the draft clearly also applied to wrongful acts of a continuing character. ICJ, in dealing with the issue of countermeasures in the *Gabčíkovo-Nagymaros Project* case, had used the term “wrongdoing State”, even though it had otherwise generally followed the terminology used in the draft on State responsibility.

24. The terms “injury” and “damage” also required clarification. The draft actually referred to “injured State”, not injury, and the term was defined in article 40 to mean a State which had suffered *injuria*, an injury in the broadest possible sense. Nowhere in the draft was there any indication that “injury” was a correlative to “damage”: a State might be damaged without being injured, and vice versa.

25. The term “damages” was familiar, although used in differing ways, in a number of legal systems, and it appeared in article 45 (Satisfaction). But the word “damage”, as used in the draft articles, referred to actual harm suffered, and a distinction was drawn between economically assessable damage and moral damage: that general concept of damage ought to be distinguished from “injury”, meaning *injuria* or legal wrong as such.

26. The next section of the first report dealt with general and saving clauses and identified some of the saving clauses which had become common in drafts produced by the Commission, as well as three general or saving clauses contained in the draft articles, albeit in part two, namely articles 37 (*Lex specialis*), 38 (Customary international law) and 39 (Relationship to the Charter of the United Nations). He was sympathetic to the suggestion that each of those saving clauses—especially article 37—should apply to the draft in general. He would, however, propose to defer the question of general and saving clauses until those articles in part two were taken up. Clearly, they were needed, and perhaps other articles too, but the Commission should proceed first with the ones in part one.

27. Part one was entitled “Origin of international responsibility”. The word “origin” was somewhat unusual, because it might imply a historical or even psychological inquiry and had a broader connotation than merely an inquiry into issues of responsibility. The French Government had sensibly suggested the phrase “basis of responsibility”, as referred to in the footnote to paragraph 103 of the first report, something the Drafting Committee might consider.

28. To sum up his conclusions on articles 1 to 4, which formed the general principles of chapter I, articles 1 (Responsibility of a State for its internationally wrongful acts), 3 and 4 should be retained unchanged, but rearranged so that, using the current numbering, the

sequence would be: article 3, article 1 and article 4 (Characterization of an act of a State as internationally wrongful). Article 2 (Possibility that every State may be held to have committed an internationally wrongful act) should be deleted. He would explain the reasons for those proposals when he came to deal with each article. There was, in fact, a close connection between articles 1 and 3; hence, much of what he had to say about article 1 covered issues which some Governments had brought up under article 3.

29. Article 1 said that every internationally wrongful act of a State entailed the international responsibility of that State. The provision was intended to cover all wrongful conduct, whether arising from positive action, omissions or failure to act. Also, the draft was concerned only with internationally wrongful conduct, conduct that was a breach of an international obligation. The basic distinction between primary and secondary rules was adhered to in that regard, and article 1 made that distinction. Of course, chapter V (Circumstances precluding wrongfulness) of part one addressed circumstances which precluded wrongfulness and raised questions about the parameters of the topic, especially with respect to article 35 (Reservation as to compensation for damage), but the Commission would have to take that up later.

30. Surprisingly, when the Commission had initially drafted article 1, it had intended to leave open the possibility of international responsibility for lawful acts. Subsequently, of course, it had adopted the topic of liability for injurious consequences arising out of acts not prohibited by international law and had been considering the topic ever since. Part of the problem was that English was the only United Nations language which distinguished between “responsibility” (for wrongful conduct) and “liability” (for lawful conduct). That such a distinction could not be made in the other working languages had added enormously to the confusion. In his view the Commission should abandon the term “liability” entirely and just admit that it was dealing with certain primary rules.

31. The experience with article 1 suggested that the notion of State responsibility was properly confined to wrongful conduct under international law. In addressing State responsibility in international law, the Commission was dealing with conduct which was unlawful in the sense that it contravened an international obligation. The possibility that there might be circumstances precluding wrongfulness was without prejudice to that conclusion. Hence, the Commission, having left the door ajar in 1973<sup>5</sup> for other forms of responsibility in the proper sense of the word, should currently firmly close it and admit that international responsibility was concerned with responsibility for unlawful conduct and that other questions had to do with obligations to compensate or perform other acts in the framework of primary rules.

32. Serious issues, however, did arise in connection with article 1, more particularly whether article 1, or possibly article 3, should contain an additional requirement of fault or damage and whether article 1 should state not merely whose responsibility existed, but to whom, because it failed to say to whom the State was responsible. Hence, two questions of substance emerged with respect

<sup>5</sup> See 2523rd meeting, para. 23.

to articles 1 and 3: whether, first, the general requirements laid down for responsibility were sufficient, a case having had been made out for adding a requirement of damage, and whether, secondly, article 1 should, as it were, establish the responsibility relationship with injured States, something that was not done until article 40.

33. The literature had amply discussed the matter of a general requirement of fault for State responsibility. Obviously, the draft articles contained no such requirement. Similarly, there had been some debate as to whether there was a requirement of damage to an injured State. No Government had suggested that articles 1 and 3 needed to be amended to add a requirement of fault, but several had proposed that a requirement of damage should be included in article 1 or 3 or that some other drafting device should be used, for instance, inserting a reference to injured State in article 1 and a requirement of damage in article 40. It might be done by an addition to article 3, as proposed by Argentina, or to article 40, associated with a link to article 1, as proposed by France, in the comments and observations received from Governments on State responsibility (A/CN.4/488 and Add.1-3), or in some other way. Although several Governments had made that proposal, most were satisfied with the formulation of the articles. Germany, for example, had noted that article 1, with its so-called objective responsibility, was a well-accepted general principle.

34. The first point to be made was that the draft articles dealt with the whole enormous range of primary obligations, without exception. It covered all sorts of subjects in which States assumed obligations in many different terms. The question of the content of the obligation was a matter for the relevant primary rule, whether it was contained in a treaty, a unilateral act, a rule of general international law or elsewhere. Clearly, some rules of international law did require damage for the purposes of responsibility, for example in the context of trans-boundary harm, to the extent that there were obligations between States in respect of international watercourses or cross-border air pollution. Actual injury had to occur; the *Lake Lanoux* arbitration<sup>6</sup> supported the proposition that the mere risk of possible future harm was not a sufficient basis for responsibility, the Tribunal having upheld the position of France.

35. Since the articles had been drafted, the case that came closest to considering that question was the *Rainbow Warrior* arbitration, namely the inter-State arbitration between France and New Zealand, which had arisen after France had repatriated two agents required to be held for a period of some years on an island in the Pacific under the agreement mediated by the Secretary-General. The question in the case had been that, if France had been responsible for that repatriation or for the failure to return the agents to the islands, then what form was the responsibility to take. France had initially argued that, as there had been no damage, even moral damage, New Zealand was not entitled to any relief. New Zealand had referred to articles 1 and 3 of the draft articles on State responsibility in respect of a treaty obligation which, in apparently categorical terms, had required that the two agents be kept

in confinement on the island for a certain period of time. Subsequently, France had changed its position and accepted that there could be moral and even legal damage and that damage did not have to be material for there to be a breach of an obligation and consequent responsibility.<sup>7</sup>

36. The notion of legal damage was essentially the notion of *injuria*, to which he had referred earlier. It went beyond the idea of moral damage. The Tribunal had held that, in the context of the bilateral treaty, New Zealand had suffered damage of a moral, political and legal nature and, consequently, France had been responsible for the breach. It had avoided pronouncing directly on articles 1 and 3, but its award did not suggest that there was any logical stopping place between the narrower concept of moral damage and the concept adopted in articles 1 and 3, namely responsibility was incurred when an obligation was breached. The notion of legal damage was not, as it were, a replay in a minor key of the notion of moral damage; it was the notion of *injuria* adopted by articles 1 and 3.

37. The point could be put in another way: States could enter into obligations on any subject and in any form. They could agree that responsibility would arise only when damage was demonstrated, but they could also agree that responsibility would arise from mere failure by a State to comply with a particular obligation, however formulated. Both cases were possible. Obviously, States could agree categorically that they would or would not do a particular thing and they might do so because it would be very difficult to prove that damage had occurred from a particular act. For example, in the context of the distribution of a river's water resources it might be difficult to prove damage, but the water had to be allocated and States agreed that they would only draw off a certain amount from the river. That was an obligation. There was no implied damage requirement regarding other States if more than the allotted amount of water was taken. In modern international law, States assumed many obligations of a specific character, and there was no reason to place on other States the burden of showing, in addition to a breach, that they had been damaged. If there was a general requirement of damage for international obligations, that would in effect convert all treaties into provisional undertakings which States could ignore if they felt that to do so would not cause material damage to other States. That would put the onus of showing damage on innocent States, which was unjustified.

38. The same reasoning applied to article 3 and was important in the field of human rights. It was almost in the nature of things that other States did not suffer any specific or identifiable damage from a breach of a human rights obligation. France conceded that point in its comments and would make an exception for human rights from its general requirement. But human rights did not constitute the only area in which that reasoning held. It also applied in the field of uniform law, for example if

<sup>7</sup> See *case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, Decision of 30 April 1990 (UNRIIAA, vol. XX (Sales No. E/F.93.V.3), pp. 215 et seq.).

<sup>6</sup> See 2528th meeting, footnote 3.

States committed themselves to adopting a particular text as a uniform law on a particular subject matter. They were not committing themselves to making reparation to any person or State damaged by their failure to adopt their text; instead, it was an agreement that the law would contain a certain element. That was also true in the field of disarmament, the global commons, protection of the environment, and so on. They were areas in which States were interested in ensuring compliance and not simply in distributing losses in the event of non-compliance. It therefore followed that the suggestion that an additional requirement of damage be inserted, whether in article 1, 3 or 40, should be rejected. But a decision to reject it should not be taken to mean more than it implied. All it meant was that damage could not be read into every case involving a breach of an international obligation.

39. Three important qualifications were to be made in connection with that position and went a long way towards solving the legitimate concerns of States about vexatious claims, interference by non-interested States, and so forth. He had referred to them in paragraph 117 of the first report. First, it was true that there were some, and perhaps even many, rules of international law where damage was of the essence of the obligation. A famous example was principle 21 of the Stockholm Declaration,<sup>8</sup> which was formulated in terms of preventing damage to the environment of other States or of areas beyond national jurisdiction. The requirement of damage was written into the primary obligation. But even in cases where that was not done, it could be seen that the question of damage was to be referred to the primary obligation. It was not a general secondary requirement.

40. The second point was that the issue arose in the context of obligations *erga omnes*, yet was distinct from it. The question whether damage was a necessary element of international law arose bilaterally just as often as it did multilaterally, for example in the context of the *Rainbow Warrior* arbitration. Consequently, the Commission was not taking a position, in adopting article 1, on the question of less-directly injured States or of multiple injuries to different States, something which arose in part two and would have to be considered. It was a separate matter on which the Commission would at the current time take no position.

41. The third point was that, in saying that damage was not a requirement for responsibility, the Commission was in no sense asserting that it was irrelevant to responsibility. It was relevant in many ways, quite apart from the fact that a particular primary rule might require the occurrence of damage. For example, damage was clearly relevant in connection with reparation—the amount and the form the reparation should take were closely associated with the damage which might have occurred, and part two proceeded on that basis. Similarly, the existence or non-existence of actual damage was relevant in the context of countermeasures, which must not be disproportionate. If a State had suffered no damage, then that was a good reason for limiting its right to take countermeasures in the absence of special circumstances.

42. Accordingly, it was important not to read too much into the recommendation or the position that the draft articles took. The articles simply stated a general proposition that if a State breached an international obligation, its responsibility was incurred. It was a straightforward matter and should be so treated. The same conclusion could be drawn with respect to the element of fault. No State had argued that fault should be added as a requirement. Again, that depended on the particular primary rule. The point had been clearly made by Denmark on behalf of the Nordic countries, in the comments and observations received from Governments on State responsibility. Certain primary rules might require fault in some sense. For instance, the Convention on the Prevention and Punishment of the Crime of Genocide called for a specific intent to injure or destroy an ethnic group as such, and that was clearly an element of fault. Other rules would have their own versions of what constituted fault for particular purposes. He was merely saying that there was no general requirement of fault, a point elegantly made by the European Commission of Human Rights in the case between Ireland and the United Kingdom of Great Britain and Northern Ireland involving torture, inhuman or degrading treatment in Northern Ireland.<sup>9</sup> But such questions of responsibility were without prejudice to specific issues of fault which might apply in relation to particular rules. It followed that, for both those reasons, articles 1 and 3 were satisfactory as they stood, but his assertion should not be taken as signifying anything more than that questions of damage or fault were referred to the specific primary rules.

43. The issue of principle was whether the articles should spell out to which States responsibility was owed or whether it was sufficient for the purposes of part one to formulate the notion of responsibility in “objective” terms. In that connection, in the comments and observations received from Governments on State responsibility, France proposed that the phrase “the injured States” should be inserted at the end of article 1 and went on to propose an elaborate reworking of article 40. The Commission would have to return to those proposals when it came to consider article 40 at the next session. A first point that needed to be stressed was that, as universally agreed, State responsibility was not limited to bilateral obligations or to bilateral relations of responsibility. The relationship of responsibility that arose from a breach was, or could be, a relationship of a multilateral or general character.

44. The question was whether it was nonetheless possible to have responsibility in the abstract, as it were. One of the points underlying the French Government’s comment was that article 40 seemed to create a form of abstract responsibility. It was important to note that such had not been the Commission’s intention in adopting the articles. The draft articles were designed to deal with the topic of the responsibility of States and, as far as part one was concerned, they were not limited to the responsibility of States to other States. As paragraph 121 of the first report made clear, the Commission had meant to leave

<sup>8</sup> See 2529th meeting, footnote 7.

<sup>9</sup> Council of Europe, Application No. 5310/71, *Ireland v. United Kingdom*, Report of the Commission adopted on 25 January 1976, *Yearbook of the European Convention on Human Rights*, 1976, vol. 19 (The Hague, Martinus Nijhoff, 1977), at pp. 758 and 760.

open the question of entities other than States that could rely on that responsibility. There was no indication whatever in the sources that the responsibilities of States to persons in international law other than States would be based on any different conditions. Moreover, it would be difficult to think of any international responsibilities owed exclusively to entities other than States. In leaving part one quite general in that respect, the Commission had not meant to endorse the idea of responsibility in a vacuum. As could be seen from the passage in the commentary to article 3 quoted in paragraph 121, the idea of an obligation of a State was always correlative to rights to other States or persons. In that connection he would favour deletion of the adjective “subjective” qualifying the word “rights” in the passage in question.

45. Part two was slightly more limited in scope than part one in that it dealt only with the rights of injured States. However, that rather minor distinction did not, in his view, create any difficulty as there was no reason to think that part one would have been drafted differently if the scope of part two had been broader. The decision to limit part two to the rights of injured States had been a sensible one, but in the current environment, where international obligations were relied on by individuals in the context of particular treaty mechanisms and by international organizations in the context of their constituent instruments, as well as by other entities, it was *a fortiori* sensible to leave the possibility open, as the Commission had deliberately done at the time of the adoption of part one.<sup>10</sup> In addition to the explanation already provided in the commentary to article 3, the point could also be made in the commentary to article 1.

46. For all those reasons, he was recommending that article 1 should be adopted without change, subject to further consideration of its relationship to the concept of “injured State” as defined in article 40 and applied in part two.

47. Article 2 said that every State was subject to the possibility of being held to have committed an internationally wrongful act entailing its responsibility. The proposition was a complete truism which had never, to his knowledge, been denied in any quarter. Indeed, to deny it would be to deny the principle of the equality of States and the whole system of international law. Moreover, the article did not deal directly with the topic of international responsibility but, rather, with the possibility of such responsibility. It was an example of the tendency towards over-refinement that was one of the problems with the draft articles. The article was, in his view, unnecessary and could be deleted.

48. Article 3, on the other hand, was very important both for the structural reasons explained in paragraph 134 of the first report and because it did not say that any condition other than conduct consisting of an action or omission attributable to the State and constituting a breach of an international obligation was necessary in order for an act of a State to be qualified as internationally wrongful. As stated in paragraph 132, there was a case for placing article 3 before article 1. With regard to the proposal by France, in the comments and observations received from Governments on State responsibility, for the inclusion of

a reference to “legal acts”—or, rather, “acts in law”—in subparagraph (a), he believed that the present wording already covered acts in law and that it would be sufficient to make the point in the commentary.

49. Lastly, the proposition contained in article 4 had, of course, been repeatedly affirmed in international law going back all the way to the “Alabama” case.<sup>11</sup> As PCIJ had pointed out on many occasions, the characterization of an act as unlawful was an autonomous function of international law not contingent on its characterization by national law and not affected by the characterization of the same act as lawful under national law. That did not mean internal law was irrelevant to the characterization of conduct as unlawful; on the contrary, it might well be relevant to it in a variety of ways. No suggestion for changes to the article had been received, and he was therefore recommending its adoption.

50. His proposal was that the Commission should, after debate, refer articles 1 to 4 to the Drafting Committee with the recommendation that articles 1, 3 and 4 should be adopted without change and that article 2 should be deleted. The Drafting Committee should also be requested to give consideration to changing the order of the articles and changing the title of part one.

51. Mr. BROWNLIE, after congratulating the Special Rapporteur on his very careful exposition of important subject matter, said it was not his impression that articles 1 to 4 were really controversial. He was, however, concerned about the question of damage and wished to say a few words in support of the Special Rapporteur’s proposal not to include a separate requirement of damage. The difficulty with the concept of damage was not only semantic but also conceptual. As the Special Rapporteur had explained, the content of liability was defined by the primary rules in each case, and when the primary rules failed to deal with some particular detail, it was necessary, especially in the remedial sphere, to fall back on general principles of international law.

52. His objection to the concept of damage was three-fold. First, making damage a special requirement would *ex post facto* create confusion with regard to the primary rules, which often did not contain a requirement as to damage, especially in economic or material terms. Secondly, developments in international law since the Second World War had shown that there could be liability without proof of special damage, and he was therefore strongly in favour of relying on the more global concept of *injuria* and of the injured State. Thirdly, he feared that overemphasis on the concept of damage might prejudice the concept of moral damage. It was a constant refrain of his that interest in relatively new concepts such as obligations *erga omnes* tended to overshadow the usefulness—not least in the field of human rights—of existing ones, such as moral damage. It would be a pity if, in building up the importance of the concept of damage, the Commission were, perhaps by indirection, to cause the concept of moral damage to fall into disfavour.

<sup>10</sup> See 2532nd meeting, footnote 9.

<sup>11</sup> The Geneva Arbitration (The “Alabama” case) (United States of America v. Great Britain), decision of 14 September 1872 (J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. I), pp. 653 et seq.

53. Lastly, with regard to the concept of “fault”, in English it was not always clear that fault (*culpa*) included an element of intention (*dolus*). Hence, there might be some value in occasionally using the expression “fault or intention” in the commentary. In the American literature of tort, for example, the unwritten assumption tended to be that all wrongfulness was negligence; yet that was often not so, and sometimes dramatically not so, as in the *Rainbow Warrior* case.

54. Mr. PAMBOU-TCHIVOUNDA said he too thanked the Special Rapporteur for his presentation. As a first reaction, he wished to endorse the proposal by France referred to in the footnote to paragraph 103 that the title of part one should speak not of the “origin” but of the “basis” of State responsibility, on the understanding that in the French the term “basis” would be rendered as *les fondements*. As to the expression “State which has committed an internationally wrongful act” and the proposal in paragraph 98 (*b*) to replace it by “wrongdoing State”, he wondered whether such a course would not be inconsistent with the recommendation in paragraph 126 that article 1 be adopted unchanged. In view of the pressure of time, it might be best to defer the matter to the second part of the fiftieth session of the Commission in New York.

55. Mr. ECONOMIDES said he endorsed Mr. Pambou-Tchivounda’s comments about the use of the term “wrongdoing State”. It would be undesirable to make the change in the very short time remaining at the current part of the session. As to the rest of the Special Rapporteur’s recommendations, he agreed that article 1 should be maintained, article 2 deleted and the title of part one amended. He also concurred that articles 3 and 4 should be adopted, but he intended to propose drafting changes at some later date.

56. Mr. MELESCANU said that the Special Rapporteur deserved the Commission’s thanks for his preparation and presentation of a most interesting document which provided an excellent basis for an eventual decision. While agreeing in principle with the Special Rapporteur’s main recommendations, he shared the misgivings voiced by Mr. Pambou-Tchivounda and Mr. Economides about the expression “wrongdoing State” and also expressed reservations about the proposal to delete article 2. Admittedly the article added nothing of substance to articles 1 and 3, but he could not help feeling that something that went without saying might go still better if it was said. For example, in his own country, Romania, where he was engaged in work on a new Constitution, the article which proclaimed that no one was above the Constitution had given rise to a surprising amount of discussion. The Special Rapporteur was no doubt right from the technical point of view, but he nevertheless wished to place on record his reservations regarding deletion of article 2.

57. Mr. ROSENSTOCK said that he considered all the points raised by the other members so far to be matters of drafting. None of them justified action other than the referral of articles 1 to 4 to the Drafting Committee with a view to the Commission’s taking up the Committee’s report thereon in New York.

58. Mr. CRAWFORD (Special Rapporteur) said that those members who had invoked the pressure of time

were evidently under a misapprehension. The Commission was scheduled to continue its consideration of the topic of State responsibility that afternoon.

*The meeting rose at 1.05 p.m.*

## 2547th MEETING

*Thursday, 11 June 1998, at 3.10 p.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Mikulka, Mr. Rosenstock, Mr. Yamada.

**State responsibility<sup>1</sup> (continued) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>2</sup> A/CN.4/490 and Add.1-7,<sup>3</sup> A/CN.4/L.565, A/CN.4/L.569)**

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. DUGARD said that he would like the Special Rapporteur to explain the approach he was proposing that the Commission should adopt with regard to articles 1 to 4, since he had suggested that three of them should be kept, that article 2 (Possibility that every State may be held to have committed an internationally wrongful act) should be deleted and that the text should be referred to the Drafting Committee. In the case of other instruments, the opinion had been expressed that it was not advisable to amend the existing text. Did the Special Rapporteur share that opinion about the articles to be kept or would he be prepared to consider more elegant wording for some parts? He personally thought that some should be redrafted, but without touching any of the principles adopted. He was not sure that that was up to the Drafting Committee alone. It was for the members of the Commission to decide.

2. Mr. CRAWFORD (Special Rapporteur) said he agreed that that problem was one to be solved by the Commission as a whole. The Working Group chaired by

<sup>1</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>2</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>3</sup> *Ibid.*

Mr. Simma had given him some indications of how far the Commission was willing to go in reconsidering the text in respect both of principles and of wording.

3. As far as principles were concerned, it was clear that some provisions of the draft articles did require reconsideration, either because they had given rise to sharp disagreement or misunderstanding, as in the case of article 22 (Exhaustion of local remedies), or because those provisions were currently outdated or had been called into question in later decisions, as in the case of article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State), which did not contain any reference to the possibility that a State might *ex post facto* claim responsibility for an act which would not otherwise be attributable to it. That possibility had arisen in the case concerning *United States Diplomatic and Consular Staff in Tehran*, and had prompted ICJ to state that principle expressly and it should therefore be incorporated in the draft articles.

4. With regard to principles that the Commission continued to endorse because it thought they were fair or because they had been stated so many times in later decisions that it would be unthinkable to go back on them—and that was the case of some of the draft articles—it could probably be assumed that their wording should not be amended unless there was a good reason to do so. He was naturally in favour of a text that was as elegant and concise as possible and that was why he had proposed to find another wording to replace the expression “State which had committed an internationally wrongful act”, which was very cumbersome and used at least 20 times in the text. In that connection, he had no intention of amending the principles, that is to say, the substance; he was referring only to terminology, that is to say, to form. The Drafting Committee might agree on a term such as “responsible State”, which would eliminate the problem raised by Mr. Melescanu (2546th meeting), namely, that the wording as it currently stood might have a negative connotation and involve an element of fault, something that was not necessarily the case from the point of view of responsibility within the meaning of article 1 (Responsibility of a State for its internationally wrongful acts). The objective was thus to establish a balance or, in other words, to redraft the text in the light of developments in the last 20 or 30 years with a view to consistency and elegance of drafting, but without changing terms to which international law experts had grown accustomed. Some of those terms were particularly unwieldy and it might cause trouble to question them because they had been referred to so often that they were regarded as forming part of the law, but, if there was some good reason for changing them, that should be done and that was, apparently, what the Commission wanted.

5. Mr. ROSENSTOCK said he agreed that it was not advisable to amend an existing text, but there was no prohibition on doing so for valid reasons and if the text had not become sacrosanct because it had been cited time and time again. There was nothing to prevent the Commission from improving the text to make it clearer and easier to read.

6. Mr. DUGARD, referring to the criterion of fault, said he thought it was generally agreed that, if article 19 (Inter-

national crimes and international delicts) and the concept of the criminal responsibility of the State were to be maintained, the question of fault as a general requirement would have to be discussed and the question of culpable intent (*mens rea*) would have to be dealt with in the context of State responsibility. That question had been discussed by the Working Group, but, since the Special Rapporteur had not referred to obligations *erga omnes* and had expressed the view that the requirement of fault had to be ruled out at the current stage, he would like to know whether he had considered the possibility of a separate category of responsibility in respect of such obligations.

7. Mr. CRAWFORD (Special Rapporteur) said that the members of the Commission were obviously divided on article 19 and the question whether it dealt with genuine crimes or not. Some were in favour of the principle embodied in article 19, paragraph 2, without necessarily agreeing with its wording, interpreting that concept, rather, as an extremely serious wrongful act. Others were opposed to article 19, although they recognized that there could be obligations to the international community as a whole and that, for different purposes, distinctions must be made between the most serious wrongful acts and the others, both in terms of the degree of seriousness of the breach and its effect on States and in terms of the categories of States which might object, file a claim or demand cessation or restitution. What could be said, however, was that there was agreement on the need to include such distinctions in a regime of State responsibility even if work continued on how to proceed. As international law and international relations currently stood, very few members of the Commission were prepared to consider the possibility of genuinely criminalizing the conduct of States in the sense that a consequence which could be characterized as a sanction could be attached to such conduct. He did not rule out the possibility, however, that that concept of punishable crime might eventually prevail in future. At the current time, if it was included in the draft articles, some articles of part one, including articles 1 and 3 (Elements of an internationally wrongful act of a State), would have to be reconsidered because it was clear that a crime could not be conceived of without the general criterion of fault, but that was not necessarily the case of responsibility. During the discussions, he had not dwelled at length on that element, which was referred to in paragraphs 108 to 118 of his first report on State responsibility (A/CN.4/490 and Add.1-7), so as not to venture on to ground that was likely to create divisions and because he did not think it necessary to do so for the time being, although he would not necessarily close the door on that concept in future.

8. As to obligations *erga omnes*, the discussions in the Working Group, chaired by Mr. Simma, had shown that the provisions of articles 1 to 4 applied, regardless of the nature of the obligation breached, whether it was an obligation *erga omnes*, a rule of *jus cogens* or any other rule. They thus applied whether the obligation was bilateral, of a limited multilateral nature or *erga omnes*. The discussion on that point should thus not affect those articles.

9. He hoped that, on the basis of a very brief discussion, at the beginning of the second part of the session in New York, the members of the Commission would agree to

refer the four articles to the Drafting Committee. So far, it was not his own point of view that he had put forward, but that resulting from the discussions in the Working Group. He would nevertheless refer to some of the points made at that time.

10. In the case of the terminology problem to which the French wording (*État auteur du fait internationalement illicite*) gave rise and to which Messrs Economides, Melescanu and Pambou-Tchivounda had referred, it should be noted that article 1 did not expressly mention the concept of fault, but, paradoxically, that concept was implied in the term used in the French text. The problem did not arise in English because the term “wrongful” did not necessarily have the pejorative connotation of “fault”. The Drafting Committee might take a look at that question and consider the possibility of using the term “responsible State”, which would avoid any negative connotation and was concise.

11. The internal constitutional law experience that had been gained was valuable from the point of view of the work on State responsibility, as Mr. Melescanu had rightly pointed out in the Working Group. International law was, of course, an autonomous institution which did not depend on any internal law system, but it could not be dissociated from the experience mankind had gained in the field of internal law. Although the Commission had to be cautious when it came to analogies, it must be noted that international law was constantly borrowing from internal law, particularly techniques and terminology. He still did not agree with Mr. Melescanu’s conclusions, however, because, in the first place, the Commission had not been entrusted with the task of drafting an international constitution and, even if it had, it would be rather strange to prepare such an instrument on the basis of the breach of the primary rules which it contained by the member States which acceded to it. The usual role of a constitution was to make rules with which the signatories had to comply and not to take account of the abnormal situation constituted by a breach of those rules. Recalling that all States were governed by international law was a key point. It was, of course, important that the very first paragraph of the draft Declaration on the Rights and Duties of States, adopted by the Commission,<sup>4</sup> indicated that the States of the world formed a community governed by international law, but that was a predicate formulated in the preamble—not a principle expressly stated in an article—on the basis of which the concept of the equality of States had subsequently been affirmed. State responsibility was only one, and not even the most important, component of international law. It was therefore not necessary, in a text on a sub-component of international law, to refer to that predicate, which was the basis of international law as a whole. That predicate took on its full meaning in the context of the equality of States, but not in that of State responsibility, moreover, and saying that every State was “subject” to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility tended to debase the noble idea of the equality of subjects of law. He was therefore of the opinion that, if it was decided that a preamble should be added to the draft articles, that was where

that predicate should be recalled and that idea might be developed in the commentary, but there was no justification for including it in the text itself of the draft articles.

12. Mr. MELESCANU said that he would not press that idea if no one else supported it. As to the term “responsible State”, the joint position of the French-speaking members of the Commission was that it was probably not the best solution, for, in some cases, a wrongful act could be committed without entailing the responsibility of the author, since a special article established the conditions in which the author of a wrongful act could be exempted from responsibility. The question was complicated and should be discussed at greater length.

13. Mr. ECONOMIDES congratulated the Special Rapporteur on his latest communication, which was of the highest quality, and said that he was prepared to follow the recommendations being made to the Commission.

14. Referring to the draft articles one by one, he said that article 2 was entirely superfluous. In his opinion, it should be deleted, but, as its deletion might be misunderstood, the reason should be explained in the commentary.

15. Article 3 could be criticized as to form. Not only must conduct consisting of an action or an omission be attributable to the State under international law, as provided for in subparagraph (a), but the breach of the international obligation referred to in subparagraph (b) must also be assessed in the light of international law, and that was not expressly stated. He suggested that the article should read:

“There is an internationally wrongful act of a State under international law when:

(a) Conduct consisting of an action or omission is attributable to the State;

(b) That conduct constitutes a breach of an international obligation of the State.”

16. With regard to article 4, he said that, theoretically, it had to be assumed that internal law must be in conformity with the provisions of international law and use the solutions it provided, and not the opposite. That consideration was not made sufficiently clear in the second sentence, which should be replaced by the following, more neutral wording: “Internal law cannot take precedence over international law in this regard.” Such wording would, moreover, be in keeping with the original proposal by the former Special Rapporteur, Mr. Roberto Ago.<sup>5</sup>

17. As to the Commission’s doubts about the characterization of a State which had committed an internationally wrongful act, he agreed that the term “wrongdoing State” was full of connotations, but the term “responsible State” was also not entirely satisfactory. In French, the term *État mis en cause* might be used. The Drafting Committee would no doubt find an elegant solution to that problem.

18. Referring to a comment by Mr. Dugard, he said that he was not sure about the need for special provisions relating to fault.

<sup>4</sup> *Yearbook* . . . 1949, p. 287.

<sup>5</sup> See 2523rd meeting, footnote 9.

19. Mr. CRAWFORD (Special Rapporteur) said that the amendments proposed by Mr. Economides were entirely acceptable. The Drafting Committee, which would meet when the session resumed in New York, would benefit from them.

20. Following a discussion in which Messrs CANDIOTI, CRAWFORD (Special Rapporteur), KUSUMA-ATMADJA and ROSENSTOCK took part, the CHAIRMAN suggested that the Commission should refer draft articles 1 to 4 to the Drafting Committee.

*It was so agreed.*

*The meeting rose at 4.10 p.m.*

## 2548th MEETING

*Friday, 12 June 1998, at 10.05 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

**Reservations to treaties (*continued*)\* (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,<sup>1</sup> A/CN.4/L.563 and Corr.1)**

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)\*

GUIDE TO PRACTICE (*continued*)\*

DRAFT GUIDELINE 1.1.4

1. Mr. PELLET (Special Rapporteur) said that he would resume his discussion of the draft guidelines (ILC(L)/INFORMAL/12) with draft guideline 1.1.4, entitled "Object of reservations", which read: "A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which the State intends to implement the treaty as a whole". In his view, draft guideline 1.1.4

was much more important than those considered so far, and could have practical implications.

2. As he had pointed out in his presentation (2541st meeting), he had omitted to refer in draft guideline 1.1.4 to international organizations, which were obviously concerned as well. The words *ou l'organisation internationale qui la formule* ("or the international organization which formulates it") should therefore be inserted after *dont l'État* ("in which the State").

3. Draft guideline 1.1.4 was important for the following reason: in the Vienna Conventions, a reservation was defined in terms of its purpose, namely as a statement purporting to exclude or to modify the legal effect of certain provisions of the treaty in their application to the State or international organization formulating the reservation. There had been much discussion in the literature about the words "certain provisions" and as to whether a statement which did not concern a specific provision or provisions, but the treaty as a whole, could be called a reservation. That question had long been resolved in practice in a way which departed somewhat from the letter of the Vienna definition but was in keeping with its spirit: through the practice of what might be called "across-the-board" or "transverse" reservations, that is to say, reservations which did not refer to specific provisions of a treaty but, more generally, to the way in which the State or international organization formulating the reservation intended to apply the treaty as a whole. The use of such reservations was very common: they could concern the circumstances under which a State would or would not apply a treaty, or certain categories of persons to whom it denied the benefits of the treaty, or the exclusion of certain territories from the treaty as a whole. In all those cases, the reservation did not concern specific provisions of the treaty, but the effect of the treaty for the State formulating the reservation. Reservations of that kind, a mere handful of which he had cited in paragraph 37 of ILC(L)/INFORMAL/11, had never, as far as he knew, given rise to objections as such, provided that the reservation was not incompatible with the purpose of the treaty. That of course was a question of the validity of the reservation, not of its definition. He hoped the members of the Commission would confine their observations to the latter issue.

4. It would be excessively formalistic of the Commission if, in interpreting the Vienna Conventions, it did not address a common practice which might conceivably cause a problem if a State decided to invoke the Vienna definition literally, in a manner contrary to its spirit; for instance, if a State were to argue that certain legal experts challenged the idea that a reservation could refer to a treaty as a whole if the reservation was looked at on the basis of the Vienna definition, which to his mind was not very satisfactory. He did not think that definition should be changed, but simply interpreted in the light of practice. He therefore believed the Commission should adopt wording along the lines of draft guideline 1.1.4.

5. Mr. HAFNER said that he preferred a factual approach which only took into consideration instruments which already existed. International law must be based on the facts. That led him to raise a number of doubts which he had about draft guideline 1.1.4. The Special Rapporteur

\* Resumed from the 2545th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1998, vol. II (Part One).

teur himself had stressed the problem to which the issue could give rise. He interpreted the Special Rapporteur's proposal (2541st meeting), for the inclusion of a general clause concerning the obligation that a reservation should be in conformity with the 1969 Vienna Convention, to relate not only to draft guideline 1.1.3, but above all to draft guideline 1.1.4, and to be an attempt to eliminate certain problems which arose in connection with it. In his own view, draft guideline 1.1.4 was unacceptable. If the goal of international law was to create a basis for stable and predictable international relations and lessen their complexity and uncertainty, reservations of the kind contemplated in draft guideline 1.1.4 were unlikely to do so; on the contrary, if a State formulated such a reservation, the other parties to the treaty would never know by what obligations the State formulating the reservation was bound and for the violation of which provisions of the treaty that State must assume responsibility.

6. Reservations of that kind reflected some hypocrisy on the part of States, which were prepared to accept a treaty while at the same time refusing to be bound by obligations stemming from it. Although being party to a treaty without assuming its obligations might have an educational effect on a State, that would not contribute to predictable international relations. The Austrian reservation to the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques,<sup>2</sup> cited by the Special Rapporteur in paragraph 37 of ILC(L)/INFORMAL/11, stated that "its cooperation within the framework of this Convention cannot exceed the limits determined by the status of permanent neutrality", but no one knew the exact content of the status of permanent neutrality. Hence the vague nature of the obligations which Austria had assumed.

7. There had already been cases which demonstrated the impermissibility of such reservations. First, there had been cases before the European Court of Human Rights in which the general, or "transverse", scope of reservations had been discussed. Of course, it might be argued that that was merely because of the wording of article 64 of the European Convention on Human Rights, but in his view article 64 reflected what existed in international law. Secondly, a number of States, above all members of the European Union, had taken a position against such reservations. To cite an example, they had jointly drafted, and separately transmitted, a declaration which had termed inadmissible, owing to its general nature, the reservation made by Saudi Arabia upon its accession to the International Convention on the Elimination of All Forms of Racial Discrimination. The part of that reservation objected to read: "[. . . it will] implement the provisions [of the above Convention], providing these do not conflict with the precepts of the Islamic Shariah".<sup>3</sup> Similar declarations had been made relating to reservations of a like nature. Consequently, as he saw it, it had become recent international practice that "transverse" reservations as contemplated in draft guideline 1.1.4 were impermissible in international law, and he did not think that the impression should be given that they enjoyed any support.

<sup>2</sup> See *Multilateral Treaties . . .* (2542nd meeting, footnote 3), p. 878.

<sup>3</sup> *Ibid.*, p. 100.

8. Mr. ECONOMIDES said that, although the Special Rapporteur had reproduced international practice in the area, Mr. Hafner had rightly raised a number of problems. While the first part of draft guideline 1.1.4, stating that "a reservation may relate to one or more provisions of a treaty", repeated what was in the definition of a reservation, the second part, which referred to "the way" in which the State intended to implement the treaty as a whole, was new. That "way" must be limited; otherwise, the reservation was not a reservation but an interpretative declaration. Since the point of drafting a Guide to Practice to assist States was to give them advice, the Guide might stress that States should avoid formulating general or vague reservations and should enunciate as clearly as possible the restrictions which they intended to apply to the treaty. General reservations of the kind Mr. Hafner had mentioned were inapplicable and introduced an element of instability into international relations, because other parties could not know exactly what commitments a State was entering into. General reservations were a fact, but they must be made more restrictive and less general.

9. Mr. ROSENSTOCK said that the previous speaker had raised an interesting question in suggesting that States should be given advice in drafting reservations. He was pleased to note that Mr. Economides did not disagree that draft guideline 1.1.4 was a reasonable reflection of the current status quo. The fact that reservations of the kind referred to in that text had in some cases been contrary to the object and purpose of the treaty said nothing more than that reservations of the most specific nature to a particular treaty might be contrary to its object and purpose. The practice of the European institutions under article 64 of the European Convention on Human Rights merely meant that where there was a specific obligation to spell out the law, that obligation was not carried out where the institutions in question thought that the law should be spelled out yet in some cases did not insist on that, whereas in others they insisted that there was a defect because the law had not been spelled out. That did not establish a universal norm prohibiting reservations with regard to the way in which a State planned to implement a treaty. There might be some which were so vague as to be incomprehensible and others which were contrary to the treaty's object and purpose, but that was no more true, even though more likely, with that class of reservations than with those relating to one or more provisions of the treaty. Consequently, although he had an open mind on advising States against formulating reservations of the former kind and on warning them that such reservations might raise problems, he did not think it was valid to conclude that such a reservation was by definition impermissible or not part of the pattern of State conduct which the Commission was currently seeking to organize. He wished to see draft guideline 1.1.4 kept exactly as it was, with a note that it might be one of the provisions concerning which the Commission might wish to make a few comments.

10. Mr. PELLET (Special Rapporteur) pointed out that he had not spoken of general, but of "transverse" reservations. Some of them might be general, while others were not. Mr. Hafner had raised the issue of the validity of reservations and not their definition. The permissibility of "transverse" reservations was a matter of the law of treat-

ties. He asked members to bear in mind that the discussion was not about validity, but about definitions.

11. Mr. MELESCANU agreed fully that the way in which draft guideline 1.1.4 was worded reflected the practice of States in the area of reservations. He was in favour of that text, subject to the inclusion of a suitable commentary.

12. Mr. Hafner's view was correct, but as the Special Rapporteur had pointed out, it must be accepted that a reservation had been made, and, bearing in mind the example cited by Mr. Hafner, the State must raise an objection to the reservation. If a reservation was so general that other States could not accept it, they had only to exercise their right to object to it. Needless to say, a reservation so objected to had no legal effect in relations between the objecting States and the State which had formulated the reservation. There was no danger in the situation as long as the basic tenets of the Vienna Conventions were applied.

13. Concerning the point raised by Mr. Rosenstock, the Commission had not discussed whether the Guide to Practice would have a commentary. If it was decided that it would, he was in favour of each definition having an explanation. Nothing prevented the Commission from including in the definition a number of interpretative elements in order to guide States in the application of reservations. The text of draft guideline 1.1.4 should therefore remain as it was and the Commission should consider what interpretation or advice to include in the commentary to it.

14. Mr. DUGARD said that it could prove extremely difficult in practice to distinguish between the definition of a reservation and its admissibility. If there was evidence to suggest that a particular category of unilateral statement was unacceptable, surely that category should be excluded from the definition of a reservation. He was not convinced, moreover, that draft guideline 1.1.4 accurately reflected State practice. Many States had made objections similar to that mentioned by Mr. Hafner to reservations that were unduly vague and general. It could therefore be argued that State practice was not clear-cut and that there was scope for progressive development as an alternative to codification of existing practice. The competence of a State to enter sweeping reservations must be questioned and the Commission, in looking for an answer, should be willing to probe further than the existing provisions of the Vienna Conventions. All in all, draft guideline 1.1.4 needed careful consideration before the Commission endorsed it.

15. Mr. HAFNER said he was well aware of the distinction between the permissibility of reservations and their definition and had never implied that the statements referred to in draft guideline 1.1.4 were not reservations. His problem was with the use of the word "may", which made it unclear whether the draft guideline referred to a definition or to permissibility.

16. In response to Mr. Rosenstock, he said that all aspects of State practice must be taken into account, including that of objections, which might be aimed not only at reservations that were permissible within the meaning of the Vienna Conventions but also at reserva-

tions of a different kind that were viewed as impermissible. It was in order to make that point that he had quoted the wording of the European Union objection.

17. Mr. SIMMA thought that the debate was running into difficulties because of what he called the Special Rapporteur's "menu-reading" approach: the Commission had been presented with a tempting bill of fare but told to concern itself solely with its spelling and grammar and refrain from tasting any of the dishes. It would be frustrating to focus on the definition in draft guideline 1.1.4 but ignore the problems it raised. The idea of a definition of reservations that referred solely to cases that were per se impermissible was absurd. The way in which a State intended to implement a treaty as a whole could, in some cases, be impermissible because it was too general or sweeping, a view he had expressed previously in connection with reservations to human rights treaties. But the situation was different if a State indicated, for example, that a treaty was to be interpreted in the light of a clearly set out provision of its Constitution.

18. Mr. MIKULKA said he shared the Special Rapporteur's concern about general statements which purported to indicate how a State would implement a whole treaty. He agreed that the legal implications of, and the regime applicable to, such statements must be examined. He saw no reason, therefore, to accord them a priori recognition as reservations in draft guideline 1.1.4, since they did not necessarily fall within the scope of the definition. The 1969 Vienna Convention definition referred to exclusion or modification of the legal effect of "certain" provisions of a treaty. The *a contrario* corollary of that was that a reservation should not purport to exclude or modify the legal effect of the treaty as a whole. In that regard, draft guideline 1.1.4 seemed to contradict the Vienna definition. However, the Special Rapporteur had rightly drawn attention to the existence of a grey area of the law that called for further consideration.

19. Mr. CRAWFORD said he fully agreed with Mr. Simma and Mr. Mikulka. The discussion should not be confined to the definition in draft guideline 1.1.4 without some reference to the consequences of defining a particular statement as a reservation. The establishment of a unitary system of reservations might imply that certain doubtful statements were in some sense permissible. He urged the Special Rapporteur to proceed on the basis that the issue of permissibility must be addressed. In any event the relationship between the definitions adopted and the substance of the draft guidelines must be considered eventually.

20. Mr. MELESCANU said that even if the Commission omitted any reference to general reservations in the Guide to Practice, States would continue to formulate such reservations because the Vienna Conventions prohibited only those which were incompatible with the object and purpose of the treaty or were expressly prohibited. They should not be prevented from exercising that right.

21. Mr. GALICKI said that a far lengthier and more detailed discussion was necessary before the Commission could decide whether or not certain statements were to be classified as reservations. He had the impression that the

Special Rapporteur was inclined to expand the issue of the object of reservations to include the widest possible range of unilateral statements made by States in connection with treaties. He was not convinced that was the proper way to proceed. The Commission should acknowledge that reservations were by no means the only kind of unilateral statement that could be made.

22. Mr. PELLET (Special Rapporteur) said that those members who feared that draft guideline 1.1.4 would somehow validate general reservations had based their argument on the fact that such statements did not constitute reservations under the Vienna regime, citing the provision concerning incompatibility with the object and purpose of the treaty. In doing so, they were admitting their status as reservations, albeit of an impermissible kind.

23. He understood that members might find it frustrating to be denied a taste of food for the time being, but without that discipline they might be tempted to taste too many dishes at once. It was reasonable to begin with definitions instead of getting bogged down in unproductive arguments.

24. He agreed with Mr. Hafner that the word “may” was infelicitous. He had certainly not intended it to convey any sense of authorization or approval. What he had meant was that a unilateral statement whereby a State or international organization indicated the manner in which it intended to implement the treaty as a whole should be viewed as a reservation. Any such statement would be subject to the reservations regime and must therefore be compatible with the object and purpose of the treaty. If the Commission abandoned the idea of a definition along the lines proposed in draft guideline 1.1.4, it would imply that reservations such as that entered by the United Kingdom of Great Britain and Northern Ireland to the International Covenant on Civil and Political Rights,<sup>4</sup> referred to in paragraph 37 of ILC(L)/INFORMAL/11 and ILC(L)/INFORMAL/12, were impermissible, which was clearly not the case. Unlike Mr. Hafner, he thought that the reservation by Austria referred to in the same paragraph was also sound and a typical example of many other legitimate “transverse” reservations. Although they were not covered by the letter of the Vienna Conventions, their omission from the Guide to Practice would be an instance of hidebound conservatism.

25. Mr. Crawford had said that the issue of permissibility should currently be considered. That would amount to putting the cart before the horse. To assess whether reservations were permissible, it must first be established whether they could be classified as reservations.

26. Mr. PAMBOU-TCHIVOUNDA said that the relationship between the definition and the permissibility of a reservation was not fortuitous or imaginary, but one that must be borne in mind at all times. The Commission should not present States with a Guide to Practice that failed to mention their obligation to comply with the Vienna Conventions. The entire regime established by those Conventions must be placed in the forefront of the Guide to Practice as a constant frame of reference. Yet in

draft guideline 1.1.4 it was taken for granted. He proposed that it should be made explicit by an addition, at the end of the guideline, of the phrase “provided that the object and purpose of the treaty is thereby preserved”. He would be reluctant to endorse the guideline without such wording.

27. Mr. BROWNLIE said that the Special Rapporteur had made it clear that the parameters laid down in draft guideline 1.1.4 were not intended to deal with the question of validity. Yet its wording and the fact that it fell under the rubric “definition of reservations”, combined with the presumption of regularity, might lead a reader to assume that there was a prima facie validity concealed in the range of possible reservations outlined by the Special Rapporteur. The problem currently was not one of getting agreement about the paragraph among members of the Commission, but of the Drafting Committee finding the right wording, by an indication that, apart from the issue of definition as such, the aim of the drafting—an important one—was to make clear the scope of the Guide to Practice.

28. Mr. CRAWFORD agreed with those remarks and said he had no objection to draft guideline 1.1.4 being referred to the Drafting Committee. However, the extent to which State practice had gone beyond the 1969 Vienna Convention definition of a reservation should not be exaggerated. Many States had grave concerns about purported reservations which actually excluded from the scope of the treaty everything which a Government might consider to be contrary to the nation’s constitution or religious ethic. Those States were not prepared to give up a potential argument under the Vienna Conventions by conceding in advance that all such “transverse” reservations were reservations as defined therein. They wanted to see how the regime of the 1969 Vienna Convention would operate in respect of “transverse” reservations. The agreement to refer the issue to the Drafting Committee must therefore be without prejudice to that substantive point, which could not be concealed under the rubric of a definition.

29. Mr. ECONOMIDES said he was opposed to the distinction which had been drawn between definitions and the validity of reservations. With definitions in existence, a general reservation could be formulated to indicate the way in which a State intended to apply a convention, and such a reservation could not be said to be invalid. The discussion had shown that some “transverse” reservations were permissible: the example had been given of the reservation by the United Kingdom to the International Covenant on Civil and Political Rights. A reservation could thus exclude the application of all the provisions of a treaty, but only for certain categories of persons, and yet remain perfectly valid.

30. Some general reservations were permissible, however, for two reasons. First, because they were not true reservations, since they specified no restrictions, and secondly, because they were so vague that the other parties to the treaty had no way of knowing what the reservation concerned. Such reservations could not be applied in practice. The Commission should provide guidance to States that applied the 1969 Vienna Convention on precisely which “transverse” reservations were valid and

<sup>4</sup> Ibid., p. 130 and United Nations, *Treaty Series*, vol. 999, p. 287.

which were not. If the matter was sent to the Drafting Committee, it must be given the competence to deal with that substantive issue and to look carefully into the constituent elements of a “transverse” reservation for incorporation in an appropriate text.

31. Mr. ROSENSTOCK said that the comments made by the previous speaker indicated that the matter might be referred to the Drafting Committee. Caution should be exercised, however, about suggesting that “transverse” reservations could be subjected to criteria that differed from those applicable to every reservation, namely that it was inconsistent with the object and purpose of a treaty, that it was too vague or expressly prohibited by the treaty, and so forth. To concentrate attention on “transverse” reservations was not a useful exercise if it went further than the observation that they had a tendency, by their very nature, to raise particular problems. The practice of States in accepting such reservations since the entry into force of the 1969 Vienna Convention left little room for arguing that their acceptance was inconsistent with the meaning of the Convention as States understood it. He knew of no case where a State had rejected a reservation because it was “transverse”; States rejected reservations for being too vague or too general. A case in point was the United Kingdom’s reservation to the International Covenant on Civil and Political Rights regarding military personnel and detainees. There were other cases in which States had clearly accepted “transverse” reservations.

32. Mr. Sreenivasa RAO said the test was ultimately not on what subject and in what way the reservation was made, but whether it was consistent with the basic objective and criteria of the treaty. When, in accepting a treaty, States made their positions known as to how they would implement it, there were often doubts as to whether they were making a reservation or an interpretative declaration, not as to whether the statement was permissible or not. The framers of treaties that dealt with broad social objectives had obviously not expected that, once the treaty was signed, all problems would be resolved. When States, while accepting the basic thrust of the treaty exercise, said they wished to implement the treaty in a particular way, the question arose as to whether that statement was actually a reservation. He did not agree that simply because such a statement was made, it automatically became permissible.

33. Mr. MIKULKA said it was true, as Mr. Rosenstock had said, that some general, unilateral declarations had been rejected precisely because they were too vague. But that was exactly the problem: the aspect of certainty, the requirement that the reservation be the expression of a well-defined and clear intent, had to be part of the definition of reservations. Why should a completely incomprehensible declaration be automatically considered a reservation? As Mr. Sreenivasa Rao had suggested, it could be considered to be an interpretative declaration.

34. The Special Rapporteur’s remarks had currently made it clear that the wording of draft guideline 1.1.4 was the opposite of what he wanted to say, his intention being that all such vague declarations should be examined in the light of the requirements applying to reservations. That was correct, but he himself would go further and say that the real issue was what happened if a State made a general

statement about the way it intended to implement a treaty. The designation of the statement as a reservation from the very outset should be avoided.

35. Mr. PELLET (Special Rapporteur) said that the members of the Commission seemed to agree that “transverse” declarations could be reservations; and all he was asking was that that be spelled out in the Guide to Practice. It was, after all, the most serious omission he had uncovered in the definition of reservations set out in the 1969 Vienna Convention. Mr. Economides had drawn attention to two instances when such declarations could not be considered reservations: when they were interpretative declarations, and when they were too vague. Although that was true, he remained convinced that the question of permissibility came into play.

36. He agreed with Mr. Brownlie that the matter under discussion should be addressed in the Guide to Practice. He did not believe, however, that a text should be referred to the Drafting Committee with conditions attached, for example that it re-examine the entire regime of reservations. In any event he had promised the Commission that he would submit a draft guideline 1.1.9, which would be a “without prejudice” clause; hence, whatever wording was decided on for draft guideline 1.1.4, it would not in any way prejudice the validity of reservations or interpretative declarations. In sum, he thought there was general agreement on the substance within the Commission, but that there was good cause to modify the wording of draft guideline 1.1.4, which created some misunderstandings.

37. Mr. HAFNER said that was precisely the point he had been seeking to make. The basic question, as Mr. Mikulka had pointed out, was whether every declaration intended to change the scope of obligations and rights under a treaty was to be termed a reservation. He had some doubts. If, for example, a treaty excluded all reservations, but a State made one that was intended to change the obligations arising under the treaty, and the other parties reacted only with silence, what would the situation be? Had a reservation been made, after all? Had an agreement been concluded implicitly among the States? That problem underpinned the text of draft guideline 1.1.4 and the definition of reservations in general, and it had to be resolved.

38. Mr. ECONOMIDES said that the heading to draft guideline 1.1.4 should perhaps be changed from “Object of reservations” to “Transverse reservations” or “General reservations”. The text of the guideline might read as currently drafted, with the addition, at the end of the text, of the phrase “providing that such reservations meet the requirements of the 1969 Vienna Convention”. Finally, the text might indicate that the reservation must be sufficiently clear for the other parties to be able to see how the application of the treaty would actually be limited. If couched in those terms, the guideline would be a useful aid.

39. Mr. PELLET (Special Rapporteur) said he did not agree with the second change proposed by Mr. Economides, because the reference to the need for reservations to fulfil the requirements of the 1969 Vienna Convention would be in draft guideline 1.1.9. He could accept a modification of the heading along the lines proposed by

Mr. Economides, but thought that was a matter for the Drafting Committee to work out.

40. He was surprised by Mr. Hafner's position. Article 19, subparagraph (a), of the 1969 Vienna Convention indicated that a State might formulate a reservation unless "the reservation is prohibited by the treaty". How then could one say that the reservation was not a reservation? It was a reservation which, in the very words of article 19, subparagraph (a), was prohibited by the treaty. The argument that a reservation was not a reservation if it was prohibited viewed the problem the wrong way round and amounted to saying that precisely since something was a reservation, it could not be applied because it was prohibited by a treaty. But to modify the definition of a reservation because of the prohibition of making reservations would be entirely inappropriate. Even if a reservation was prohibited by a treaty, it remained a reservation—a prohibited reservation, but a reservation all the same.

41. Yet members of the Commission seemed to take the view that if a reservation was prohibited, it was not a reservation. It had been argued that if a reservation was too vague in the view of another party, it was not a reservation: the example had been given of the Saudi Arabian reservation to the International Convention on the Elimination of All Forms of Racial Discrimination. He did not agree: it was certainly a reservation, but an impermissible one. He was grateful to Mr. Hafner, however, for citing that excellent example of an impermissible reservation.

42. Mr. HAFNER said he had gone further than to say simply that the reservation was impermissible; he had indicated that it had been applied as an impermissible reservation, and that raised the question whether the reservation could still then be called a reservation. If a State accepted a reservation that was contrary to the object and purpose of the treaty, did that mean that the State had modified the treaty, perhaps in violation of a specific amendment procedure? In such a situation, could the reservation—an impermissible reservation which was applied, despite its illegal nature—still be called a reservation?

43. Mr. PELLET (Special Rapporteur) said that in his view it could.

44. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.1.4 to the Drafting Committee, on the understanding that the Drafting Committee would take into account all the comments made during the meeting.

*It was so agreed.*

45. Mr. PELLET (Special Rapporteur) said that, in view of the pressure of time, he would prefer to postpone the introduction of the remaining draft guidelines until the beginning of the second part of the session in New York.

46. Mr. GALICKI supported that suggestion for practical reasons. A presentation made at the current meeting would undoubtedly have to be repeated in New York in order to refresh members' memories after an interruption of several weeks.

47. The CHAIRMAN, in reply to a question put by Mr. ECONOMIDES, assured the Commission that the outstanding draft guidelines, including guideline 1.1.9, would be discussed at the second part of the session in New York before being referred to the Drafting Committee.

**Programme, procedures and working methods of the Commission, and its documentation  
(A/CN.4/483, sect. G)**

[Agenda item 8]

RECOMMENDATIONS OF THE PLANNING GROUP  
TO THE COMMISSION

48. The CHAIRMAN invited members to consider the recommendations of the Planning Group contained in ILC(L)/PG/1. He explained that, for the time being, the Commission was not being asked to consider chapter X of the draft report of the Commission on the work of its fiftieth session.

**A. Recommendations for the Commission's current session**

REPRESENTATION OF THE COMMISSION AT THE UNITED NATIONS CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

*The recommendation was adopted.*

PROGRAMME OF WORK FOR THE SECOND PART OF THE COMMISSION'S PRESENT SESSION

*The recommendation was adopted.*

**B. Recommendations for future sessions of the Commission**

MAKING AVAILABLE SPECIAL RAPPORTEURS' REPORTS PRIOR TO THE COMMISSION'S SESSION

*The suggestions and recommendation were adopted.*

**Date and place of the fifty-first session**

49. Mr. HAFNER said that, in reply to a questionnaire, a majority of the members of the Commission had expressed themselves in favour of having a split session in 1999. He asked why that view was not reflected in the recommendations of the Planning Group.

50. The CHAIRMAN said the Planning Group had been faced with the situation that the Commission had a budget for a session of 12 weeks in 1999 provided the session was continuous. That was why it was recommending that sessions subsequent to 1999 should be split sessions of 12 weeks. The second and third recommendations of the Planning Group under section B should perhaps be considered together.

**Date and place of sessions subsequent to 1999**

51. Mr. ROSENSTOCK said that his understanding of what had transpired in the Planning Group was that the members who favoured a split session, and who formed the majority, had recognized the difficulty of having a split session in 1999; and that, at the same time, those members who had been hesitant on the subject had agreed

that it would be reasonable and appropriate to request a split session for the year 2000. The fact that those two decisions had been taken simultaneously and were equally firm should, in his view, be reflected in a second sentence to be added to the recommendation on the date and place of the fifty-first session, and reading: "The Planning Group further recommends that in the year 2000 the session should be 12 weeks in duration and should be split, with both parts taking place in Geneva."

52. Mr. PELLET said that he was not prepared to endorse the Planning Group's recommendations unless he received a formal assurance that at the end of the current session the Commission would take a firm decision on the form and duration of the fifty-second session. The budgetary blackmail to which the Commission was exposed year after year had to be resisted.

53. Mr. DUGARD suggested that the matter should be discussed at the second part of the session in New York, although if possible not in the final week of the session when there might be a risk of under-representation.

54. Mr. YAMADA referred to the proposed programme of work for the second part of the session in New York appended to the recommendations of the Planning Group. He wondered whether two meetings would suffice for the Drafting Committee to complete the first reading of the draft articles on prevention of transboundary damage from hazardous activities which had been referred to it.

55. Mr. SIMMA (Chairman of the Drafting Committee) agreed that it might be useful to allow the Drafting Committee more time on the draft articles on prevention of transboundary damage from hazardous activities so as to have some completed work to present to the Sixth Committee.

56. Mr. PELLET said that he had no objection to the Drafting Committee being allowed to spend more time on the topic of prevention of transboundary damage from

hazardous activities provided the additional meetings were scheduled to take place after the meetings set aside for the topic of reservations to treaties. In that connection, he pointed out that the texts referred to the Drafting Committee under the latter topic were accompanied by commentaries, which was not so far the case with the draft articles on the former.

57. The CHAIRMAN said that the proposed programme of work was purely indicative and could be adjusted. After a further brief discussion on the subject of the date, place and form of sessions subsequent to 1999, in which Mr. GALICKI and Mr. ECONOMIDES took part, he said he took it that the Commission wished to adopt the Planning Group's recommendations on the understanding that the Commission would receive some assurances on budgetary matters during the second part of the session in New York and that a decision concerning the fifty-second session would be taken, if possible, early during the second part.

58. Mr. ROSENSTOCK said that the Commission ought not to ask the budget authorities for their views but tell them what it had decided.

*The recommendations on the date and place of the fifty-first session and of sessions subsequent to 1999 were adopted on the understanding outlined by the Chairman.*

#### **Closure of the first part of the session**

59. After the usual exchange of courtesies, the CHAIRMAN declared the first (Geneva) part of the session closed.

*The meeting rose at 12.40 p.m.*

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*Summary records of the 2549th to 2564th meetings,  
held in New York from 27 July to 14 August 1998*

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**2549th MEETING**

*Monday, 27 July 1998, at 10.25 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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**United Nations Diplomatic Conference of  
Plenipotentiaries on the Establishment of an  
International Criminal Court**

1. Mr. CRAWFORD said that he had represented the Commission for two days at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held at Rome from 15 June to 17 July 1998. The Conference had adopted by consensus the Rome Statute of the International Criminal Court<sup>1</sup> that went well beyond what the Commission had thought possible, demonstrating that times had changed. Since the Conference had had a task relating not to codification but to the establishment of a new institution, he had merely outlined to the participants the evolution of legal thinking on the subject and the contribution made by the Commission in that area. He had thus pronounced on the Commission's behalf, not an imprimatur, but a *nihil obstat* of the results of the Conference.

2. Mr. LEE (Secretary to the Commission) read out the draft resolution adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court to express its gratitude to the Commission. He noted that the substantive services of the Conference had been provided by the same members of the Codification Division who serviced the meetings of the Commission.

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<sup>1</sup> A/CONF.183/9.

**Reservations to treaties (*continued*) (A/CN.4/483,  
sect. B, A/CN.4/491 and Add.1-6,<sup>2</sup> A/CN.4/L.563  
and Corr.1)**

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

GUIDE TO PRACTICE (*continued*)

3. The CHAIRMAN invited the Special Rapporteur on the topic of reservations to treaties to introduce the three draft guidelines that had not yet been considered: draft guidelines 1.1.5, 1.1.6 and 1.1.7.

4. Mr. PELLET (Special Rapporteur) said that at the current stage, the work he was submitting focused exclusively on the definition of reservations and not on the relevant legal regime. The purpose was not to discuss the permissibility of a given type of reservation, but rather, to draw a distinction between what could be classified as a reservation and what could not.

DRAFT GUIDELINES 1.1.5 AND 1.1.6

5. Draft guidelines 1.1.5 and 1.1.6 had to be taken together, because they both addressed the problem of so-called extensive reservations—an idea developed in the doctrine but used by some to refer to reservations that increased the obligations of the reserving State and by others to mean exactly the opposite, that is to say, reservations that increased the obligations of the other parties vis-à-vis the said State. It was when the reserving State voluntarily entered into supplementary obligations that the fewest difficulties arose, but how often did such situations actually occur? The only clear example was that of a declaration whereby the Union of South Africa had undertaken commitments in respect of an article in the General Agreement on Tariffs and Trade that went beyond what the Agreement required of the parties.<sup>3</sup> Other examples that could be cited were of relatively little consequence, but as the South African precedent could be repeated, and as the Commission had taken up the problem at its sixteenth session, in 1964, and again at its forty-ninth session, in 1997, it seemed worth while to look into whether that type of declaration could be classified as a reservation. In his opinion, it would be hard to construe declarations like that of South Africa as reservations, if only because they could be made at any moment and not

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<sup>2</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>3</sup> See Protocol modifying certain provisions of the General Agreement on Tariffs and Trade, p. 39.

solely at the time when the State making them consented to be bound by the treaty, and because they could relate exclusively to certain parts of a treaty, in other words, not to a treaty. To classify such declarations as reservations would be to enclose them artificially in what was in fact a relatively stringent regime. Such declarations were actually self-regulating unilateral acts such as those whose existence had been acknowledged by ICJ in the *Nuclear Tests* cases but whose validity and legal regime were entirely independent of the treaty which, in exceptional cases, served as the pretext for them. Draft guideline 1.1.5 indicated as much but added, in brackets, that such statements were governed by the rules applicable to unilateral legal acts. That language departed from the confines of the definition and encroached upon the terrain of legal regimes, but that seemed necessary in order to spare future users of the Guide to Practice any confusion as to the exact nature of that type of statement.

6. The problem of reservations designed to limit the obligations of their author was entirely different. They were true reservations, and one could not help but be surprised at the uncertainty of some of the doctrine and of a number of members of the Commission on that point. As Mr. Economides had stated (2548th meeting), limiting the effect of the provisions of a treaty in their application to the reserving State was, after all, one of the purposes most frequently served by reservations. Even if a reservation did not aim at excluding certain provisions of the treaty or the legal effect of those provisions, it inevitably aimed at limiting their application. The problem was not serious enough to merit changing the definition in the 1969 Vienna Convention so as to insert "limit" between "exclude" and "modify", or to replace "modify" by "limit", but it would be useful to specify that "modify" could mean only "limit". That clarification was all the more necessary since the problem had been badly presented in the literature, which had reduced it to the dichotomy between "extensive reservation" and "limitative reservation". If a typical limitative reservation existed, it was surely the one by which the former socialist countries of eastern Europe had expressed their disagreement with article 9 of the Convention on the High Seas, relating to the immunity of ships of State.<sup>4</sup> The reserving States had indicated that such immunity applied in general to all ships owned or operated by a State. A Polish writer, Renata Szafarz, had interpreted that reservation as being an extensive reservation,<sup>5</sup> however, on the grounds that by expanding their immunity under article 9, the reserving States expanded the obligations of other States. True, but those obligations were expanded only in relation to what was envisaged in the treaty. The reservation, like all others, merely neutralized the restructuring of rights and obligations induced by the provision it addressed and thereby caused a reversion to the situation *ex ante*, in other words to general international law: the common law that was applied outside the realm of treaties. The authors of the reservation had been pursuing the objective of all authors of reservations, namely of not having to apply a

specific provision in a treaty. As to whether the reservation to article 9 was permissible or not—even though that question had no bearing on the problem of definition—first, everything depended on the real scope of the rule of customary international law applicable to ships of State independently of the Convention, and secondly, the other States were entirely free to accept the reservation or not to accept it. If the interpretation of common law given by the authors of the reservation was not correct, then the reservation was impermissible and was devoid of legal effect, but in no case was a particular category of reservations involved.

7. It could so happen, however, that while leaving a treaty intact, a State might wish to use a statement to add something to the treaty that was not already there. The only two examples of such instances were the "reservation" by which Israel had tried to add the Shield of David to the emblems of the Red Cross and the Red Crescent under the Geneva Conventions of 12 August 1949,<sup>6</sup> and the one by which Turkey had similarly sought to add the Red Crescent to the Red Cross under the Convention for the adaptation to maritime warfare of the principles of the Geneva Convention.<sup>7</sup> But in neither instance had the authors of the reservation intended to modify the effect of the treaty on themselves. They had simply wished to add to the treaty a sort of unwritten clause, not in fact a reservation but a draft amendment or a draft auxiliary agreement that other States were free to accept or reject. That was the sense of the final phrase in draft guideline 1.1.6, the formulation of which could perhaps be improved.

8. Mr. ECONOMIDES said that the case covered by draft guideline 1.1.5, a statement designed to increase the obligations of the author, was in fact extremely rare. If such a statement was not a reservation, as the text indicated, then one was entitled to ask what it was. First, it could be construed as a proposal for extension of a treaty made by a signatory State of its own volition and introducing a new provision extraneous to the subject matter of the treaty. If the proposal was accepted by the other States parties, it could acquire the character of a treaty provision by application in subsequent practice or even through a collateral agreement. Secondly, one could postulate that it was an interpretative declaration: a State, misunderstanding the meaning of the treaty it was signing, added to its own obligations in good faith. Again, the other States could subsequently, by their application, give that statement the status of a treaty provision.

9. In both cases, something other than a reservation was involved, and that should accordingly not be dealt with in the Guide to Practice; the content of draft guideline 1.1.5 could be mentioned, however, by way of explanation in the commentary to draft guideline 1.1 on the definition of reservations.

10. As for draft guideline 1.1.6, it contributed nothing new and merely gave an *a contrario* definition of reservations. It simply added to the general definition the idea that the author of the statement "intends to limit . . . the

<sup>4</sup> See *Multilateral Treaties . . .* (2542nd meeting, footnote 3), pp. 787-789 and United Nations, *Treaty Series*, vol. 450, p. 162, and vol. 905, pp. 80-81.

<sup>5</sup> R. Szafarz, "Reservations to multilateral treaties" . . . , op. cit. (see 2545th meeting, footnote 3), pp. 295-296.

<sup>6</sup> See United Nations, *Treaty Series*, vol. 75, pp. 436-438.

<sup>7</sup> See J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915), pp. 181 and 256.

rights which the treaty creates for the other parties”. But that was self-evident, by virtue of the principle of reciprocity that was rigorously applied in treaty matters, so the explanation was unnecessary. The reverse was true, however, of the phrase “unless it adds a new provision to the treaty”, which rightly brought up the case of statements that went beyond classical reservations. In his view, the content of draft guideline 1.1.6 should also be included in the draft guideline on the definition of reservations.

11. Mr. SIMMA said he endorsed the content of draft guideline 1.1.5 but agreed with Mr. Economides’ analysis of draft guideline 1.1.6. It was true that that provision was merely a paraphrase of the definition in draft guideline 1.1, with the sole difference that it spoke of “limiting” rather than “modifying” the obligations. He questioned whether that nuance really merited a separate guideline.

12. In paragraphs 97 et seq. of his third report on reservations to treaties (A/CN.4/491 and Add.1-6), the Special Rapporteur analysed what were, strictly speaking, extensive reservations. He identified three types, the last being statements that purported to impose new obligations not envisaged by the treaty upon the other parties thereto. If they were compared with the statements defined in draft guideline 1.1.6, one could see a progression between the two, since it was no longer a question of “imposing obligations” but of “limiting rights”. Did the second type of statement also constitute, strictly speaking, extensive reservations?

13. As Mr. Economides had pointed out, the final phrase of draft guideline 1.1.6 definitely had to be changed, because it was impossible to assert that a unilateral declaration could “add a new provision”. How could one imagine that a provision, in the proper sense of the term, could be added to a treaty by a simple unilateral declaration? All a State could do was to make a proposal for a new provision.

14. Mr. HAFNER said that draft guideline 1.1.5, which gave an *a contrario* definition that was far too broad, should be amended. As he saw it, there were indeed unilateral declarations that actually constituted reservations. He gave the example of the conclusion by a number of States of a treaty to suspend the application among themselves of a general regime establishing obligations under international law. If one of the States made a reservation to that treaty, it created new obligations: in other words, it revived those of general international law, and the declaration must be considered a reservation. Such cases deserved to be mentioned in the commentary.

15. The wording of draft guideline 1.1.6 was extremely close to that of the general definition given in draft guideline 1.1. It raised the question of whether there was a uniform regime, applicable to all declarations, under which they could modify contractual obligations. He cited the Rome Statute of the International Criminal Court that had just been adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.<sup>8</sup> The Rome Statute con-

tained a transitional provision (art. 124) by which a State, at the time of ratification, could make a declaration under which it reduced the scope and the nature of the obligations imposed upon it thereby. According to draft guideline 1.1.6, that was indeed a reservation. But the Rome Statute itself explicitly excluded the possibility of making a reservation. He therefore assumed that there were two regimes, one applicable to what were, strictly speaking, reservations, the other to declarations. The question that the Commission had to resolve was indeed whether there was a single regime for reservations.

16. Mr. BROWNLIE said that he was not entirely convinced by the distinction apparently being introduced in draft guidelines 1.1.5 and 1.1.6 between unilateral declarations that constituted reservations and those that did not. In his view, there was no substantial difference in the theory of the law between a declaration that alleviated and one that enhanced the obligations placed upon the author. It also seemed inappropriate to say that a statement by which a State undertook commitments going beyond the obligations in a treaty fell under a regime other than that of reservations.

17. Mr. ROSENSTOCK said he found the final phrase of draft guideline 1.1.6, “unless it adds a new provision to the treaty”, to be risky and thought its subject was unclear. On the other hand, the example of the Rome Statute given by Mr. Hafner was not entirely convincing. The provision he had cited offered States what was actually a menu approach: they were free to opt in or opt out of any given obligation. The exercise of that option was not a reservation per se.

18. Mr. FERRARI BRAVO said he thought the two draft guidelines were not of decisive importance for the theory of law but might simply be useful for States, and it was for that reason that they deserved to be included in the Guide to Practice.

19. The bracketed phrase “and is governed by the rules applicable to unilateral legal acts” in draft guideline 1.1.5 was fairly injudicious in that the Commission did not define the statement to which it referred, but merely observed that that type of statement did not constitute a reservation and cited the rules applicable to it. If that phrase was deleted, the draft guideline would be acceptable.

20. Draft guideline 1.1.6, too, failed to say what was meant by statements designed to limit the obligations of their author when they did not constitute reservations, and it likewise left open the question of what was a statement that added a new provision to the treaty.

21. Mr. BENNOUNA said that a distinction could indeed be drawn between a reservation and a unilateral statement designed to modify a treaty. But according to the definition in draft guideline 1.1, which was taken from the 1969 Vienna Convention, a reservation modified, not the treaty, but the “effect” thereof. In other words, it always remained within the scope of the treaty. To add a new provision was to go beyond the treaty as such and thereby to depart from the category of reservation.

<sup>8</sup> See footnote 1 above.

22. Draft guideline 1.1.6 was particularly badly worded in that the most important part, the phrase “unless it adds a new provision to the treaty”, was merely a subsidiary clause. The hypothesis set out in that phrase should be the central feature of the provision which, in fact, merely reproduced the classical definition of a reservation.

23. Draft guidelines 1.1.5 and 1.1.6 should be combined, since the second merely gave an *a contrario* definition of the legal device described in the first. As for the bracketed phrase in draft guideline 1.1.5, it would be better to delete it, because it raised an entirely different issue that was for the time being outside the topic.

24. Mr. MIKULKA said that, as Mr. Hafner had already pointed out, there were treaties that purported not to create obligations but rather to restrict those that were already in force under other instruments. An example could be taken from the field of diplomacy. General international law and multilateral treaties established certain norms in that field, but those norms were far from being peremptory and States were free to derogate from them by specific agreement—at the regional level, for example. One could thus imagine that in order to avoid abusive recourse to diplomatic immunity, the States of a region might agree to limit the privileges of their respective agents, thereby restricting the obligations of the host State with regard to diplomatic representatives. If one of the States made a reservation to that specific agreement which had the effect of making a provision inoperable, the regime of general international law would apply. That example definitely constituted a reservation, but one that did not meet the criteria set out in draft guideline 1.1.5. Such contradictions called for clarification in the commentary.

25. Mr. LUKASHUK, referring to draft guideline 1.1.1 on the joint formulation of a reservation, said the provision had no place in the draft, for a reservation was essentially a unilateral act for which the author was responsible unilaterally.

26. Referring to draft guideline 1.1.5, he said that unlike Mr. Ferrari Bravo and Mr. Brownlie, he saw it as a very useful provision, in that it settled the question of how to handle statements designed to increase the obligations of their author. Nevertheless, the bracketed phrase should be deleted, as other speakers had requested. The same remark—that it should be deleted—could be made of the final phrase, “unless it adds a new provision to the treaty”, in draft guideline 1.1.6.

27. Mr. GALICKI said he thought draft guidelines 1.1.5 and 1.1.6 should be included in the Guide to Practice, because a number of elements were missing from the definition of reservations in draft guideline 1.1, which indicated that a reservation was a unilateral declaration that purported to “exclude or modify the legal effect of certain provisions”. There was no problem with the term “exclude”, but the word “modify” raised a question: did that mean to increase or to decrease the obligations? As the Special Rapporteur had pointed out, the regime of reservations could not be applied to statements designed to increase the obligations imposed upon their authors. On the other hand, when statements were aimed at limiting

the obligations, they must be considered to be reservations, with all the consequences that that entailed. As for draft guideline 1.1.5, the most important aspect was clearly that the statements described therein were not governed by the regime of reservations, something which the Special Rapporteur had rightly emphasized. The final phrase in draft guideline 1.1.6 brought up another question: did it mean that if a statement added a new provision to the treaty, it did not constitute a reservation? It would be better to delete the phrase, although there was another possibility: to delete draft guideline 1.1.6 as a whole. After all, if it was indicated that statements designed to increase the obligations of their author were not reservations, then the logical conclusion was that those designed to limit such obligations were indeed reservations. In any event, if draft guideline 1.1.6 was retained, the phrase “unless it adds a new provision to the treaty” should be deleted.

28. Mr. CRAWFORD said that draft guidelines 1.1.5 and 1.1.6 raised difficulties that went beyond simple drafting problems. Referring to the final phrase of draft guideline 1.1.6, “unless it adds a new provision to the treaty”, he said it was obvious that a reservation could under no circumstances add a provision to a treaty. Reservations had the effect of modifying the obligations flowing from a treaty. The phrase therefore had no place in the draft. If one considered that a reservation was a statement that, depending on the manner in which it was received by the other States parties, modified the obligations of the reserving State and the other States in a number of ways, then why should statements designed to increase the obligations of their author be excluded? For example, a State party to a multilateral treaty could formulate a reservation that extended its obligations in the hopes of simultaneously extending, by reciprocal action, those of the other States parties. While it was obvious that a simple unilateral act that had the effect of increasing the obligations of its author was not a reservation, it was by no means self-evident that the same was true for other types of declarations that had the same effect. The Drafting Committee should look into that question more closely.

29. Mr. CANDIOTI endorsed draft guidelines 1.1.5 and 1.1.6. Regarding draft guideline 1.1.5, he said it would be wiser to delete the bracketed phrase, as the type of declaration to which it referred was not necessarily a unilateral act. It would be better to examine those declarations case by case. Concerning draft guideline 1.1.6, he thought that it was useful to specify that statements designed to limit the obligations of their author constituted reservations but that, as other speakers had pointed out, the final phrase, “unless it adds a new provision to the treaty”, should be deleted, because it was outside the context of the topic. The draft guidelines clarified the concept of the reservation and were therefore appropriate for inclusion in the Guide to Practice.

30. Mr. MELESCANU said that draft guidelines 1.1.5 and 1.1.6 raised two questions of crucial importance for the Guide to Practice. The first was whether, in formulating a reservation to a treaty, one could add or exclude provisions. The answer was obviously no. Consequently, the final phrase in draft guideline 1.1.6 had no place in the Guide. Second, if a reservation could modify the legal

effect of a provision, could it only reduce that effect or expand it as well? As Mr. Crawford had pointed out, it was difficult to see why a reservation should be able solely to reduce the legal effect of a provision of a treaty. Mr. Hafner, among others, had asked why, if the legal effect of a treaty could be expanded by the application of customary law, that could not be achieved by the formulation of a reservation? Lastly, he said it was clear that a reservation could neither add nor exclude a treaty provision, but it could modify the legal effect of any existing provision by reducing or enlarging it.

31. Mr. KABATSI said that draft guideline 1.1.5 clarified the definition of reservations set out in draft guideline 1.1, but at the present stage one could hardly assert that the type of statement to which it referred constituted a unilateral legal act. The bracketed phrase should therefore be deleted. As for draft guideline 1.1.6, it was generally acceptable, although the final phrase was superfluous.

32. Mr. RODRÍGUEZ CEDEÑO thanked the Special Rapporteur for his proposals and said that he, too, thought they should be included in the Guide to Practice. He shared the view that unilateral declarations designed to increase the obligations of their author did not constitute reservations. They were autonomous acts representing a promise and did not require the acceptance of other States. As for the bracketed phrase, while it was clearly important to specify that the statements in question could be covered by other legal regimes, the draft guideline was too categorical, because such statements were not necessarily unilateral acts. The phrase could be deleted and an explanation of that point included in the commentary. Regarding draft guideline 1.1.6, it was important to include it in the Guide, even if it seemed repetitive. On the other hand, the final phrase was indeed superfluous. Subject to those amendments, he thought the two draft guidelines could be transmitted to the Drafting Committee.

33. Mr. GOCO requested the Special Rapporteur to indicate what would be the effect of the withdrawal by one State of a reservation formulated jointly with other States. He pointed out that according to the definition of reservations, a reservation was a statement that purported to exclude “or” modify, and not to exclude “and” modify, the effect of treaty provisions.

34. Mr. KUSUMA-ATMADJA said that the consideration of draft guidelines 1.1.5 and 1.1.6 had sparked a very interesting debate. It was highly desirable to elaborate a Guide to Practice for reservations to treaties, even if many treaties adopted since the 1980s—the United Nations Convention on the Law of the Sea being an example—prohibited reservations.

35. Mr. ILLUECA said the Commission must fill in the gaps in international law in the area of reservations and the difficulties it could encounter derived both from the technical nature of the topic and from the accompanying political considerations. In that regard, he welcomed the approach adopted by the Special Rapporteur, which was more pragmatic than dogmatic. Like many other members of the Commission, he thought that draft guidelines 1.1.5 and 1.1.6 should be retained, with the deletion of the

bracketed phrase in the first provision and of the final phrase, beginning with “unless”, in the second.

36. Mr. HE thanked the Special Rapporteur for his very clear introduction of the provisions under consideration. With regard to draft guideline 1.1.5, he believed it was appropriate to indicate clearly that a statement designed to increase the obligations of the author did not constitute a reservation, but was simply a unilateral declaration. On the other hand, it was not necessary to identify the rules that governed such statements, and that was why the bracketed phrase should be deleted. As to draft guideline 1.1.6, even if it appeared to state the obvious and to reproduce the definition set out in draft guideline 1.1, it should be retained, following the deletion of the final phrase.

37. Mr. YAMADA said that he, too, believed the final phrase in draft guideline 1.1.6 should be deleted. He endorsed the two provisions under consideration, but wished to ask a question of the Special Rapporteur. In 1971, Japan had signed with other countries the Food Aid Convention, 1971, under which the signatories had committed themselves to providing food aid to certain countries. Not being a producer of wheat, Japan had made a reservation<sup>9</sup> indicating that it would provide a quantity of rice equivalent in monetary terms to the quantity of wheat that it would have had to provide. None of the signatory States had objected. While the reservation had not modified the legal effect of the treaty for Japan, it had nevertheless replaced the obligation to provide wheat with the obligation to provide rice. He would like to know if that reservation should be considered a reservation or a unilateral declaration.

38. Mr. PELLET (Special Rapporteur) drew the attention of members of the Commission to his third report, the length of which was attributable to the complexity of the topic. He informed members that they would find therein the answers to many of the questions they had asked him about the Guide to Practice, which could not usefully be discussed without reference to the report. He would reply in detail at the next meeting to the questions and comments of members of the Commission. He wished to point out, however, that some members—including Mr. Economides and Mr. Simma—had given their own reading of the definition of reservations in the 1969 Vienna Convention: specifically, they saw the word “limit” where the Convention said “modify”. True, the legal effect of certain provisions was usually “limited”, but that was not what was said in the text. In response to the question raised by Mr. Melescanu, he said that according to the definition in the 1969 Vienna Convention, a reservation could exclude the legal effect of certain provisions of a treaty.

*The meeting rose at 1.10 p.m.*

<sup>9</sup> United Nations, *Treaty Series*, vol. 800, p. 197.

## 2550th MEETING

Tuesday, 28 July 1998, at 10.15 a.m.

Chairman: Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

### Reservations to treaties (*continued*) (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,<sup>1</sup> A/CN.4/L.563 and Corr.1)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

GUIDE TO PRACTICE (*continued*)

DRAFT GUIDELINES 1.1.5 AND 1.1.6 (*concluded*)

1. Mr. PELLET (Special Rapporteur) said it was gratifying to see that the discussion (2549th meeting) of the draft Guide to Practice contained in his third report on reservations to treaties (A/CN.4/491 and Add.1-6) had been productive; he wished to make some general comments on the results. First, there was a need to get back to the real meaning of the definition of reservations given in the Vienna Conventions, namely that a reservation excluded the legal effect of a provision in a treaty. It was therefore inaccurate to assert that a reservation could exclude the provisions of a treaty, just as it was inaccurate to say, as Mr. Melescanu had (2549th meeting), that it could not. Similarly, it was wrong to contend, as Mr. Economides and Mr. Simma had (*ibid.*), that the Vienna Conventions defined reservations as purporting to limit the legal effect of the provisions of a treaty, for the term used in the Vienna Conventions was “modify”; hence the problem of extensive reservations.

2. His second general comment concerned the essential question of whether a State could increase the obligations of other States by making a reservation. Two distinct facets of that question had to be discerned. First, one had to determine whether a reservation could increase the obligations that would normally be imposed on the parties under a treaty. The response, in his view, was quite plainly yes, since by excluding the application of the pro-

visions of a treaty, the reserving State neutralized them. The situation then reverted to the application of general international law which, if a reservation was made, was likely to impose more obligations on the contracting States than would the treaty. Although it was theoretically possible (the specific case was the subject of draft guideline 1.1.5), it was unlikely that a State would make a reservation under such circumstances.

3. Secondly, one might ask whether the reserving State could increase the obligations of the other contracting States in relation not only to the treaty itself but also to general international law. In other words, could the reserving State exploit the act of reservation to modify customary law to its own advantage? That seemed hard to imagine since a State could obviously not modify customary international law in its own favour by a unilateral act. But the Vienna definition did not say that a reservation could do nothing but limit the obligations arising from a treaty: it said it could modify them, and modification could operate in both directions. If they were not expressly accepted, modifying reservations that would increase the rights of the reserving State and the obligations of the other contracting States were impermissible reservations that went against customary international law. That highly academic view of the problem did not address a very serious consequence, namely that States often neglected to object to reservations and were deemed to have accepted them after a period of 12 months had elapsed. While the consequences were minimal for large industrialized States that had well-organized legal departments, they could be very serious for small underdeveloped States that would be bound by “legislation” imposed upon them from outside. The section devoted to the definition of reservations was perhaps not the appropriate place to try to offset those drawbacks, but the very academic debate on the subject masked a practical problem with political undertones.

4. The final general comment he wished to make concerned the consensus that seemed to have emerged from the Commission’s discussion about the wording of the draft guidelines. Members were, on the whole, against retaining the reference in draft guideline 1.1.5 to “rules applicable to unilateral legal acts”. But if the declarations covered in the draft were not to be characterized as reservations, it was hard to imagine them being anything other than unilateral acts. Like Mr. Rodríguez Cedeño (*ibid.*), he thought that nuance should be explicated in the commentary. A number of members had proposed the phrase “offer of negotiation”, but he counselled against introducing that idea in the guideline itself and thought it would be better to do so in the commentary.

5. Members of the Commission seemed to have similar doubts about the final phrase in draft guideline 1.1.6: “unless it adds a new provision to the treaty”. Those doubts seemed to stem more from the form than from the content of the phrase, most members apparently espousing the underlying idea that some unilateral declarations, termed reservations by their authors, were in fact draft amendments purporting either to increase or reduce the obligations of third States. Such was the case with the famous Israeli reservation, according to which Israel had tried to add the Shield of David to the emblems of the Red Cross and the Red Crescent under the Geneva Conven-

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

tions of 12 August 1949.<sup>2</sup> That type of reservation was in fact a sort of amendment that would enter into force only if accepted by the other States. The problem was to know whether such “reservations” should be classified as such, in view of the phenomenon he had just described: the tacit acceptance of reservations. In that situation, too, States, particularly those of the third world, ran the risk of being unwittingly bound by a convention that was not the one they had adopted or ratified.

6. Responding to a comment made by Mr. Hafner (*ibid.*), he said “opting in” and “opting out” clauses would be covered in chapter III of his report. As he saw it, the opting out clause was a type of reservation since, unlike the opting in clause, it entailed a modification in the application of a treaty. He was sympathetic also to Mr. Hafner’s argument that if “opting in” and “opting out” clauses were reservations, then they fell under the regime of reservations and accordingly, while a reservation was permissible, the rest were prohibited. The solution might be to say that those clauses had such a special character that States making them could hardly be deemed to have the intention of excluding all other reservations.

7. He thought the Drafting Committee should be asked to look into the various solutions that had been proposed and to determine whether the Guide to Practice should contain one or two provisions on the obligations of the reserving State. For his part, he would strive to submit a number of proposals to the Drafting Committee based on what had been said.

8. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guidelines 1.1.5 and 1.1.6 to the Drafting Committee.

*It was so agreed.*

9. Mr. GOCO, recalling the discussion (2549th meeting), said that the use of the word “unilateral” in draft guideline 1.1.1 seemed at variance with the idea of joint formulation of reservations. He wished to know whether draft guidelines other than 1.1.5 and 1.1.6 had been sent to the Drafting Committee.

10. Mr. SIMMA said that the question of whether reservations formulated jointly retained a unilateral character had been considered by the Committee in depth. There was no disparity between the unilateral nature of a reservation and the fact that a reservation could be formulated jointly.

11. In response to a question by Mr. LUKASHUK, he explained that joint formulation of reservations was covered in the section devoted to definitions solely because all the definitions of reservations began by stating that they were unilateral, and that brought up the question of reservations formulated jointly. The problem had been raised at the previous meeting, but it had been agreed that it would be considered in greater depth in the context of States that dissociated themselves from a reservation.

#### DRAFT GUIDELINE 1.1.7

12. Mr. PELLET (Special Rapporteur), introducing draft guideline 1.1.7, said that like draft guideline 1.1.8, it covered unilateral declarations with specific objectives: it concerned the well-known phenomenon of reservations relating to non-recognition, which took two forms. The first was when State A simply indicated that it did not recognize State B as a State. That type of precautionary declaration, which was in reality futile, was not a reservation because it had no effect on the application of the treaty. The second case was when State A further indicated that it did not intend to enter into contractual relations with entity B. That was a real reservation, even if some writers disagreed on the grounds that it was a reservation *ratione personae* and not *ratione materiae*. Actually, according to the definition, a reservation did not have to be *ratione materiae*: it was any unilateral declaration that had the effect of excluding or modifying the legal effect of a treaty. That was the case with true reservations relating to non-recognition, the effect of which was that their author, which would have been bound by all the provisions of a treaty with entity B that it did not recognize, was freed of such obligations.

13. Three problems had come up during the elaboration of draft guideline 1.1.7. The first was whether there should be two provisions, one for precautionary declarations and the other for true reservations relating to non-recognition. He had decided on a single provision, formulated in such a way that precautionary declarations could be covered by inference.

14. The second problem was whether States were always truly aware of the legal consequences of their declarations. In his view, the answer had to be yes, since practice abounded in that area. But the law of treaties generally eschewed formalism and often accorded greater importance to the intentions of the parties than to the expression of such intentions. Was it then necessary to say that declarations relating to non-recognition were reservations when they purported to exclude the application of a treaty, even when they did not so state explicitly? For reasons more of convenience than of logic, he had preferred wording that did not exclude delving into the intentions of States and that encouraged them not to be vague.

15. The third problem stemmed from the fact that true reservations relating to non-recognition differed from reservations as defined in the Vienna Conventions in that they could be formulated at the time when the reserving State agreed to be bound by the treaty, but also when the non-recognized entity became a party to the same treaty. It would be unduly formalistic to consider that the first case constituted a reservation, but not the second. That was why draft guideline 1.1.7 stated that a reservation relating to non-recognition could be made at any time. It might also be possible to include a phrase, perhaps in the commentary, to explain that reservations could be made when either the reserving State or the non-recognized entity expressed their consent to be bound by the treaty.

16. Mr. BENNOUNA said he endorsed the Special Rapporteur’s analysis of precautionary declarations. International law acknowledged that being a party to a multilateral treaty did not mean that a State recognized all

<sup>2</sup> See 2549th meeting, footnote 6.

the other parties. From the theoretical point of view, however, he wondered whether what the Special Rapporteur called true reservations relating to non-recognition really conformed to the idea of a reservation. That idea embraced the exclusion or modification of the effect of certain provisions, whereas in the case at hand, it was the entire treaty that was excluded for a given party. That created difficulties for the application of the regime of reservations. Objections, for example, were crafted in response to reservations that neutralized a given provision of a treaty, but they would henceforth have to be envisaged in terms of a State's own exclusion from the treaty in its entirety. Would it not be easier to classify such reservations as interpretative declarations? Since the unifying element in interpretative declarations was that they purported to clarify the meaning or scope of the treaty, reservations relating to non-recognition could be considered as interpretative declarations clarifying the extent of the commitment of the reserving State.

17. Mr. BROWNLIE pointed out that the declarations covered by draft guideline 1.1.7 diverged from the definition given for reservations in a number of ways. Aside from the fact that they did not exclude only "certain provisions" of the treaty, they denied the party concerned the capacity to conclude a treaty and established a precontract situation, whereas reservations were made when the parties were already bound by some type of contractual relationship. The phenomenon was one that arose often enough in practice but remained peripheral in relation to the topic.

18. Mr. LUKASHUK said he wondered whether it was wise to leave aside cases when a reservation relating to non-recognition did not exclude the application of the treaty to the non-recognized entity, such cases being in practice the most numerous. That type of declaration could be deemed to constitute a special type of recognition, confined to the scope of the treaty, failing which the treaty could not be implemented between the two parties concerned.

19. With regard to what the Special Rapporteur called "true reservations relating to non-recognition", what happened when they covered non-recognition, not of a State, but of a Government, or non-recognition of a multilateral organization that was a party to the treaty? Finally, might not the indication that such reservations could be made at any time open the door to serious complications by making it possible to halt the implementation of the treaty in the event of a change of government?

20. Mr. HAFNER said that some of the numerous declarations cited in the third report of the Special Rapporteur related to non-recognition of a State, and others to non-recognition of a Government. It seemed an exaggeration to say that they all purported to deny the party concerned the status of State and the capacity to conclude a treaty. Sometimes it was simply a matter of drawing certain conclusions from the non-recognition of the State or Government concerned. One had to determine whether the application of the treaty was necessarily linked to the question of non-recognition, whether it was a matter of non-recognition of a State or of a Government and whether such reservations were permissible. The Commission had always taken the view that non-recognition

was a strictly political act, devoid of legal effect. But if it was acknowledged that the right to exclude the application of a treaty to a State was linked to the question of non-recognition, then non-recognition was given legal effect.

21. Mr. GALICKI said that while the definition must certainly draw its inspiration from the provisions accepted by States in the Vienna Conventions, new developments in the field must also be taken into account, without going so far, however, as to assert that all new practices in relations among States could be categorized as reservations.

22. That was the risk inherent in draft guideline 1.1.7, too many elements of which contradicted the basic definition. As other speakers had pointed out, the exclusion of the whole set of treaty obligations contradicted the very essence of a reservation. In addition, the rules on objection in the Vienna Conventions could no longer be applied. Finally, the time-frames set up by the Conventions could not be applied to reservations that could be made "at any time". It would therefore be difficult to endorse draft guideline 1.1.7 as currently worded.

23. Mr. MELESCANU said he wished to inject a practical consideration into the debate by recalling that in the 1960s and 1970s, many States had been divided as a result either of the Second World War or of the cold war. One of the solutions to the problem of non-mutual-recognition of those parts of States had been to establish a system of multiple depositories, such as in the field of disarmament. That had enabled North Korea to deposit its instruments of ratification in Moscow, for example, and South Korea to do so in Washington, D.C. It was therefore clear that a declaration of non-recognition fell under the regime of unilateral declarations and not of reservations. A reservation, after all, was intended to modify not a treaty, but its effects, in other words the obligations it entailed.

24. Mr. DUGARD, replying first to the question of whether non-recognition of States or non-recognition of Governments should be envisaged, said it would be best to envisage the first: non-recognition of Governments would be too difficult to cover at the current time. Next, he pointed out that an act of recognition had meaning only in a bilateral context and had none in a multilateral context.

25. States made declarations relating to non-recognition to reaffirm their political positions. The problem was that the declarations nearly always lacked any legal precision. That was perfectly illustrated by the declarations made by Saudi Arabia and the Syrian Arab Republic on signing the Agreement establishing the International Fund for Agricultural Development (IFAD), cited by the Special Rapporteur in his third report (para. 168 et seq.).<sup>3</sup> Like Mr. Brownlie, he thought the conclusion to be drawn was that non-recognition was a *sui generis* case.

26. The question that then arose was what was to be done with non-recognition. Since it was a very common practice, it could not be passed over in silence in the

<sup>3</sup> See *Multilateral Treaties . . .* (2542nd meeting, footnote 3), p. 403 and United Nations, *Treaty Series*, vol. 1059, p. 317 and vol. 1119, p. 387.

Guide to Practice currently being elaborated. At the least, the attention of States should be drawn to the fact that their participation in a multilateral treaty did not necessarily entail recognition from all other States parties to the treaty. The question of where to put such a provision within the Guide would also have to be resolved.

27. Mr. PAMBOU-TCHIVOUNDA pointed out that declarations relating to non-recognition introduced into the topic the question of motive which, in the current instance, was political. If the Commission started reasoning along those lines, it would have to do so in a consistent manner and would have to somewhat revise the Vienna Conventions to include the concept. The question of motive had so far remained implicit, because the framers of the Vienna Conventions had held that the answer was self-evident. If, in its draft guidelines, the Commission emphasized the fact that there was a special kind of reservation involving, on the one hand, a State that did not recognize an entity, and on the other, that very entity, then it would be forced to elucidate all the situations in which such relations might arise. It would be impossible to endorse a draft guideline that would necessitate a review of the text of the Vienna Conventions.

28. Referring to the phrase “regardless of the date on which it is made”, which Mr. Galicki had already criticized, he said that the Vienna system set up a very clear time-frame, from signature of the instrument to accession of States to the treaty, and including approval and ratification. He wondered whether the phrase in question referred to all those different stages; in other words, if it was consistent with the Vienna Conventions, or if it referred to a time preceding or following the operations mentioned and thus departed from the provisions of the Conventions. To avert any ambiguity, the phrase should be deleted.

29. Mr. ECONOMIDES said that draft guideline 1.1.7 had nothing to do with reservations *stricto sensu*, as most of the other speakers had already pointed out, for essentially three reasons. First, a reservation was always directed at a treaty provision, and not, as in the current case, at the capacity of a given entity to sign a treaty. Secondly, a reservation excluded or limited the effects of certain treaty provisions, whereas in the text before the Commission, a treaty was excluded in its entirety. Thirdly, the substantive law of reservations, including procedural law, could not be applied to the cases mentioned in draft guideline 1.1.7, as was perfectly illustrated by the phrase “regardless of the date on which it is made”.

30. The draft guideline envisaged only one instance among the multitude of possible declarations which could be much less definite and express far more nuanced positions. Conversely, a declaration of non-recognition was sometimes extremely concise, the State simply indicating that “I do not recognize this or that State”. It thereby signalled that it would not apply the agreement in question in any manner that would lead it to recognize, *de jure* or *de facto*, the State that it cited.

31. If the Commission wished to settle the fate of declarations relating to non-recognition, it should engage in a much more in-depth study that would lead it to the border-

line between the topic of reservations and that of “acts that can be classified as reservations”.

32. Mr. SIMMA said he, too, thought that draft guideline 1.1.7 dealt with only one of the situations that the Special Rapporteur had covered in the body of his report. For example, it would be recalled that even when States had declared, in the context of a multilateral treaty, that they did not recognize the existence of other States parties to the same treaty, that had not prevented extremely fruitful inter-State relations from being developed throughout the duration of the cold war. The Federal Republic of Germany had not recognized the German Democratic Republic, yet it had been a party, with that country, to various multilateral treaties and had even concluded bilateral treaties with it, all without recognizing it.

33. From the logical standpoint, one could easily say that the legal device envisaged in draft guideline 1.1.7 certainly did fall under the regime of reservations: a State that refused to recognize the existence of another State signatory to the same treaty was indeed modifying the effects of the treaty on itself. But if one considered a declaration relating to non-recognition as a reservation, one became aware that in fact, very few of the provisions in the Vienna system could be applied. The Commission had therefore to decide what it should do with non-recognition which, as most other speakers had indicated, had a number of elements that did not correspond to the strict definition of a reservation.

34. Mr. YAMADA said he wished to make two comments. First, the Special Rapporteur had enumerated three categories of unilateral declarations relating to non-recognition: those in which a State excluded all contractual relations with a State that it did not recognize; those in which a State agreed to have contractual relations with a State that it did not recognize; and those in which a State indicated that it did not recognize another State, without specifying whether or not it would agree to have contractual relations with it. The second and third types of declaration did not under any circumstances constitute reservations. The first type was not merely a political declaration, and the legal effects had to be examined. The Special Rapporteur had rightly concluded that such declarations were in fact reservations.

35. Secondly, one had to determine whether a State, by making a reservation, could refuse all contractual relations with another State. According to the 1969 Vienna Convention, a State could exclude all contractual relations with another State when it formulated an objection. Could a State do the same thing in other situations? As the Special Rapporteur had indicated, a State could formulate such reservations *vis-à-vis* another State that it did not recognize. Conversely, one could ask whether a State could exclude all contractual relations with another State that it recognized.

36. Mr. CRAWFORD said that he, too, believed that the type of declaration covered in draft guideline 1.1.7 related exclusively to non-recognition, and had nothing to do with reservations. It would be preferable not to depart from the topic. Declarations made at the time of ratification or accession did not signify that their author would

never recognize the State in question. It was necessary to determine whether a State could refuse to have contractual relations in future with another State. It would be better, however, not to raise that question in the Guide to Practice; the best solution would be to delete draft guideline 1.1.7.

37. Mr. GOCO said he was of the view that draft guideline 1.1.7 was of practical interest, but only if considered independently of the law of treaties. Article 20 of the 1969 Vienna Convention (Acceptance of and objection to reservations) stated that when it appeared from the limited number of the negotiating States that the application of the treaty in its entirety between all the parties was an essential condition of the consent of each one to be bound by the treaty, a reservation required acceptance by all parties. That provision clearly had to be taken into account. Draft guideline 1.1.7 was thus suitable for inclusion in the Guide to Practice, but only if it was aligned with the 1969 Vienna Convention.

38. Mr. ELARABY pointed out that in State practice, ratification did not necessarily mean recognition. If draft guideline 1.1.7 was retained in the interests of progressive development of international law, international relations might be complicated and the universality of treaties compromised. Most multilateral treaties were applied, irrespective of whether there was recognition, and sometimes even in the absence of diplomatic relations between the States concerned. Draft guideline 1.1.7 was not suitable for inclusion in the Guide to Practice.

39. Mr. ADDO said that he was also not in favour of the adoption of draft guideline 1.1.7. The type of unilateral declaration it covered was not in fact a reservation, which was intended to modify the legal effect of certain provisions of a treaty and not to exclude the application of a treaty as a whole.

40. Mr. MIKULKA said he thought draft guideline 1.1.7 raised an important issue but was outside the scope of reservations. The type of declaration relating to non-recognition it envisaged did not meet the criteria set out in the definition of reservations. According to the Vienna Conventions, a reservation was a declaration by which a State purported to modify or to exclude the legal effect of certain provisions of a treaty. Draft guideline 1.1.7 would exclude the application of the treaty in its entirety. In addition, the hypothesis it advanced was contrary to the doctrine of the law of reservations, according to which the reserving State accepted the legal ties that bound it to other States.

41. If the draft guideline was retained, that would mean that the regime of reservations would have to be applied to the unilateral declarations concerned, which would entail a number of problems. For example, one could imagine a situation when all the other parties to a treaty were States not recognized by the reserving State. Nothing would prevent that State from excluding the legal effect of the treaty vis-à-vis all the other States parties: an absurd situation. To take another example, some treaties prohibited reservations unless they were expressly provided for in the treaty itself. Could a State make a unilateral declaration in which it excluded any legal ties

between itself and another State party that it did not recognize? It would certainly be useful to consider the matter at a later stage, but not in the context of the regime of reservations.

42. Mr. RODRÍGUEZ CEDEÑO said that he, too, had doubts about the advisability of including draft guideline 1.1.7 in the Guide to Practice. It dealt with a very special type of declaration which was not an interpretative declaration in the sense used by the Special Rapporteur in his third report. The Special Rapporteur gave two specific examples, the declarations made by Saudi Arabia and the Syrian Arab Republic at the signing of the constituent instrument of IFAD. One related to non-recognition in general, the other to contractual relations with another State party. But the constituent instrument of IFAD contained an article prohibiting the formulation of reservations. The declarations should not have been accepted as reservations.

43. Mr. HE pointed out that the problem of non-recognition was an extremely complex one, in both political and legal terms. One could choose between two alternatives: to consider that matters relating to non-recognition should not be included in the Guide to Practice, or to extract the aspect of non-recognition that related to reservations and to include it in the Guide. A more detailed explanation should nevertheless be given in the commentaries to indicate that non-recognition was a political problem that often arose but had nothing to do with reservations.

44. Mr. AL-BAHARNA said the Special Rapporteur was well aware that the matter under consideration related to non-recognition and not to reservations. He indicated as much himself, in draft guideline 1.1.7, with the probable intention of attracting the attention of States. The type of declaration envisaged was common in the context of multilateral treaties and had never given rise to objections.

45. To resolve the matter, a compromise solution could be found by retaining the text of draft guideline 1.1.7 but either putting it elsewhere in the Guide to Practice or making it into an addendum or an annex. The wording should perhaps also be amended to read:

“A unilateral statement by which a State purports to exclude the application of a treaty between itself and other States which it does not recognize constitutes a special case of reservation which does not strictly fall within the meaning of guideline 1.1 but nevertheless could be considered as a declaration affecting the relation of the State making such a declaration vis-à-vis the State or the States which it does not recognize in so far as the rights and obligations arising from the treaty are concerned.”

*The meeting rose at 1.05 p.m.*

## 2551st MEETING

Wednesday, 29 July 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

### Reservations to treaties (*continued*) (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,<sup>1</sup> A/CN.4/L.563 and Corr.1)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPporteur (*continued*)

GUIDE TO PRACTICE (*continued*)

DRAFT GUIDELINE 1.1.7 (*concluded*)

1. Mr. ROSENSTOCK said that the type of statements covered in draft guideline 1.1.7 could be made at any time, even after a State had expressed its consent to be bound by the treaty concerned. That should be spelled out, because otherwise such statements would not be deemed to be reservations, in view of the rule according to which a reservation must be formulated at the moment of consent. Draft guideline 1.1.7 could accordingly be amended to read: “A reservation by a State which purports to exclude the application of a treaty between itself and one or more other States which it does not recognize may be made at any time.”

2. Mr. ILLUECA said that the Commission had questioned (2550th meeting) whether it was really necessary to retain draft guideline 1.1.7. Non-recognition was an essentially political problem that was certainly of special importance in Latin America and the Caribbean as well as in the Middle East, but one was justified in asking whether it had its place in the Guide to Practice.

3. Mr. LUKASHUK indicated that the problem was an extremely serious one that absolutely had to be resolved. Having listened to all the previous speakers, he wished to propose a compromise solution. Some had asserted that the statements referred to in draft guideline 1.1.7 did not

constitute reservations. That was true, but they were nevertheless a particular type of statement that had a significant legal effect, since they could exclude all contractual relations between parties to a treaty. Unlike interpretative declarations, they had an impact on the legal effect of the treaty concerned. A distinction could be drawn between statements relating to recognition and statements relating to non-recognition. The fact that a State could indicate that joint participation did not signify recognition but that non-recognition posed no impediment to the application of the treaty between itself and another State could not be passed over in silence. Such situations arose all too frequently for the Commission to abstain from commenting on them.

4. Mr. MIKULKA recalled that draft guideline 1.1.7 concerned only one type of statement relating to non-recognition, namely those that purported to exclude the application of a treaty between their author and the non-recognized State, and that the problem was to determine whether such statements constituted reservations. As he had said (*ibid.*), he did not think they did. As to the amendment proposed by Mr. Rosenstock, it was generally acceptable, but he wondered if Mr. Rosenstock was truly convinced that the type of statement involved constituted a reservation. Perhaps the word “reservation” could be replaced by “unilateral declaration”; otherwise serious problems might be encountered, particularly if other States formulated objections.

5. Mr. PELLET (Special Rapporteur), summing up the discussion on draft guideline 1.1.7, said that many speakers had asked whether a political problem or a legal problem was involved. Unlike Mr. Illueca, he did not believe that because something was a political problem it should not be mentioned. Quite the contrary: it was precisely because a political problem was involved that excesses had to be averted. That being said, the Commission must not launch into a theoretical analysis of recognition and non-recognition: it must not rewrite international law. On the other hand, it was essential to determine whether the unilateral declarations concerned could have an effect on the application of a treaty. If so, did that permit them to be categorized as reservations? He fully agreed with Mr. Simma and Mr. Yamada who held that the problem should not be approached from the standpoint of non-recognition, but he disagreed with members like Mr. Crawford and Mr. Brownlie who felt that it was outside the scope of the topic of reservations. The Commission must decide whether the unilateral statements mentioned in draft guideline 1.1.7 corresponded to the definition of reservations given in the Vienna Conventions. Many speakers had emphasized the differences, which they deemed fundamental, between such statements and reservations. Some had laid stress on the phrase “certain provisions of the treaty”. He hoped to have shown, however, during the consideration of draft guideline 1.1.4 (Object of reservations), that most reservations were not aimed at “certain provisions”, a phrase that should not be taken too literally lest transverse reservations be excluded, something that would be unacceptable. On the other hand, a distinction should be drawn between “certain provisions” and the exclusion of a treaty in its entirety. Unlike most members of the Commission, he believed that a reservation did not have to have only an object *ratione materiae* and that it

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

could additionally have an object *ratione personae*. He would not press his point, however. Nobody doubted that, within the legal regime of reservations, a reservation could exclude the application of a treaty in its entirety. If an objection could do so, as Mr. Yamada had shown, it was hard to see how a reservation could not.

6. He was more worried by the comments that had essentially related not to whether a statement conformed to the Vienna definition, but to the problems that could arise from the inclusion of unilateral statements relating to non-recognition in the category of reservations. Mr. Mikulka had gone especially far in saying that such statements went against the very philosophy of reservations. He did not agree, but admitted that problems could indeed arise, if only because the system of acceptance and objection would not be able to function. He therefore acknowledged that it might be dangerous to say purely and simply that such statements were reservations. He agreed with Mr. Mikulka's reaction to the proposal made by Mr. Rosenstock: true, draft guideline 1.1.7 could be amended to place emphasis on the time when the unilateral statement could be made, but that did not resolve the fundamental problem, which was whether such statements constituted reservations. He would in any case prefer to use the option he had mentioned when introducing the draft guideline, namely to specify that a reservation could be made at the moment when the State committed itself, but also at the moment when the non-recognized entity did so. Deleting the final phrase would not solve the problem: to improve the text, the moment had to be specified.

7. Some speakers had wondered what the object of non-recognition was. It could certainly be made clear that it was not necessarily a State, but that was not the problem: the important element was the desire of the reserving State to exclude all contractual relations with another entity. As for the question raised by Mr. Yamada, namely whether it was possible to refuse to have contractual relations with a recognized State, he admitted that he had not thought about it.

8. For all those reasons, he acknowledged that it might be preferable not to classify statements relating to non-recognition as reservations. It remained to be seen what they were.

9. Members of the Commission had proposed two explanations. To some, they were *sui generis* statements, a phrase that was to some extent the jurist's admission of defeat and that elucidated nothing. To others they were interpretative declarations, a more interesting thesis whose proponents included Mr. Bennouna. The question should be given further consideration, and that was why he was not asking the Commission to send draft guideline 1.1.7 to the Drafting Committee. It would be better to revisit it during the consideration of the draft guidelines relating to interpretative declarations and general declarations of policy. But under no circumstances could the problem be passed over in silence.

10. Mr. ECONOMIDES stated that the crucial issue was whether a unilateral statement relating to non-recognition was a true reservation in the meaning of the law of treaties. At the previous meeting, a majority of members had said that it was not. Nor was it, in his opinion, a *sui*

*generis* statement or an interpretative declaration; rather, it was a statement by which a State did not recognize that an entity had the capacity to have international, including contractual, relations. Such statements fell under the rules of the law of treaties relating to non-recognition, but the Commission had to discuss the matter, and he wondered if, with the necessary explanations in the commentary, it might not use the same approach as with draft guideline 1.1.5 by indicating that a unilateral statement relating to non-recognition "does not constitute a reservation".

11. Mr. GOCO said he was worried on a number of counts. First, the basic hypothesis was that a multilateral treaty was negotiated by a number of States and that some treaties required the consent of all the parties. What, then, was the impact on the application of a treaty of a reservation relating to non-recognition? For the declarant State, the meaning of such a reservation appeared to be that it did not wish to be bound by a treaty because it did not recognize other States that were party to the treaty. In that connection, he recalled the advisory opinion of ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>2</sup> A prior counter-proposal had concerned the need for the consent of the other State party to be bound by the treaty. The question also arose as to whether the draft guideline would apply in all cases and to all international treaties.

12. Mr. HAFNER said that the problem should not be viewed from the standpoint of non-recognition. As the Special Rapporteur had emphasized in his third report on reservations to treaties (A/CN.4/491 and Add.1-6), a distinction must be made between reservations that indicated simply that the reserving State did not recognize a State party to a treaty and those that indicated that the reserving State did not recognize a State party to a treaty and that the treaty would not apply between itself and that State. The real question was whether it was possible to formulate a reservation that excluded the application of a multilateral treaty to another State party thereto, and whether that was a matter of non-recognition. Another question was whether there were cases when States rejected the application of a treaty to certain States parties in the absence of any statement relating to non-recognition.

13. He did not agree with the Special Rapporteur that the object of non-recognition was of little importance. One might expect that a State would have the right to exclude the application of a treaty between itself and another State if that State underwent a change of government which the first State did not recognize.

14. Finally, pointing out that the regime of reservations was very similar to that of agreements *inter se*, he proposed that the Commission consider whether the definition of agreements *inter se* might be applicable to such statements.

15. Mr. BROWNLIE said that the view expressed the day before to the effect that the question under consideration fell not within the law of treaties but within the law of recognition was not without merit. He agreed with the Special Rapporteur, however, that the matter was

<sup>2</sup> See 2536th meeting, footnote 13.

indeed covered by the law of treaties but was governed by those provisions of the 1969 Vienna Convention that related to the capacity to conclude treaties and to the expression of consent, not by those relating to reservations. The problem was thus one of classification and could be resolved by a saving clause such as “without prejudice to”.

16. Mr. PELLET (Special Rapporteur) said he had been struck by the good sense of the comments made by Mr. Economides and was prepared to revise the wording of draft guideline 1.1.7 along the lines he had proposed, namely to indicate that a unilateral statement by which a State purported to exclude the application of a treaty between itself and one or more States which it did not recognize did not constitute a reservation. The draft guideline should be accompanied by a fairly substantial commentary in which the comments of Mr. Brownlie, among others, could be included; that would enable the Commission to settle the problem of such statements once and for all.

17. Mr. HE said that for him, draft guideline 1.1.7 raised two fundamental issues: a State’s decision whether or not to recognize an entity, and the determination of whether the entity concerned had the capacity to be party to a treaty. A decision relating to non-recognition was a very important political statement and could not be construed as a reservation. He endorsed the proposal by Mr. Economides and thought that the Commission should very clearly indicate that the statements concerned were not reservations. The Commission would be making a contribution to international law by clarifying that matter.

18. Mr. BENNOUNA said that the method used by the Commission was unsatisfactory from the legal point of view. The debate under way was an admission of impotence, because it referred to something without classifying it. He was surprised that the Special Rapporteur had drastically changed his mind in the space of a few hours, and he hoped he would give the matter further consideration. Discussion of the question should be postponed until the next meeting.

19. Mr. MIKULKA said he thought the Special Rapporteur had changed his mind after having drawn the right conclusions from a discussion that had lasted for over a day. The intention had never been to pass over the problem in silence. On the contrary, members had recognized its existence, its importance and the need to deal with it, but not as a reservation. He therefore endorsed the proposal made by the Special Rapporteur and suggested further that the other aspect of the matter, namely the moment when a statement could be made, should be referred to the Drafting Committee. The discussion seemed to show that such a statement could be made at the moment when the declarant State expressed its consent to be bound by the treaty or at the moment when the entity whose status was disputed expressed such consent. The Drafting Committee could stipulate that it was not prejudging the position the guideline would occupy in the Guide to Practice.

20. Mr. SIMMA said that since the Special Rapporteur’s initial point of view, which was likewise his own, had proved to be in the minority, there was no reason not

to suggest that the problem be referred to the Drafting Committee, together with the explanations given by Mr. Mikulka. Once the problem of interpretative declarations had been considered, it would be up to the Drafting Committee to elaborate the relevant guidelines for inclusion in the final part of the Guide to Practice.

21. Mr. PELLET (Special Rapporteur) explained that the problem of non-recognition fell within the topic with which he had been entrusted only insofar as statements relating to non-recognition had an effect in the law of treaties and in that such statements were frequently confused with reservations. It might turn out that such statements could not even be categorized as interpretative declarations and would have to be relegated to a special category, like general declarations of policy and informative declarations. Draft guideline 1.1.7 should be referred to the Drafting Committee, with a request that it make proposals while keeping two things in mind: that a clear majority of members of the Commission thought that statements relating to non-recognition were not reservations; and that the link, if there was one, between such statements and interpretative declarations had to be identified.

22. Mr. BROWNLIE and Mr. ILLUECA endorsed that proposal.

23. Mr. HERDOCIA SACASA said that in addition, it was very important for the Drafting Committee not to lose sight of the close ties between draft guideline 1.1.7 and draft guidelines 1.1.9, 1.2 and 1.2.5.

24. Mr. GALICKI pointed out that while in general the draft Guide to Practice operated in a positive mode by indicating, for example, what constituted a reservation, it also contained draft guidelines (such as 1.1.9) that indicated that a given type of statement was not a reservation. The problem of statements relating to non-recognition existed and should be dealt with in the final part of the Guide.

25. Mr. ROSENSTOCK said he was not sure it would be prudent to decide that statements relating to non-recognition were not reservations before having looked at all the other possible categories in which they could be placed, including the possibility of addressing them in the commentary. It was necessary to be equally prudent before classifying them as interpretative declarations. Unless the Commission considered that the declaration made by Saudi Arabia at the signing of the constituent instrument of IFAD mentioned in the third report of the Special Rapporteur<sup>3</sup> had no legal effect on the capacity of the State cited therein to use dispute settlement machinery enabling it to bring Saudi Arabia before ICJ, it might well be according such statements a legal effect of which they were deemed to be devoid in other quarters if it was to classify them as interpretative declarations.

26. Mr. ELARABY said that the final goal of the operation was to ensure the greatest possible universality in accession to treaties. Political problems among States were a reality, and statements relating to non-recognition were a solution that enabled States to reconcile that reality

<sup>3</sup> See 2550th meeting, para. 25 and footnote 3.

with accession to treaties. To add to that solution the risk of being brought before ICJ would run counter to the objective of universality and would complicate inter-State practice in comparison with the way it currently worked.

27. Mr. GOCO pointed out that the job of the Drafting Committee was to revise or supplement the wording of the provision in the light of the Commission's discussion on the problem of statements relating to non-recognition, but the fundamental issues of whether such statements came under the topic of reservations and whether they should be included in the Guide to Practice had not yet been resolved. Would the Drafting Committee have to decide those matters as well?

28. Mr. LUKASHUK said he was confident of the Drafting Committee's ability to elaborate a compromise text expressing the differing but not necessarily conflicting viewpoints of all members of the Commission.

29. The CHAIRMAN suggested that draft guideline 1.1.7 be transmitted to the Drafting Committee, on the understanding that it would take into account all the important remarks made during the discussion.

*It was so agreed.*

30. Mr. PELLET (Special Rapporteur), introducing chapter I, section C, of his third report devoted to the distinction between reservations and interpretative declarations), said he wished first to make three general comments. The first was that while the three Vienna Conventions of 1969, 1978 and 1986 formed a solid basis for considering the definition of reservations, the same was not true for interpretative declarations. In elaborating its draft articles on the law of treaties, the Commission had considered the definition of such declarations first at its eighth session, in 1956<sup>4</sup> and again at its fourteenth session, in 1962,<sup>5</sup> but its thinking did not show through in the draft,<sup>6</sup> something that some States, including Japan,<sup>7</sup> had found regrettable. The 1969 Vienna Convention and, a fortiori, those of 1978 and 1986 had done nothing but adapt the rules for reservations to their own subjects and remained silent on the matter. There were both advantages and disadvantages in that silence. The first disadvantage was that the Vienna Conventions provided neither guidance nor indications regarding the definition of interpretative declarations. But that disadvantage was also in some ways an advantage, since there was no orthodoxy on the subject as there was for reservations. The Commission was not shackled by a text adopted nearly 30 years ago, and it could innovate in accordance with the convictions of its members and the needs of contemporary international society.

31. The second general consideration related to the relevant practice. Paragraphs 231 to 234 of the third report showed that it was plentiful indeed and that States frequently made statements in relation to a treaty to which

they were becoming a party that were specifically formulated in such a way as not to be reservations. The history of interpretative declarations went back as far as did that of reservations, both dating from the Final Act of the Congress at Vienna of 1815.<sup>8</sup> The two had also been in attendance at the first use of the multilateral convention and had grown up along with that technique. In numerical terms, States undoubtedly made interpretative declarations a bit less frequently than reservations, but as the table in paragraph 234 of the report showed, the figures were basically comparable.

32. Thirdly, two factors made it more difficult to define interpretative declarations and to determine what distinguished them from reservations. The first factor of complexity was that of terminological uncertainties. The question was whether the binary division, into "reservations" and "interpretative declarations" of unilateral declarations that had an impact on the treaty concerning which they were made, entailed an excessively Cartesian rationalism. While the binary approach was used in several languages, others had a more nuanced approach, employing more varied terminology. In the end he had resolved to stick to the distinction between reservations and interpretative declarations. English speakers used the terms "statement", "understanding", "proviso", "declaration", "interpretation" and "explanation", but they did not all define those terms in the same way, and they often admitted that any distinctions in the use of the terms at the domestic level did not spill over into international law. Of the 32 States and 18 international organizations that had replied to his questionnaire on the topic,<sup>9</sup> none had objected to the division of unilateral declarations concerning treaties into two categories only. Nevertheless, some doubts remained about terminology. States had been known not to give any name at all to their declarations or else to use a range of tortuous and ambiguous circumlocutions of which he gave several examples in paragraphs 255 to 259 of his third report.

33. The second major factor of complexity in distinguishing between reservations and interpretative declarations derived from what could be called the "foreign policy" or legal strategy of States. Vague or ambiguous expressions were sometimes used inadvertently, of course, but sometimes they were used deliberately. As Denmark had pointed out in its response to the questionnaire, States sometimes baptized reservations "interpretative declarations" either to sidestep a prohibition against formulating reservations or to avoid the bad press that reserving States received in certain quarters. Such "adroitness" was, of course, rightly condemned, since a reservation remained a reservation, "however phrased or named". But the practice certainly did not facilitate the analysis of reservations.

34. The fourth important consideration was that all the existing definitions of interpretative declarations began with definitions of reservations, whether those advanced in the doctrine or those proposed in the *travaux préparatoires* of the 1969 Vienna Convention. In those defini-

<sup>4</sup> See *Yearbook . . . 1956*, vol. II, p. 110, document A/CN.4/101, article 13 (I).

<sup>5</sup> See *Yearbook . . . 1962*, vol. II, pp. 31-32, document A/CN.4/144, article 1 (I).

<sup>6</sup> *Ibid.*, p. 161, article 1 (f).

<sup>7</sup> See *Yearbook . . . 1965*, vol. II, pp. 46-47, document A/CN.4/177 and Add.1 and 2.

<sup>8</sup> *British and Foreign State Papers, 1814-1815*, vol. II (London, 1839), pp. 3 et seq.

<sup>9</sup> *Yearbook . . . 1996*, vol. II (Part One), document A/CN.4/477 and Add.1 and A/CN.4/478, annexes II and III.

tions, interpretative declarations were described first and foremost as not being reservations, it being indicated either that “an interpretative declaration is not a reservation because . . .” or that “an interpretative declaration differs from a reservation in that . . .”. The adoption of that approach was logical, and would be all the more so for the Commission today since, thanks to the Vienna Conventions, it had a definition of reservations that it had decided to leave intact. It was also entirely acceptable to start from what one knew in order better to define what one did not know. And it was that empirical approach, notwithstanding the criticisms to which it had been subjected by Horn,<sup>10</sup> that he had used to arrive at the definition couched in positive terms that he was proposing in draft guideline 1.2, which he read out.

35. The definition contained elements common to both reservations and interpretative declarations: both were unilateral declarations by States or international organizations, a formal similarity that did not make the distinction any easier, especially as both declarations were qualified by the words “however phrased or named”. Obviously, it would be absurd to say that a reservation was a reservation “however phrased or named” when in all other respects it met the criteria for reservations, but not to do so for interpretative declarations. If a reservation could be called a “declaration” by its author—an inevitable consequence of the definition in the Vienna Conventions—then by the same token, all unilateral declarations that called themselves “declarations” or “interpretative declarations” were not necessarily interpretative declarations, and some unilateral declarations termed “reservations” could in fact be simply interpretative declarations.

36. Since identical causes produced identical effects, those common points of reservations and interpretative declarations called for identical explanations, and that was why he was proposing draft guideline 1.2.1, which was the counterpart for interpretative declarations of draft guideline 1.1.1 for reservations and which provided for the possibility of joint formulation of interpretative declarations. While he had not been able to find any examples of reservations formulated jointly, the practice of joint formulation of interpretative declarations seemed to be well established, as shown by the examples in paragraph 268 of his third report.

37. The rejection of nominalism in the definitions of both reservations and interpretative declarations seemed sufficiently “immoral”, however, for one to ask whether States should not be taken at their word: when a State termed its declaration a “reservation”, it should be considered as such, and when it called it an “interpretative declaration”, that, too, should be accepted. Such had been the position of Japan in 1964,<sup>11</sup> and that was also what Mr. Lukashuk had suggested (2550th meeting). He welcomed the desire to confer morality under the law but did not think it was possible to go that far, for basically two reasons that he explained in paragraphs 277 and the following of his third report. First, that position was incompatible with the Vienna definition, and secondly, it was so far removed from practice that if the Commission was to

adopt it, it would be neither codifying nor progressively developing the law, but purely and simply legislating, and that was not its role.

38. On the other hand, the Commission could make a few small steps along that road, and that was what he proposed in draft guidelines 1.2.2 and 1.2.3. Relying chiefly on the jurisprudence of the Human Rights Committee, the Commission on Human Rights and the European Court of Human Rights and on what was suggested in some of the doctrine, he proposed to acknowledge that while the title of an interpretative declaration was not proof of its legal nature, it nevertheless established a presumption, although it was not irrefragable, especially when the declarant termed some of its declarations concerning a treaty “reservations” and others “interpretative declarations”. Such was essentially the purpose of draft guideline 1.2.2.

39. When a reservation was prohibited by a treaty, there appeared to be grounds for a presumption, again, not irrefragable, that the author of an interpretative declaration had intended to act in good faith and in conformity with the law, and that the declaration was therefore an interpretative declaration and not a prohibited reservation. Such was the purpose of draft guideline 1.2.3.

40. On the other hand, interpretative declarations differed from reservations on two other points: in the temporal element, the moment when the declaration could be made, and in the teleological factor, the objective pursued by the author of the declaration. As to the teleological factor or objective, which was at the heart of the distinction, whereas a reservation purported to exclude or to modify the legal effect of provisions of a treaty in their application to its author, the same was not true of an interpretative declaration, which had the object, to state the obvious, of interpreting the treaty or certain provisions therein, in other words to clarify the meaning and scope thereof, as had been frequently stated by PCIJ and ICJ. The definition of interpretation given by ICJ, though somewhat perfunctory, would seem to be sufficient for the work on reservations to treaties. If one acknowledged that to interpret meant to clarify the meaning and scope of a text, then that was clearly not the same as to modify and exclude: interpretation left intact the provisions to which it was directed and their legal effect. Although that seemed fairly obvious, it was absolutely essential and he would like to know what members of the Commission thought: was it sufficiently clear from the definition he was proposing in draft guideline 1.2, or would it be preferable to repeat it in the more specific draft guidelines, such as 1.3.0 and 1.3.0 *bis*? Draft guideline 1.3.0 indicated that the classification of a unilateral declaration as a reservation depended solely on the determination as to whether it purported to exclude or to modify the legal effect of the provisions of the treaty, and draft guideline 1.3.0 *bis*, that the classification of a unilateral declaration as an interpretative declaration depended solely on the determination as to whether it purported to clarify the meaning or the scope that the declarant attributed to the treaty or to certain of its provisions. He would bow to the Commission’s wisdom on that point, and for his part, saw advantages and disadvantages both in specifying those criteria and in not doing so, but he believed the attention

<sup>10</sup> See 2545th meeting, footnote 4.

<sup>11</sup> See *Yearbook . . . 1966*, vol. II, pp. 301-305, document A/6309/Rev.1, annex.

of States should be drawn to the matter in the Guide to Practice.

41. Equally important was to decide on the method that was to be used for putting the distinction into action: chapter I, section C.3, was devoted to that question. Paragraphs 394 to 407 indicated that the method was the one envisaged in articles 31 and 32 of the 1969 Vienna Convention: quite simply, the general rule of interpretation of treaties. In other words, an interpretative declaration must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context—subject to verification of the results yielded by that method by the use of supplementary means of interpretation which included the *travaux préparatoires*. Such was the conclusion to be drawn from an analysis of the practice of States and above all of the jurisprudence of the Inter-American Court of Human Rights, the Commission on Human Rights and the European Court of Human Rights, as well as of the Arbitral Tribunal in the *English Channel* case;<sup>12</sup> and it was that conclusion that the Special Rapporteur proposed to the Commission in draft guideline 1.3.1.

42. Because of the definitions of interpretative declarations and of reservations, two categories of declarations of which he gave numerous examples in paragraphs 362 to 366 and 371 to 376 of his third report had to be left aside. They were, first, general declarations of policy that a State or an international organization could make at the moment of signing a treaty or of expressing its consent to be bound by a treaty, and whose object was the same as the treaty's but whose effect was not to modify the treaty, exclude certain provisions from it or interpret it; rather, such declarations merely purported to express the author's policy towards the object of the treaty. It was that type of declaration that was the subject of draft guideline 1.2.5, with which he was not satisfied and which he would be revising in a corrigendum to be distributed to members of the Commission.

43. The second category was that of informative declarations, in which a State or an international organization indicated the manner in which it intended to discharge its obligations at the internal level, without any implications for the rights and obligations of other States. That was the subject of draft guideline 1.2.6. In neither case was such a declaration a reservation or an interpretative declaration: he thought it was useful to make that clear.

44. One remaining element of the definition of reservations whose inclusion in the definition of interpretative declarations had to be approved or rejected was the temporal element, in other words the moment at which the unilateral declaration was made. As he pointed out in his third report, the response must be categorically no, that the temporal element must not be included in the general definition of interpretative declarations. On the other hand, he was in favour of introducing it in the definition of a specific category of interpretative declarations, namely conditional interpretative declarations, for the following reasons.

45. As he had already indicated, he did not think that the Commission's earlier membership had been right at the

time in deciding to include the temporal element in the definition of reservations. That element concerned the legal regime and, in his opinion, could simply have been dealt with in article 23 of the 1969 and 1986 Vienna Conventions. What was done was done, and one had to accept it, but that was no reason to perpetuate the same mistake in the definition of interpretative declarations. There was a purely pragmatic reason why special rapporteurs on the law of treaties had included the temporal element in the definition of reservations: they had felt that reservations were a threat to the stability of legal relations and the unity of treaties. But the same considerations did not carry the same weight in relation to interpretative declarations. Practice agreed with theory in that regard: reservations were linked to the conclusion of treaties, as demonstrated by the inclusion of the rules on reservations in Part II of the 1969 Vienna Convention, whereas interpretative declarations were linked to the application of treaties, as shown by the inclusion of rules on such declarations in Part III of the Convention. On that point he was entirely in agreement with his predecessor, the former Special Rapporteur, Sir Humphrey Waldock, who had stated of interpretative declarations that they could be made at any moment during the negotiations, at the time of signature, ratification, etc., or later, in subsequent practice.<sup>13</sup> In practice, it was precisely to escape the temporal limitations on the possibility of formulating reservations established by article 2, paragraph 1 (*d*) and article 23 of the 1969 Vienna Convention that States made interpretative declarations, thereby demonstrating their conviction that such declarations were possible at times when reservations were not. The primary conclusion was therefore that the temporal element must not be included in the definition of interpretative declarations, for it had to be possible to formulate them at any time after the birth and during the life of a treaty.

46. But what was true for interpretative declarations in general was not true for a specific type of interpretative declaration whose existence had been admirably described by McRae.<sup>14</sup> In that very well-documented study, the author drew a distinction between mere interpretative declarations and qualified interpretative declarations. An interpretative declaration was conditional in that the State or international organization that formulated it made its consent to be bound by the treaty conditional upon the interpretation it was putting forward, just as the author of a reservation made its commitment to the treaty conditional upon the reservation. That corresponded to what was indisputably a practice, of which paragraph 310 of the third report gave a striking, though not very commendable, example: the interpretative declaration made by France when signing Additional Protocol II of the Treaty for the Prohibition of Nuclear Weapons in Latin America,<sup>15</sup> a declaration that was reproduced in the report, and which he read out.

47. That declaration was clear enough, but that was not always the case, and it was by using the general rule of interpretation set out in article 31 of the 1969 Vienna

<sup>13</sup> See *Yearbook . . . 1965* (footnote 7 above), p. 49.

<sup>14</sup> D. M. McRae, "The legal effect of interpretative declarations", *The British Year Book of International Law*, 1978, vol. 49, p. 155.

<sup>15</sup> Ratification of Additional Protocol II (United Nations, *Treaty Series*, vol. 936, p. 419).

<sup>12</sup> See 2541st meeting, footnote 14.

Convention, supplemented if necessary by the supplementary means of interpretation outlined in article 32 of the Convention, that one could determine whether a unilateral declaration was a simple or conditional interpretative declaration: in other words, whether it met the criterion of conditional interpretative declarations that he reproduced for safety's sake in draft guideline 1.3.0 *ter*.

48. If it did, then one was obviously dealing with an interpretative declaration that was much closer to a reservation than were simple interpretative declarations, since reservations, too, were "conditional". The time had not yet come to look into the legal regime for conditional interpretative declarations, but the reluctance to include a temporal element in the definition of interpretative declarations in general appeared not to be valid for conditional interpretative declarations. Since the declarant made its commitment conditional upon its declaration, such a declaration could obviously be made only before or at the moment when the commitment was made. And while it did not seem necessary to include the temporal element in the general definition of interpretative declarations, it had to be included in the definition of conditional interpretative declarations in the same form as for reservations. Those were the considerations that had resulted in draft guideline 1.2.4 as set out in the third report.

49. He thought to have reviewed as briefly as possible, considering the complexity of the subject, the entire set of draft guidelines to be found in chapter I, section C, of his third report, with the exception of draft guideline 1.4. It was derived from a promise he had made after a discussion in the first part of the current session and in response to points raised by Mr. Economides and Mr. Hafner, among others. To define was not to regulate, and all the definitions in the first part of the Guide to Practice were given without prejudice to the relevant legal regimes, and in particular to the permissibility of the reservation or interpretative declaration. A reservation could indeed be permissible or impermissible, but it remained a reservation as long as it corresponded to the established definition, and an interpretative declaration could be permissible or impermissible, but it still remained an interpretative declaration. One could even say that it was because a unilateral declaration was either a reservation or an interpretative declaration that one could determine whether or not it was permissible. It was in the light of those observations that draft guideline 1.4 had been elaborated and was at the current time submitted to the Commission.

*The meeting rose at 1.05 p.m.*

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## 2552nd MEETING

*Thursday, 30 July 1998, at 10.15 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Later:* Mr. Igor Ivanovich LUKASHUK

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-

Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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### Reservations to treaties (*continued*) (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,<sup>1</sup> A/CN.4/L.563 and Corr.1)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

GUIDE TO PRACTICE (*concluded*)

DRAFT GUIDELINE 1.4

1. Mr. PELLET (Special Rapporteur) said that he had given a full explanation (2551st meeting) of the object and purpose of draft guideline 1.4 on the scope of definitions. The draft guideline, which he would call a saving clause, was in fact a general pronouncement to make it perfectly clear that the Guide to Practice did not seek to go beyond the definition of concepts.

2. The text before the Commission established the principle that a unilateral declaration must be classified before the permissibility or impermissibility of its content was determined and the relevant regime was implemented, situation permitting. When applied to reservations, that principle made it possible to conclude that impermissible reservations existed.

3. He proposed that draft guideline 1.4 be referred to the Drafting Committee.

4. Mr. LUKASHUK said it was unfortunate that the Guide to Practice did not state that an interpretative declaration could under no circumstances obstruct the implementation of a treaty, either at the domestic level or internationally. Even though no regime was yet attributed to a jointly formulated interpretative declaration, such a declaration imposed upon the parties at least the principle of good faith, in other words that the declarant State must hold to the interpretation that it had given.

5. As for interpretative declarations in general, he wondered what should be done with that international legal device. Such declarations played a very important role, since a treaty established functional inter-State relations that evolved in accordance with the will of States. In that sense, a treaty was always being interpreted, as was well demonstrated by the Special Rapporteur in his third report on reservations to treaties (A/CN.4/491 and Add.1-6). The Vienna Conventions provided that in the interpretation of a treaty, any understandings reached between the parties regarding the meaning to be given to the provi-

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

sions of the treaty and the practice of States in the implementation of the treaty, including interpretative declarations, must be taken into account. The regime and legal status of interpretative declarations had obviously not been established, but it was senseless to carry out an in-depth study of the regime of reservations and say absolutely nothing about the regime of interpretative declarations.

6. Mr. BENNOUNA said the Special Rapporteur had been quite right to make the classification of a reservation or a unilateral declaration a precondition for the consideration of its permissibility.

7. The Commission had started with a draft Guide to Practice in respect of reservations and was currently faced with the problem of interpretative declarations which, while differing from reservations, encroached on some of their terrain. They were two different but overlapping phenomena. If the Commission went beyond the topic of reservations to take up the subject of interpretative declarations, it would be entering an immense universe, as demonstrated by the part of the third report under consideration. He thought it would be better not to head off in that direction. Perhaps the title of the Guide to Practice should be changed to read: "Practice in respect of reservations and interpretative declarations".

8. Draft guideline 1.4 made the concept of "permissibility" apply equally to both reservations and interpretative declarations, but that seemed inappropriate. While one could certainly speak of the permissibility of a reservation, what term should be used in respect of interpretative declarations? The Drafting Committee would undoubtedly find a solution.

9. Mr. PAMBOU-TCHIVOUNDA said that the Special Rapporteur had been right to conclude that the silence of international law on the subject of interpretative declarations was one more reason for the Commission to concern itself with them. Both reservations and interpretative declarations emanated from unilateral acts of States and they had the same object: they were thus very similar. But reservations were governed by positive law, while interpretative declarations were governed only by practice, which could be considered to have been institutionalized, even if not always in written form.

10. The Special Rapporteur was proposing what he called a "saving clause" which established the principle that classification as an interpretative declaration determined whether a declaration was permissible or not. The importance attached by the Special Rapporteur to the idea of permissibility, which was only one aspect of the problem of unilateral declarations, could be questioned: he could equally well have referred to the applicable regime. That was why he himself would propose that the middle part of the draft guideline be amended by the replacement of the phrase "is without prejudice to its permissibility under the rules" by the words "does not affect the permissibility or the regime".

11. In conclusion, he wondered if the dichotomy between reservations and interpretative declarations and the problem of where to put the draft guideline within the Guide to Practice were not two good reasons for the Com-

mission to assign itself another topic: interpretative declarations on treaties.

12. Mr. ECONOMIDES said he could find nothing wrong with draft guideline 1.4, which raised the problem mentioned already by Mr. Bennouna and Mr. Pambou-Tchivounda, that of the "permissibility" of interpretative declarations under the rules of international law. While one could say that a reservation was impermissible, the same was not true for interpretative declarations, the "rules" of which had never been codified. One usually spoke of a declaration as being "operant" or "not operant", rather than "permissible" or "impermissible"—in other words, productive of legal effect or not. That terminological difficulty was not a reason to delete draft guideline 1.4, which had been presented as a saving clause, but it could be couched in more straightforward terms, such as: "The implementation of a reservation or an interpretative declaration as defined in part . . . of the Guide to Practice depends upon the permissibility of the reservation or the operant nature of the declaration under the international law applicable to reservations and interpretative declarations."

13. He endorsed the referral of draft guideline 1.4 to the Drafting Committee.

14. Mr. SIMMA and Mr. HAFNER said that they, too, would like to see draft guideline 1.4 referred to the Drafting Committee.

15. Mr. PELLET (Special Rapporteur) said that while it was true that the regime of interpretative declarations had never been codified, that did not mean that there were no rules applicable to them. Consequently, in contrast to what Mr. Bennouna and Mr. Economides maintained, an interpretative declaration could be considered impermissible. That concept certainly applied in respect of conditional interpretative declarations, which resembled reservations very closely, and which could be considered to be impermissible.

16. Was it really necessary to enter into the domain of interpretative declarations? He had thought to avoid that problematic legal device, but as the discussion went on, it was becoming necessary to envisage it at every turning point of the thinking on reservations.

17. Mr. BENNOUNA raised a methodological question that seemed to need clarification. As the Special Rapporteur had pointed out, conditional interpretative declarations were very similar to reservations, to the point that it was sometimes difficult to tell them apart. The main difference was that interpretative declarations were part of the world of treaties, which the declarant read in a certain way.

18. The Special Rapporteur was right to say that the problem of interpretative declarations had to be brought up at successive points in the consideration of reservations, but that such declarations were already defined under international law.

19. Mr. ROSENSTOCK said that those issues did not have to be resolved before draft guideline 1.4 was referred to the Drafting Committee. To allay the concerns of members who worried about speaking of the "permissibility"

of an interpretative declaration, perhaps the words “or effect” could be inserted after “its permissibility”.

20. Mr. KATEKA pointed out that the Commission was entering into a discussion on specific features of the interpretative declarations to which the Special Rapporteur had devoted chapter I, section C, of his third report and said he would like to have the opportunity to put forward general remarks on that section as a whole.

21. Mr. GOCO said he was surprised that the Commission had already taken up draft guideline 1.4 when there were still a great many important issues to resolve. He, for example, had questions to raise about draft guideline 1.2.3 (Formulation of an interpretative declaration when a reservation was prohibited).

22. Mr. SIMMA (Chairman of the Drafting Committee) said he was sympathetic to the concerns expressed by Mr. Kateka and that it would be useful to outline the course ahead. The Drafting Committee would soon put the final touches on the draft guidelines concerning reservations and would submit the results of its work to the Commission in plenary. Since draft guideline 1.4 had raised a number of questions both in the Commission and in the Drafting Committee, however, it might be useful to decide what to do with it at the current time and to refer it to the Drafting Committee simultaneously with the draft guidelines on reservations. Clearly, it was out of the question to send the draft guidelines on interpretative declarations to the Drafting Committee at the current stage.

23. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.4 to the Drafting Committee.

*It was so agreed.*

#### DRAFT GUIDELINES 1.2 TO 1.3.1

24. Mr. KATEKA said that the topic of reservations to treaties, which was extremely complex in itself, was further complicated by the issues raised by interpretative declarations. The Special Rapporteur had pointed out in paragraph 254 of his third report that it must be admitted that the terminology in that area was marked by a high level of confusion. It was therefore important to draw a distinction between reservations and interpretative declarations.

25. In paragraphs 320 and 321 of his third report, the Special Rapporteur mentioned the specific problem of conditional interpretative declarations, stressing the significant distinction between application and interpretation. He himself was of the view that conditional interpretative declarations were true reservations and had to be treated as such. True, the Vienna regime was silent on the subject of interpretative declarations, but perhaps a formula similar to that used for reservations could be applied: when a treaty said nothing about reservations, States were authorized to formulate them, unless they were incompatible with the object and purpose of the treaty. It would be useful to incorporate that principle in the Guide to Practice. The same held true for the fact that a reservation had to be formulated in writing: that principle should be applied to interpretative declarations as well and included in the Guide.

26. Under cover of interpretative declarations, States had sometimes been known to try to formulate true reservations. Draft guideline 1.2.2 (para. 291) settled the matter by underlining the fact that it was not the phrasing or name of a unilateral declaration that determined its legal nature but the legal effect it sought to produce. The Special Rapporteur ended his analysis on a fairly pessimistic note, saying that regardless of how carefully reservations were defined and distinguished from interpretative declarations some uncertainty would always persist. It was to be hoped that he would continue to make his very useful contributions to the cause of eradicating uncertainty.

27. He was likewise concerned by interpretative declarations made in respect of bilateral treaties. He had expressed the hope (2551st meeting) that the Special Rapporteur would raise the matter, his idea being that such declarations should be prohibited, or at least discouraged. That was why he was dissatisfied with draft guideline 1.2.8 (Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party).

28. Mr. PELLET (Special Rapporteur) announced that the part of his third report concerning the problem of unilateral declarations made in respect of bilateral treaties would soon be issued. His colleagues would certainly wish to become familiar with it before making statements on the problem.

29. Mr. HAFNER said he wished to make a few general remarks on interpretative declarations and on chapter I, section C, that dealt with them. As the Special Rapporteur had emphasized, it was sometimes very difficult to distinguish between interpretative declarations and reservations, as many specific examples clearly showed. The Austrian Government had proposed that Parliament make an interpretative declaration concerning Protocol I to the Geneva Conventions of 12 August 1949, but Parliament had transformed that interpretative declaration into a reservation without changing the text in any way.<sup>2</sup>

30. The Vienna regime was not totally silent on the subject of interpretative declarations, in contrast to what had been said by some speakers. The general rules of interpretation in section 3 of the 1969 Vienna Convention could be considered to apply.

31. Though it was true that it was unnecessary to examine interpretative declarations in detail, the fact remained that the criteria for distinguishing them from reservations had to be clearly defined.

32. Mr. BROWNLIE said that being vigilant regarding the various types of behaviour engaged in by States did not mean it was indispensable to undertake the codification of interpretative declarations, which had no normative content. It might be sufficient to make a few remarks in the commentary, while avoiding any mention of the phenomenon in the Guide to Practice.

33. The CHAIRMAN invited the Special Rapporteur to introduce the draft guidelines relating to interpretative declarations.

<sup>2</sup> United Nations, *Treaty Series*, vol. 1289, pp. 303-304.

34. Mr. PELLET (Special Rapporteur) said that draft guideline 1.2, which he had introduced (2551st meeting), had seemed necessary because the 1969 Vienna Convention did not define interpretative declarations. Draft guideline 1.2.2, to which Mr. Kateka had directed his comments, indicated that it was the objective pursued that made the difference between reservations and interpretative declarations, in accordance with the definition of reservations given in the Convention. Mr. Kateka seemed to equate impermissible reservations with conditional interpretative declarations. If, however, one took the example of the United Nations Convention on the Law of the Sea, which explicitly prohibited reservations but permitted interpretative declarations, the question arose as to whether a conditional interpretative declaration made by a State concerning that Convention would be permissible. While the regime of conditional interpretative declarations could be aligned with that of reservations in a great many instances, the two concepts could not be completely fused.

35. He agreed with Mr. Hafner that articles 31 and 32 of the 1969 Vienna Convention provided indications of the legal regime for interpretative declarations, even though the expression was not used therein. But the Convention did not give a definition, and the Commission was doing useful work in proposing one. As for the declarations attached to treaties of accession in the area of community law, for example, it was difficult to imagine them as being unilateral declarations under international law insofar as they were the subject of lengthy negotiations and were accepted with the conclusion of the treaty of accession. Perhaps they should be considered a type of interpretative declaration.

36. Mr. Brownlie had questioned the need for codification of interpretative declarations, which had no normative content. He himself believed that such declarations did not have to have normative content in order for the Commission to try to define them. The provisions of a treaty that defined a term were not strictly speaking of a normative character either, but they affected the subsequent application of the relevant mechanism. Without getting into the codification of interpretative declarations, the Commission should at least propose a definition thereof and answer the question of whether or not the legal regime for reservations could be carried over to such declarations.

37. Mr. SIMMA said that Mr. Brownlie had drawn attention to a real problem: by trying to push too far with the codification of interpretative declarations, the Commission might lose sight of the objective of the draft guidelines it was elaborating—to facilitate a distinction between reservations and interpretative declarations. All the Special Rapporteur's proposals except draft guideline 1.2.1 (Joint formulation of interpretative declarations) met that criterion.

38. The relationship between interpretative declarations and the provisions in the 1969 Vienna Convention on the interpretation of treaties could be envisaged from two different viewpoints. Article 31, paragraph 2 (b), stated that a treaty could be interpreted with the assistance of, among other things, any "instrument which was made by one or more parties in connexion with the conclusion of the

treaty and accepted by the other parties as an instrument related to the treaty". But another provision (art. 31, para. 3 (b)) stated that any "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" could be used to define interpretative declarations formulated at a later date. The Special Rapporteur was referring to that article when, in draft guideline 1.3.1, he proposed to apply the general rule of interpretation of treaties set out in article 31 of the 1969 Vienna Convention. The Commission must nevertheless be alert to the fact that the general rules laid down in the Convention had the purpose of clarifying the meaning of an agreement entered into voluntarily by two or more parties, whereas the interpretative declarations covered in the draft guidelines involved unilateral declarations. The Commission had to determine whether rules designed to regulate the expression of consent at the bilateral or multilateral level could be applied to a unilateral interpretative declaration.

*Mr. Lukashuk took the Chair.*

39. Mr. ILLUECA pointed out that the definition given in draft guideline 1.2 applied to both bilateral and multilateral treaties. Although the Special Rapporteur wanted the Commission to concern itself primarily with multilateral treaties, some bilateral treaties developed into multilateral treaties or had effects on third States.

40. The criteria proposed by the Special Rapporteur for distinguishing between reservations and interpretative declarations were not the same for conditional interpretative declarations. Aside from the problem of terminology, the definition performed a unique function in determining the permissibility of a unilateral declaration. The Special Rapporteur was right to say that it had to be determined whether an interpretative declaration was involved before deciding whether it was permissible or not.

41. He drew attention to article 46 of the 1969 Vienna Convention on the provisions of internal law regarding competence to conclude treaties and recounted an incident connected with the Panama Canal Treaty.<sup>3</sup> A group of senators from the United States of America had formulated an objection because the reservations, amendments and conditions appended to the Treaty had not been submitted to a referendum in Panama, in contrast to what was provided by the Panamanian Constitution, although the Treaty itself had been approved by a referendum organized under United Nations auspices. Panama had maintained that the reservations, amendments and conditions concerned had been accepted by the Panamanian Government at the time of ratification of the Treaty and did not need to be submitted to a new referendum. It had likewise argued that the reservations, amendments and conditions were part of the interpretation of the Treaty. The United States Government had conceded that Panama's position had a good legal foundation and that it was not in violation of Panama's internal law within the meaning of article 46 of the 1969 Vienna Convention.

42. Referring again to the Panama Canal Treaty, he said it was a good example of a bilateral treaty with multilateral effects, which in that instance derived from the

<sup>3</sup> Signed at Washington on 7 September 1977 (United Nations, *Treaty Series*, vol. 1280, p. 3).

Canal's regime of permanent neutrality. The rights and interests of third States were taken into consideration under a regime that was part of general international law but was likewise governed by a bilateral treaty and a protocol concerning the permanent neutrality of the Canal to which several States had adhered.

43. In conclusion, he said that the Special Rapporteur's work was extremely interesting in that he had taken into account the situation of third States and the problem of compatibility with general international law.

44. Mr. ADDO, referring to the comments by Mr. Kateka and the Special Rapporteur's response on the subject of conditional interpretative declarations, requested clarification on one particular point. If, when ratifying a treaty, a State made an interpretative declaration indicating that it would become a party to the treaty only if its interpretation was accepted by other parties, and if another State rejected that interpretation, could that rejection pose an obstacle to the treaty's entry into force between the State that had made the interpretative declaration and the one that had objected?

45. Mr. AL-BAHARNA said that the definition set out in draft guideline 1.2 was entirely appropriate. He proposed that it be used to elaborate a provision explicitly stating that States had the right to make interpretative declarations as long as they met two criteria. The first, set out in paragraph 231 of the third report, was that such declarations must not seek to modify or exclude the legal effect of certain provisions of the treaty, and the second, drawn from article 19, subparagraph (c), of the 1969 Vienna Convention and adapted to interpretative declarations, was that they must not be incompatible with the object and purpose of the treaty. Finally, since the interpretative declarations thus defined could not be reservations, the relevant draft guideline should be placed at the end of the Guide to Practice.

46. Mr. HERDOCIA SACASA said that the definition proposed in draft guideline 1.2 corresponded well to the need to dispel the misunderstandings, deliberately engendered or not, surrounding the concept of the interpretative declaration and what distinguished it from reservations. The tools for the analysis of reservations were furnished in articles 1 and 19 to 23 of the 1969 Vienna Convention; other criteria had to be elaborated for interpretative declarations. Under the proposed definition, such declarations had to purport to clarify the meaning or scope of the treaty, and it was the intention and content of the declaration, and not its name or form, that were decisive. But a limitation mentioned by the Special Rapporteur in paragraph 231 of his third report should perhaps be introduced: that interpretative declarations sought neither to modify nor to exclude the legal effect of certain provisions of the treaty.

47. Mr. ECONOMIDES said he had four comments to make about the definition of interpretative declarations. First, a crucial term was absent from the definition: the verb "to interpret". Secondly, a reservation modified or excluded the legal effect only of certain provisions of a treaty, but under the proposed definition, an interpretative declaration would have the object of clarifying the meaning or scope of the entire treaty. He was not convinced that that distinction was borne out in practice. Thirdly, the phrase "attributed by the declarant to the treaty" intro-

duced a subjective element, that risks weakening the rules concerning the interpretation of treaties. Lastly, limits must be placed on interpretative powers by indicating that an interpretation must be in accordance with the letter and spirit of the provision concerned, even though that element was perhaps more in line with the legal regime than with the definition of interpretative declarations. Accordingly, he proposed that the final part of draft guideline 1.2 be amended to read: "purports to interpret certain provisions of the treaty by clarifying their meaning or scope".

48. Mr. BENNOUNA said that he, too, questioned the advisability of using the phrase "attributed by the declarant to the treaty". The Drafting Committee should perhaps reformulate the definition in the light of the primary objective of all exercises of interpretation—to give the exact meaning of what was being interpreted. Interpretation derived, in addition, from a concern to facilitate compatibility between international law and internal law. The United Nations Convention on the Law of the Sea, to which the Special Rapporteur had referred, contained many provisions that necessitated the revision of domestic legislation and consequently provided for the possibility of formulating interpretative declarations concerning its implementation. Perhaps draft guideline 1.2 should contain similar language to the effect that interpretative declarations purported to clarify not only the meaning or scope of the treaty but also the conditions for its implementation.

49. Mr. GALICKI said that the definition proposed in draft guideline 1.2 aptly highlighted both the major differences between reservations and interpretative declarations and the purpose of interpretative declarations. Since the text was in some sense a basic provision from which several others were derived, however, it might be useful to include language in the negative mode, stating what interpretative declarations were not.

50. Mr. AL-BAHARNA pointed out that the verb "to interpret" could be interpreted in various ways itself, so that the use of the term might deprive the definition of some of its operational relevance. The comments made on the word "attributed" were very pertinent: it would indeed be more prudent to say that an interpretative declaration purported to clarify the position of the declarant State with regard to the treaty in its entirety or to certain of its provisions.

51. Mr. PELLET (Special Rapporteur), responding to the various comments made during the meeting, said that the fact that many aspects of the regime of reservations applied to conditional interpretative declarations was not enough, in his opinion, for conditional interpretative declarations to be described as reservations. As for the idea that a conditional interpretative declaration might contain a false interpretation, it raised the legal and philosophical question of whether an interpretation could be false. Many speakers had opined that the definition should include a negative formulation. He had preferred to make it symmetrical to the definition in draft guideline 1.1, the opposite approach being used in draft guidelines 1.3.0, 1.3.0 *bis* and 1.3.0 *ter*. He was not, however, opposed to having the definition indicate that an interpretative declaration did not purport to modify or exclude the legal effect of a treaty or certain of its provisions.

52. Simplifications that complicated matters should, however, be avoided: the definition of interpretative declarations was not the place to describe the legal regime applicable to them, and it seemed premature to transpose to interpretative declarations article 19 of the 1969 Vienna Convention, on the formulation of reservations.

53. Similarly, the warnings given about the verb “attributed” and the concerns expressed about limiting the power of interpretation went back to the question of the legal regime for interpretative declarations. On the other hand, the remark that an interpretative declaration purported to clarify, not the meaning or scope of a treaty, but the position of the declarant State in respect of the treaty, was relevant at the stage of definition. To introduce the term “interpret” into the definition would make it somewhat repetitive.

54. On the other hand, to indicate that an interpretative declaration could apply to the treaty in its entirety was well in line with practice, and it would not be wise to rule out the solution of transverse interpretative declarations by retaining the limitations wrongly imposed by the 1969 Vienna Convention.

55. Lastly, to have the definition say that an interpretative declaration also purported to clarify the conditions for implementing a treaty would be to introduce into the definition the problem of relations between international law and internal law, a problem that actually related to draft guideline 1.2.6.

56. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft guideline 1.2 to the Drafting Committee.

*It was so agreed.*

*The meeting rose at 12.05 p.m.*

## 2553rd MEETING

*Friday, 31 July 1998, at 10.10 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Yamada.

### State responsibility<sup>1</sup> (*continued*)\* (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>2</sup> A/CN.4/490 and Add.1-7,<sup>3</sup> A/CN.4/L.565, A/CN.4/L.569)

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. CRAWFORD (Special Rapporteur), introducing chapter II, section C, of his first report on State responsibility (A/CN.4/490 and Add.1-7) concerning part one, chapter II, of the draft articles (The “act of the State” under international law), said that draft articles 5 to 15, which made up chapter II, related to the first of the two conditions for State responsibility set in article 3 (Elements of an internationally wrongful act of a State), that is to say, that the conduct in question must be attributable to the State, the other condition being that it must constitute a violation of an international obligation of the State. Since the adoption of the articles on first reading in the 1970s the jurisprudence on the topic had grown considerably, as a result of the work both of ICJ and of various other arbitral or human rights courts. Some of the draft articles were cited in that jurisprudence and must therefore be handled with care, but for others the room for manoeuvre was greater. The comments of Governments on the chapter had certainly come from a small number of States but were no less substantial for that. Generally speaking, the main concern of Governments was to ensure that attribution could be made on a sufficiently broad basis to prevent a State from escaping its responsibility by means of formal definitions of its organs or agents and to prevent the recent tendency for privatization of the public sector from leading to any reduction of the scope of the rules of attribution. The Commission had to take the comments of Governments into account as it continued its work on the topic. However, no Government was proposing any change to the basic structure of the positive-attribution articles; thus his own few proposed changes were essentially for clarification. There were two distinct groups of articles in that basic structure: articles 5 to 8 and 10, which dealt with attribution in general, and articles 9 and 11 to 15, which dealt with specific problems; he had added a draft article 15 *bis* on a special case which had not been addressed in the articles.

ARTICLES 5 TO 8 AND 10

2. The “general” articles on attribution gave rise to two problems of terminology. The first was that the Commission had preferred the term “attribution” to the term “imputability”<sup>4</sup> used at the outset by the former Special Rapporteur, Mr. Roberto Ago.<sup>5</sup> ICJ had continued to use “imputability” in later cases. The Commission’s choice

\* Resumed from the 2547th meeting.

<sup>1</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>2</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>3</sup> *Ibid.*

<sup>4</sup> See *Yearbook . . . 1971*, vol. II (Part One), p. 214, document A/CN.4/246 and Add.1-3, para. 50.

<sup>5</sup> See *Yearbook . . . 1970*, vol. II, pp. 187 et seq., document A/CN.4/233.

was nevertheless right, since “imputability” introduced an element of fiction where none existed. Moreover, in the title of chapter II of the draft articles the term “act of the State” appeared in inverted commas in order to prevent any confusion with the similar language found in various national legal systems. He proposed eliminating both the inverted commas and the risk of confusion by adopting the more informative title “Attribution of conduct to the State under international law”. Notwithstanding those terminological questions, the “general” articles on attribution gave effect to the fundamental principles of the notion of attribution described in paragraph 154 of the report, the main point being the distinction between attribution and violation of an obligation: even when there was a close link between the grounds of the attribution and the obligation which appeared to have been violated, the attribution of the conduct to the State did not in itself imply in any way that the conduct constituted a violation of the obligation in question. The main articles in the first group were article 5 (Attribution to the State of the conduct of its organs), article 7 (Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority), article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State), and articles 6 (Irrelevance of the position of the organ in the organization of the State) and 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity), which had an explanatory function, with respect to article 5 alone in the case of article 6 and to three articles (5, 7 and 8) in the case of article 10.

#### ARTICLES 5 AND 6

3. Article 5 dealt with the attribution to the State of the conduct of its organs; the problems to which it gave rise turned essentially on the concept of organ. For example, in the comments and observations received from Governments on State responsibility (A/CN.4/488 and Add.1-3), the French Government had proposed adding “or agent” after “any State organ”; however, apart from the fact that the concept of agent was dealt with in article 8, article 5 addressed only entities forming part of the organic structure of the State. According to article 5, an organ of the State was any entity having that status under the State’s internal law. Since internal law was not always sufficient for determining such status, it was sometimes necessary to refer to practice, conventions, and so forth. It was also rare for the meaning attached to “organ” in national legal systems to correspond exactly to the meaning which it must have for the purposes of State responsibility. In some systems the term covered only the higher levels of the State apparatus, whereas for the topic under consideration it could cover all levels. He therefore proposed, in line with many Governments, to delete the reference to internal law and to state clearly in the commentary that internal law, while particularly pertinent, did not constitute the sole criterion.

4. Several aspects of the notion of organ were explained in article 6, which pointed out first of all that the organ could belong to the constituent, legislative, executive, judicial or other power. The point was an important one, prompting some commentators to ask whether it did not introduce in article 5 a limitation on the exercise of the

powers of the public authorities found in article 7 with respect to parastatal entities, or indeed the limitations found for example in the law of State immunity in the distinction between governmental and non-governmental functions. That had not been the Commission’s intention when it had drafted article 6, and it was clear that the conduct of any organ having that status was attributable to the State and that the classification of the functions was irrelevant. The second clarification contained in article 6—“whether its functions are of an international or an internal character”—stated a self-evident fact in connection with attribution and seemed all the more superfluous in that it posited a dichotomy whose existence was not at all clear in reality. The third clarification—“whether it holds a superior or a subordinate position in the organization of the State”—described a well-established practice but its formulation might exclude organs which were intermediate, autonomous or independent. It would be preferable to say “whatever position it holds in the organization of the State”.

5. He therefore proposed to retain the substance of articles 5 and 6, to delete the reference to internal law, and to combine the two articles into the new article 5 which he suggested at the end of his first report in chapter II, section C.3.

#### ARTICLE 7

6. Paragraph 1 of article 7 introduced the notion of territorial governmental entity. However, both the comments made by Czechoslovakia in 1981<sup>6</sup> and the commentary to article 7<sup>7</sup> itself showed clearly that the structure of the State under its internal law did not affect the principle of “the unity of the State” for the purposes of international law, including the case of federal States. Accordingly, the paragraph merely restated article 5 in more confusing terms and should be deleted. Paragraph 2, on the other hand, addressed the very interesting and important problem of the exercise of public powers by entities which were not part of the structure of the State itself: airlines exercising control of immigration, private companies managing prisons, and so forth. The comments of Governments revealed no opposition to the rule of attribution stated in the paragraph, but one government had requested the Commission to define the notion of public power. The Commission could of course clarify the notion by means of examples and commentary, but it should not try to define it. Public power was not defined only in terms of content but also in terms of its treatment in internal law. Furthermore, it was not for international law to prescribe a priori what conduct should be regarded as public.

#### ARTICLE 8

7. Like article 7, article 8 had a dual structure: subparagraph (a) dealt with the normal situation in which a person or group of persons acted in fact on behalf of the State; and subparagraph (b) dealt with the more unusual

<sup>6</sup> *Yearbook* . . . 1981, vol. II (Part One), p. 72, document A/CN.4/342 and Add.1-4.

<sup>7</sup> *Yearbook* . . . 1974, vol. II (Part One), pp. 277 et seq., document A/9610/Rev.1.

situation in which a person or group of persons in fact exercised elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of that authority. Subparagraph (a) gave rise to two problems. First, it began with the formula “it is established that”, which singled article 8 out from articles 5 and 7 without any valid reason: the requirement that it must be established that the conduct was attributable to the State was set out in article 3 as a general principle and held good for all three articles. There was therefore no reason to repeat that formula for article 8 alone. The second problem was more important since it concerned the scope of the term “on behalf of”: whether it was limited to cases in which there were express instructions or whether it went further than that. In his dissenting opinion in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see page 189, footnote 1), Mr. Ago had criticized ICJ for its use of the criterion of “effective control”, which went beyond the criterion of “express instructions” (para. 198 of the first report). The concept of “control” had been used in various forms in several subsequent cases, for example by the International Tribunal for the Former Yugoslavia to determine whether the conduct of the Bosnian Serbs could be attributed to the Federal Republic of Yugoslavia (paras. 201 et seq.); of course, that was not exactly a problem of State responsibility, but the criterion used had indeed been the criterion of control. It had also been used by the Iran-United States Claims Tribunal (paras. 205-206) and by the European Court of Human Rights (paras. 207-208).

8. It thus seemed that article 8 contained an ambiguity which must be removed and that it should be stated clearly that the conduct was attributable to the State not only when it was the result of express instructions but also when it occurred in a situation in which the State exercised powers of direction and control. However, it was also necessary to prevent the expansion of the scope of the term “on behalf of” so as to extend the rule of attribution to any conduct of a corporation owned by a State and therefore under its control, for that would introduce an inconsistency between article 8 and paragraph 2 of article 7. A formulation must therefore be found which would also make it clear that the State must not exercise merely general control and that the direction and control should be related to the conduct in respect of which the claim was made. The new wording for article 8, subparagraph (a), which he proposed in chapter II, section C.3, met those conditions by inserting the new phrase “or under the direction and control of, that State in carrying out that conduct”. In view of the ambiguity of the original language of article 8, the proposed new wording was perhaps in the end only a clarification and not an expansion of the scope of the rule of attribution.

9. The second situation, addressed in article 8, subparagraph (b), was the one in which the organs of the State could not operate (revolution, collapse of government) and the powers of the public authority were exercised by individuals or groups in the absence of the official authorities. That situation could be likened to the famous institution of the *levée en masse* in the law of armed conflicts. The principle did not come into play often but it could have an important role, as shown by the use made of it by

the Iran-United States Claims Tribunal. It should therefore be retained, but its formulation posed a problem: the original wording stated that the elements of the governmental authority should be exercised “in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority”. But if the conduct was held to be unlawful, it was difficult to “justify” it. That was a simple drafting problem which could be solved by saying instead “in circumstances which called for the exercise of those elements of authority”.

10. The choice of the verb “call for” certainly implied that the situation required that the elements of the governmental authority should be exercised, but not necessarily that the conduct in question should take place. If article 8, subparagraph (b), was left unchanged, that inconsistency would remain. The last and extremely important point to be taken up was that of article 10, on attribution to the State of the conduct of organs acting outside their competence or contrary to instructions concerning their activity. That was a classic problem of *ultra vires* conduct; it meant that the conduct of an organ of the State was considered to be an act of the State itself if the organ had acted without authorization, if it had exceeded its competence, or if it had acted contrary to instructions concerning its activity. The principle was also found in the law of treaties, which regulated very strictly the extent to which a State could rely on its internal law to escape its obligations. If the principle was valid in the law of treaties, which was concerned with the existence of an obligation, it was valid a fortiori in the law of State responsibility, which addressed cases in which an obligation had been violated. Furthermore, the jurisprudence subsequent to 1975 and the comments of governments left no doubt as to the validity of article 10.

#### ARTICLE 10

11. However, article 10 did give rise to a problem of formulation, also found in other articles, that is to say, the meaning of the notion of “capacity” when applied to an entity or organ. The case law had attached a rather broad meaning to the language in question. The commentary cited as a virtually definitive formulation the language derived from the decision of the French-Mexican Claims Commission in the *Caire* case, in which it was stated that the officers guilty of unlawful acts had acted “under cover of their official character” or had “availed [themselves] of [their] official status”.<sup>8</sup> The notion of “capacity” remained very vague, and the problem was to determine whether any person invoking his capacity of agent of the State was in fact acting in his official capacity even when it was quite obvious that his conduct was outrageously unlawful. It must therefore be determined whether the wording of article 10 and other articles in chapter II was sufficient or whether “under cover of his official capacity” needed further clarification. It might be possible to include the phrase “acting in or under cover of that official capacity” in article 10 in order to make it clear that the earlier jurisprudence was being preserved. Since there had been no objections to article 10 and since the rules which it contained had been applied in several instances,

<sup>8</sup> Decision No. 33 of 7 June 1929 of the French-Mexican Claims Commission (UNRIAA, vol. V (Sales No. 1952.V.3), pp. 529 et seq.).

he was not sure that the case for that change had been made out, but it nevertheless merited the attention of the Drafting Committee.

12. To sum up, he proposed retaining unchanged most of the draft articles concerning the central question of attribution, that is to say, articles 5 to 8, and 10, subject to some minor and mostly drafting changes. The most important amendments would be to delete the reference to internal law in article 5, delete article 8, subparagraph (a), on the grounds of redundancy, and add the phrase “or under the direction and control of, that State in carrying out that conduct”. Except for those few changes the draft articles should remain as they were, for they had stood the test of time.

13. Mr. BROWNLIE said that he welcomed the work done by the Special Rapporteur and supported his proposals. It was satisfactory that, generally speaking, the Special Rapporteur had retained the text of the draft articles as they were, for it should not be forgotten that they had existed for several decades and had been included in several compendiums of international law, and that important decisions had been based on them. Although the Special Rapporteur had not been given the mandate of confirming the status quo, it was not a bad thing to ensure a degree of continuity, subject to a few improvements.

14. Several comments had to be made. First, it was impossible to solve the many problems of State responsibility by deploying an armoury of legal concepts. The draft articles tended to reflect the empirical nature of the sources of international law, in particular the useful experience of courts and commissions which had dealt with difficult situations. He had taken particular interest in the content of articles 8 and 10. Article 8 concerned cases in which an entity acted in fact on behalf of the State. In order to rule on that type of situation it was sufficient to have evidence that an entity was acting in the capacity of agent of the State; that applied equally to the cases of *ultra vires* conduct addressed in article 10.

15. On the other hand, the question of the delegation of State functions was much more difficult, for example when the running of the prison system was entrusted to the private sector or when some of the functions of the army were privatized. Such situations did not fit very well with the wording of paragraph 2 of article 7. By mentioning the delegation of State functions he was merely trying to initiate the debate using conventional terms. In fact, the term “elements of the governmental authority” raised many questions: its scope, for example, not to mention ideological considerations. The real difficulty of the delegation of functions hitherto belonging to the State, for example the running of prisons, could be resolved only if an obligation of result was imposed on the State, that is to say, if the State was obliged to guarantee compliance with the rules for prison maintenance. In that case it was irrelevant whether the prisons were regarded as organs of the State: the problem was no longer one of attribution but of substantive law.

16. A second point, of less importance, concerned the Iran-United States Claims Tribunal, whose decisions the Special Rapporteur had cited. A degree of caution was required in that connection, for the rules applied by the

Tribunal were not purely rules of public international law, so that the principles of law had not necessarily been applied in the Tribunal in the same way as elsewhere.

17. The Special Rapporteur, perhaps unintentionally, had set the notion of “control” in opposition to a specific authorization from the State. He had since proposed much more satisfactory language which linked the notions of control and direction, the very existence of control presupposing that the conduct was approved. That situation could be likened to the one in which a State endorsed the conduct of entities not acting on its behalf. In the one case there was a direct causal relationship, and in the other the acts of third entities were endorsed once they had been carried out.

18. Lastly, the views of Mr. Ago in the case concerning *Military and Paramilitary Activities in and against Nicaragua* were presented as if he had been trying to “protect his turf”. The arguments submitted by the Nicaraguan side were based on general international law. The Commission’s draft articles, far from being ignored or sidelined, had been cited together with other materials. If the notion of control was to be approached from the standpoint of the decisions taken in that case, it should be borne in mind that the Court had been required to rule in a very specific context, and to determine in particular whether the United States of America had the sort of connections with the contras and their command structure which rendered it responsible for the violations of international humanitarian law alleged against the contras. The Court had rightly taken a conservative view, for the question of primary rules also came into play—the notion of sufficient control varying according to the legal context.

19. Mr. LUKASHUK said that in his introduction the Special Rapporteur had raised a whole series of very complicated problems to which he would respond after studying the report in detail. However, he wished at the outset to raise a question which had not been addressed with sufficient clarity in the oral presentation. There were in fact two forms of State responsibility: direct responsibility for acts carried out by the State itself, and indirect responsibility for acts carried out by physical or moral persons under its jurisdiction. He would be grateful if the Special Rapporteur could give his opinion on that question.

20. Mr. CRAWFORD (Special Rapporteur), replying to Mr. Lukashuk, said that the State could not be regarded as indirectly responsible on the sole ground that the unlawful act had been committed on its territory; an additional factor was necessary, for example an act or an omission of an organ of the State, physical or moral person, or other entity. The draft articles did not provide that the State could be held indirectly responsible, and there was always an interaction between the rules of attribution and other rules. The State was responsible only for the acts or omissions of its organs.

21. Mr. BENNOUNA said that in general terms he endorsed the approach taken by the Special Rapporteur, although it did prompt the question of the definition of the organs of the State and of the reference to internal law. Draft articles 8 and 10 drew the consequences of the exercise of elements of the governmental authority, but he wondered whether that concept was already well estab-

lished or still in the process of development. In fact, States increasingly delegated functions regarded, only a few years ago, as inseparable from the State.

22. Mr. CRAWFORD (Special Rapporteur) said that paragraph 2 in articles 7 and 8 relied on the notion of elements of the governmental authority to determine whether an entity was indeed an organ of the State. The question could in fact be answered only in the context of each specific case; while international law had to define what the State was for the purposes of responsibility, it did not do so *a priori*, and it was for each State to decide on its own internal organization, even if some areas such as the judicial and prison systems and the parliament were regarded *a priori* as pertaining to the State. The situation was certainly evolving, and procedural questions, such as the extent to which the internal system regarded a given activity as part of the exercise of public power, were of particular importance.

23. Mr. PAMBOU-TCHIVOUNDA said that he wished to congratulate the Special Rapporteur on the very constructive work which he had done in chapter II.C of his report and for his effort to simplify the text, focusing on the idea that the harm must be attached to an entity of the State. But he wondered why the draft articles repeatedly used the term “be considered”. He asked by whom or by what was the act in question to “be considered” as an act of the State, by international law or by the Commission. The term was an unhappy one, and it would be preferable to replace it by “is” an act of the State.

24. He profoundly regretted that the Special Rapporteur also wished to delete any reference to internal law. It was in fact primarily internal law which determined which organs were organs of the State, and the entities or physical or moral persons referred to in the draft articles operated within the territorial framework of the State. Internal law was moreover implicitly present, for example when article 7 spoke of an entity “empowered by the law of that State” or when article 8 spoke of “instructions” given by the State: those situations were clearly governed by internal law. It might therefore be necessary to stipulate in a general clause that the international law had to be interpreted in the light of the internal law.

25. Lastly, he was astounded to see the words “in fact” in article 8: if a person was acting on the instructions or under the control of the State he was acting in law and not in fact. He therefore proposed that the two words should be deleted.

26. Mr. CRAWFORD (Special Rapporteur) said that he accepted that the words “in fact” used in article 8 were not ideal, but they were much more emphatic in French than in English. The Drafting Committee would certainly be able to solve the problem. He denied that he had wished to delete all references to internal law. He had certainly done so in article 5 but not in paragraph 2 of article 7, and his purpose was only to indicate that internal law was not decisive. It sometimes happened that the internal legal system did not reflect the organization of the State. He was not opposed to restoring the reference to internal law in article 5, provided that internal law was not presented as decisive for the purposes of attribution.

27. Mr. GOCO said that the term “act of the State” might be ambiguous. It was sometimes invoked as a defence by ousted leaders claiming immunity for acts committed when they were in power. Perhaps “act of the Government” would be preferable.

28. Mr. CRAWFORD (Special Rapporteur) said that the act of State doctrine available in the laws of certain States and referred to by Mr. Goco was not at issue in the draft articles. It was in fact a question of internal law, but the draft articles concerned the attribution of an unlawful act to the State under international law.

29. Mr. PELLET said that he was grateful to the Special Rapporteur for having preserved the general structure of the draft articles but that he was opposed to two of the main changes introduced: the deletion of the reference to internal law in article 5 and the deletion of paragraph 1 of article 7. The Special Rapporteur had given two reasons in support of the first of those “innovations”: international law could be relevant in determining what was an organ of the State; and most national laws did not use the word “organ”. On the first point, it was difficult to conceive of an internal law which did not take account of the fact that international law prevailed in that area; and the second point was of little importance, the main thing being to know whether national laws were sufficient for determining whether an organ was considered to be an organ of the State. For him, the reference to internal law was the very *raison d'être* of article 5. As the Special Rapporteur himself said in paragraph 174 of his first report, the position of separate entities was different; in order to determine whether an entity was “separate” it was necessary to refer to internal law, for to have recourse to international law for that purpose would run counter to the principle of the freedom of the State to organize itself as it wished. International law was subordinate to internal law on that point, and that was why a reference to internal law was indispensable.

30. In note 3 to draft article 5, in paragraph 284 of the first report, the Special Rapporteur explained that a reference to internal law amounted to giving the State the possibility of escaping its responsibility by denying that an entity which had acted contrary to international law was an organ of the State. That fear was unjustified since the internationally unlawful act must be assessed as at the time of its commission, as indicated in article 24 and subsequent articles. Furthermore, the very function of articles 7, 8 and 10, in particular article 8, subparagraph (a), was to prevent such solutions of continuity in State responsibility.

31. The second proposed change—the deletion of paragraph 1 of article 7—stemmed from the same *a priori* concept of what the State was or ought to be in the eyes of international law. For the purposes of State responsibility, the State must be regarded as a juridical person and not as a sociological subject. The deletion of the specific reference to “territorial governmental entities” produced an amalgam of different juridical persons. A territorial governmental entity, a commune for example, was not the State even though its acts could of course trigger the international responsibility of the State. The notion of attribution was particularly interesting in that respect, for it allowed an entity to be held responsible for an act com-

mitted by another entity which had a separate legal personality. It thus seemed essential to state that such entities, which were not the State under internal law, or even international law, could trigger State responsibility. He was particularly astonished by the deletion of paragraph 1 of article 7 because all the States which had submitted comments on the subject had stressed the importance of that provision, and some of them had even requested that it should be spelled out in greater detail. It would be possible for example to add at the end of article 5 “and regardless of whether it is a central or decentralized organ” or another phrase to the same effect. However that might be, it did seem essential to restore the reference to internal law in article 5 and to retain the idea expressed in paragraph 1 of the earlier version of article 7.

32. The other comments which the report called for were less important. He agreed with Mr. Pambou-Tchivounda with respect to the words “be considered”. Furthermore, the phrase “for the purposes of the present articles” was not justified at the current stage, but it could always be restored if the draft articles became a treaty. He also proposed that “acting in that capacity” should be deleted from articles 5, 7 and 10 and that the current text of article 10 should be preceded by a new paragraph stating that the responsibility of the State came into play when its organs or entities acted “in that capacity”.

33. He agreed with the Special Rapporteur that “attribution” was preferable to “imputability” since attribution covered both imputability to the State of an act committed by another entity and the fact that a State’s responsibility could be triggered by its own act. Furthermore, it had been argued in the commentaries to the draft articles<sup>9</sup> that the concept of attribution kept things at a safe distance from internal law. He also endorsed the deletion of article 6.

34. The Special Rapporteur had said that the Drafting Committee would be able to make the meaning of article 8 clearer. He was himself not sure that it was always necessary to clarify what was not clear. With reference to the various cases considered by international legal bodies—*Military and Paramilitary Activities in and against Nicaragua, United States Diplomatic and Consular Staff in Tehran* and *Tadić*<sup>10</sup>—he thought that the Commission would gain by not being too specific. The changes proposed by the Special Rapporteur, which were certainly intended to clarify the law, tended to harden the rules of attribution and might inconvenience some States and make it more difficult to establish responsibility at the international level. He could not embrace the underlying philosophy of that approach and he had reservations about the restrictive interpretation of the decision in the case concerning *Military and Paramilitary Activities in and against Nicaragua* used by the International Tribunal for the Former Yugoslavia in the *Tadić* case. When the law was not entirely stabilized the Commission must avoid taking sides. With regard to the Special Rapporteur’s pro-

posal to replace “justified” by “called for” in article 8, subparagraph (b), he felt that “justified” was preferable in French.

35. Lastly, he totally disagreed with a comment made by Mr. Pambou-Tchivounda at the beginning of his statement to the effect that attribution was designed to determine whether “harm” could be attributed to a person. Attribution was in no way intended to determine the author of the harm but rather the author of the internationally unlawful act. The question of harm was addressed at a later stage. That was an extremely important point because it went to the heart of the very philosophy of the draft articles.

36. Mr. CRAWFORD (Special Rapporteur) said that he was not opposed to Mr. Pellet’s proposal to refer to territorial governmental entities in article 5, provided that there was no duplication between article 5 and article 7, paragraph 1. Although he had himself initially intended to delete the phrase “for the purposes of the present articles”, he had decided to retain it in order to make clear the difference between the law of attribution for the purposes of State responsibility and for other purposes, such as the law of treaties or the law of multilateral acts. Mr. Pellet’s proposal for article 10, which would avoid the repetition of “acting in that capacity”, was useful and helped to clarify the draft articles.

37. He did not share Mr. Pellet’s opinion on the concept of the State in international law. “State” must be understood to mean not only the governmental organs but also all the subdivisions established by internal law. In that connection, and in contrast to what Mr. Pellet seemed to think, it was not unusual for States to rely on their internal law to escape their international responsibility. For example, in the arbitration between Texaco Overseas Petroleum Company and California Asiatic Oil Company and the Government of the Libyan Arab Republic, the Government of the Libyan Arab Republic had claimed that it was not responsible for a contract concluded by its Minister of Oil and Gas.<sup>11</sup> In another arbitration in which he had himself participated recently, a State had asserted that only the acts of its Government—under its internal law only the acts of the President and Council of Ministers—could be imputed to that State. Such a definition of State was unacceptable for the purposes of international responsibility. He did not deny the importance of internal law or the freedom of a State to organize itself as it wished, but international law did have a complementary role to play. He could agree to restore a reference to internal law in article 5 if the majority of the members of the Commission so desired, provided that internal law was not presented as the decisive criterion, for that would contradict article 10 and would be inconsistent with international law.

*The meeting rose at 12.50 p.m.*

<sup>9</sup> For the commentaries to articles 1 to 6, see *Yearbook . . . 1973*, vol. II, pp. 173 et seq., document A/9010/Rev.1; for the commentaries to articles 7 to 9, see *Yearbook . . . 1974* (footnote 7 above).

<sup>10</sup> *Prosecutor v. Duško Tadić a/k/a/ “Dule”*, International Tribunal for the Former Yugoslavia, case No. IT-94-1-T, Trial Chamber II, opinion and judgment of 7 May 1997.

<sup>11</sup> See *International Law Reports* (Cambridge), vol. 53 (1979), preliminary award of 27 November 1975, pp. 392 et seq., in particular, p. 415, para. 23 (a).

## 2554th MEETING

Monday, 3 August 1998, at 10.20 a.m.

Chairman: Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

### Cooperation with other bodies (*continued*)\*

[Agenda item 9]

#### STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN invited Mr. Jonathan T. Fried, Observer for the Inter-American Juridical Committee, to address the Commission.

2. Mr. FRIED (Observer for the Inter-American Juridical Committee) said that his statement would deal with the Inter-American Juridical Committee's recent activities and current work, its working methods and procedures, its contributions to the progressive development and codification of international law in America, and the difficulties which it encountered in discharging its mandate.

3. The first area on which the Committee focused its work was international trade law. Over the past two years it had made a comparative study of dispute-settlement systems in subregional trade agreements in America (such as the North American Free Trade Agreement (NAFTA), the Southern Cone Common Market (MERCOSUR) the Central American Common Market (CACM) and the Andean Pact) and had publicized and disseminated the results. More recently it had undertaken a legal analysis of the most-favoured-nation clause and its implications for inter-American trade agreements such as the Latin American Integration Association (LAIA). It had also made a detailed analysis of the initial text of the draft inter-American convention to combat corruption. The Inter-American Convention against Corruption adopted by the General Assembly of OAS took into account most of the observations and changes which the Committee had put forward.

4. The second main area of the Committee's activities was the promotion of democracy. Amongst other things, it had been requested by the OAS General Assembly to study questions connected with the administration of justice in America, in particular the question of the protection of judges and lawyers in the performance of their duties. It had produced a comparative study and an analysis, from the standpoint of international law, of the individual and institutional guarantees which were or ought to be accorded to judges, lawyers and all other persons working in the judicial system, on the basis of the international and inter-American human rights instruments. The Committee's report had led to the establishment of the Working Group on Enhancement of the Administration of Justice in the Americas, which was reporting directly to the OAS Committee on Juridical and Political Affairs.

5. Another aspect of the Committee's work in the field of democracy was the right to information, which included the protection of the privacy of persons detained by official administrations and institutions, and of the information held by such persons, and the right of access to such information and verification of its accuracy. The Committee had studied the existing legislation, particularly that of Brazil, the United States of America and Canada, and had tried to identify common principles with a view to drafting standard legislation which could be used in other countries of America. The Committee had made an exhaustive study of the legal aspects of democracy in the inter-American system, drawing in particular on the practice of States since the creation of OAS in 1948. Its report had been published and widely disseminated, and it had recommended that the political organs of OAS should follow up the report by means of educational activities and technical assistance.

6. The third area of the Committee's work was human rights. Amongst other things, it had been asked to consider the draft Inter-American Convention on the Elimination of All Forms of Discrimination by Reason of Disability proposed by the Government of Panama and Costa Rica. It had examined the text clause by clause, proposed changes, and reported on it to the OAS political organs, which were currently using those proposals in their work on the draft Convention. In March 1998 the OAS General Assembly had submitted to the Committee a text which might serve as the basis for a draft convention or declaration on the rights of the indigenous peoples of America. The Committee had made a detailed analysis of the text and had formulated comments dealing in particular with the different legal status of a declaration and a convention.

7. The OAS General Assembly had also requested the Committee to take up the question of cooperation among the countries of the region in the fight against terrorism. The Committee had studied the various multilateral conventions dealing with specific aspects of terrorism. It had concentrated its efforts, *inter alia*, on the production of legal tools which States might use to combat that scourge, such as agreements on reciprocal legal assistance and extradition treaties.

8. Turning to a comparison of the methods and procedures of the Commission with those of the Committee, he said that in its work the Committee gave greater

\* Resumed from the 2538th meeting.

emphasis to comparative law. It was apparent from its work on the development of democracy that the Committee studied national legal systems not only to determine whether they reflected principles which might be regarded as forming the foundation of State practice or which might be common to several legal systems and, as such, constitute general principles of international law, but also from the standpoint of the codification and progressive development of internal law in certain areas.

9. With regard to corruption, for example, the OAS General Assembly had requested the Committee to draft a standard law which could be used both in the common law and in the Roman law countries.

10. The Committee maintained close and regular links with the Inter-American Specialized Conference on Private International Law (CIDIP) and was currently taking part in the preparations for its sixth session (CIDIP VI), the agenda for which would include a number of questions connected with private international law and comparative law.

11. The Committee had only 11 members, and its meetings were noteworthy for their relaxed atmosphere and the frankness of the exchanges of views. In accordance with the Charter of OAS,<sup>1</sup> the Committee expressed its conclusions exclusively in the form of opinions and resolutions. It had no opportunity, unlike the Commission at the annual debate in the Sixth Committee of the United Nations General Assembly, to conduct a true dialogue with the States members of OAS. Its annual report was submitted to the OAS Committee on Juridical and Political Affairs, but few of the missions in Washington had staff members with the necessary legal skills to participate in the debates at the level of the interventions in the Sixth Committee.

12. As part of its educational and publicity functions with respect to international law the Committee maintained relations with the Inter-American Bar Association and other similar bodies. It had established libraries and made other arrangements with a number of Brazilian universities, as well as organizing conferences, seminars and workshops for its members.

13. The Committee made a big contribution to the codification of law—especially with respect to reciprocal legal assistance, extradition and corruption—and to the progressive development of law. It made an equally big contribution to comparative law: in particular, it had drafted a standard law on the suppression of corruption and had participated in the codification of the basic principles concerning the independence of judges and lawyers and the principles governing the protection of privacy and access to information in that field.

14. The Committee encountered many difficulties in discharging its mandate. Only a short time ago the OAS General Assembly had entrusted to it a number of difficult problems, such as the question of the Falkland Islands (Malvinas), or more recently the Cuban Liberty and Democratic Solidarity (Libertad) Act (Helms-Burton

Act), signed into law by the United States. Important debates had taken place both in the Committee and in the political organs to which it reported as to the usefulness of entrusting such studies to the Committee. That was why, when drafting comments and resolutions, it took good care to state that it was not a court and did not exercise any judicial or State function. Another difficulty stemmed from the fact that the OAS budget was subject to pressure similar to that weighing on the United Nations finances, for the OAS political organs did not always attach due importance to the work of an independent advisory body.

15. The Committee would like to develop exchanges with the Governments of member States and of civil society in general, in particular bodies concerned with the study, progressive development and codification of international law. Every year for the past 25 years it had organized in Rio de Janeiro an intensive training course on international law, attended by lawyers, diplomats, teachers and law practitioners nominated by the States members of OAS. The network of relations established during the training courses helped to strengthen the dialogue with legal circles in the countries concerned.

16. Since much of the Committee's work was concerned with international trade law, it endeavoured to bring public international law and international trade law closer into line with each other or even to produce a synthesis of them. Its work on international trade law in America had persuaded it that trade law was progressing much quicker than any other branch of public international law. That development had unexpected consequences in some areas of classical public international law. For example, international trade law had a fully codified regime of State responsibility, even covering situations of non-violation, in accordance with the principle of cancellation or reduction of advantages without violation in the framework of the General Agreement on Tariffs and Trade.

17. He invited the Commission to consider in conjunction with the Committee means of strengthening their relations and, in particular, to have regular exchanges of views on the topics on which they worked. In that connection the members of the Commission and the Committee might strengthen their personal relations with each other and consider the possibility of institutionalizing such exchanges.

18. Mr. CANDIOTI responded to the statement by the Observer for the Inter-American Juridical Committee by describing for him the progress of the Commission's work on the six topics on its agenda. Like the Committee, the Commission continually reviewed its methods of work. Every year it re-examined its long-term programme of work and proposed new topics to the General Assembly. Whatever the topic under consideration, the Committee had always had very useful contributions to the Commission's work; hence the need to find means of securing practical improvements in the contacts, links and exchanges of information, testimony and ideas between the two bodies.

19. Mr. LUKASHUK said that the Committee did very important work, with very high professional standards, on topics of interest to many countries, such as the fight

<sup>1</sup> Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the "Buenos Aires Protocol" of 27 February 1967 (*ibid.*, vol. 721, p. 324).

against corruption or the consolidation of democracy. However, the documents resulting from that work did not reach the persons who might be interested in them sufficiently promptly. The shortage of resources, a problem which the Committee shared with the Commission, was partly responsible for that situation, but there was also the fact that the communication between the two bodies often operated at the purely formal level; it ought therefore to be reorganized on the basis of genuine working relations.

**State responsibility<sup>2</sup> (continued) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>3</sup> A/CN.4/490 and Add.1-7,<sup>4</sup> A/CN.4/L.565, A/CN.4/L.569)**

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

ARTICLES 5 TO 8 AND 10 (continued)

20. Mr. HERDOCIA SACASA said that in what was a fundamental matter for the development of international law, the Special Rapporteur had succeeded, with rigour and accuracy, both in preserving what the Commission had already achieved and in introducing the necessary modifications and clarification. The task was not an easy one, for to define the conditions in which the conduct of an organ or entity of the State was attributable to the State meant dealing with the tensions caused by four polarities: internal law or international law; limits of State responsibility or more specific and flexible means of control, with respect to anti-pollution measures in particular; centralized State or decentralized State; and the law of the real world or fictional law.

21. With regard to the relations between internal and international law, article 3 (Elements of an internationally wrongful act of a State), the cornerstone of the draft articles, posited that the attribution of conduct to the State was governed by international law, with important consequences for article 5 (Attribution to the State of the conduct of its organs), which concerned internal law. To rely on internal law alone to determine what was an organ of the State meant undermining the fundamental principle that State responsibility was governed by the rules of international law adopted by the community of States. It thus meant accepting rules which opened the door to every kind of interpretation. That being the case, internal law did have a role to play, but that role should not be exaggerated, or taken out of its context, or set aside in favour of international law.

22. The clarification and balance provided by article 6 (Irrelevance of the position of the organ in the organization of the State) with respect to the definition given in article 5 confirmed the need to amend the title of chapter II (The "act of the State" under international law) in order to make it clear that it was not a question of defining

the act of the State but rather the conditions for attribution of that act in international law. That would make it possible to eliminate the artificial dichotomy between international law and internal law which might be used as a means of escaping international obligations. The end of article 5 ("provided that organ was acting in that capacity in the case in question") could lead to many different interpretations or even bring internal law into play, even though the conduct in question was conduct of organs of the State. The Special Rapporteur had been wise to propose more neutral wording in that connection.

23. The reference to internal law in article 7 (Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority) was justified, however, for a causal link was needed in that case: the entities in question were not part of the formal structure of the State, and only internal law could authorize them to exercise elements of the governmental authority. The reference to internal law should be retained not only for considerations of form but because it imposed a substantial restriction on the scope of the rule of attribution by excluding acts whose attribution to the State was not permitted by internal law. On the other hand, article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State) expanded the scope by rendering the conduct of persons or groups of persons acting in fact on the instructions or under the direction of the State attributable to that State. The question then arose as to whether that expansion introduced the desired degree of flexibility.

24. The Commission's task was to contribute to the elaboration of international law which addressed the realities and all possible concrete situations. From that standpoint the abandonment of the concept of "imputability" in favour of "attribution" was not merely a terminological change. It provided a way out of the "fiction" and a means of filling gaps which might provide grounds for impunity or non-responsibility. The new approach taken by the draft articles went in that direction, for it rendered the conduct not only of the official organs of the State but also of any entity acting on its behalf attributable to that State. A concern for transparency and morality was apparent in the wish to subject to the authority of law the conduct of persons or groups of persons whose legal link with the State was sometimes difficult to determine. A balance must be found which would make it possible to attribute such conduct to the State, not on an arbitrary basis but without ambiguity either.

25. Several decisions of ICJ, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, for example, were relevant in that connection, but the criterion of "control" which those decisions advanced, although very important, could not be the only criterion. Moreover, the case concerning *Military and Paramilitary Activities in and against Nicaragua* must be placed in a broader context than the context of humanitarian law alone. Having lived through an era, happily past, in which some States had connections with paramilitary groups responsible for thousands of forced disappearances, Latin America had equipped itself, under the auspices of OAS, with an important convention on the subject, the Inter-American Convention on the Forced Disappearance of Persons, which assimilated forced disappearance to

<sup>2</sup> For the text of the draft articles provisionally adopted by the Commission on its first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>3</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>4</sup> *Ibid.*

deprivation of freedom, regardless of whether the agent of that deprivation was an agent of the State or a person or group of persons acting with the authorization, support or consent of the State. That approach provided other criteria which allowed greater flexibility.

26. With regard to the effects of decentralization, the Special Rapporteur had been right to reaffirm the unity and singularity of the State with respect to international law, as well as the indivisibility of its responsibility. To proceed in any other way would mean undermining the integrity of international law. Having analysed and defined all the elements stemming from all those polarities, the Special Rapporteur would certainly succeed in the future, with the aid of the Commission, in solving the last of the difficulties—that of giving concrete expression to the will of the State in the legal framework which the Commission had undertaken to define.

27. Mr. HAFNER said that he was glad that the Special Rapporteur had highlighted in his first report on State responsibility (A/CN.4/490 and Add.1-7) all of the problems raised by the draft articles; he would himself comment only on the changes which the Special Rapporteur had made in articles 5 to 8 and 10.

28. In article 5 the Special Rapporteur proposed deleting the reference to internal law in connection with an organ. It was obvious that an organ of the State could be described as such only in terms of internal law since, as Mr. Pellet had already noted, the term “organ” was itself a legal term used in internal law: it was not international law which defined what an organ was but rather the national law of the State concerned. If the article spoke of “organ” without any qualification, it might easily be asserted that the type of organ referred to in the article was different from the type of organ defined by international law. The text would end up by saying that an act was attributable to the State because it was the act of an organ and that it was the act of an organ because it was attributable to the State—not a very satisfactory situation.

29. The argument put forward by some States to the effect that the reference to internal law authorized States to escape their responsibility was neither relevant nor applicable in the current case. If a State established a separate entity in order to entrust State functions to it, the State remained responsible for the acts of that entity pursuant to article 7. One example was that of central banks: in many countries they had a separate legal status and were sometimes not even bound by the policies of the State, which they were not obliged to carry out. But it remained true that the acts of such entities were attributable to the State, as had already been established in several cases. The case in question did fall within the scope not of article 5 but of article 7. Furthermore, if a State adopted a law according an entity the status of organ, its responsibility was triggered by the acts of that entity; hence the need to refer to internal law. Article 7 contained another reason for retaining that reference, for it mentioned the “formal structure of the State”. The reference to internal law in article 5 would facilitate the interpretation of that term in article 7.

30. The Special Rapporteur was partly right to make a distinction between acts *de jure imperii* for the purposes

of the law of State immunities and the acts of the State for the purposes of State responsibility. However, it should not be forgotten that there were links between those two legal concepts, since an act could not be regarded as *de jure gestionis* or *imperii* unless it was an act of the State. As to the term “in that capacity”, the Special Rapporteur had said that he would make his intentions clear in connection with article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity), but the commentary to article 10<sup>5</sup> did not really give an explanation: the case cited there did not really clarify article 5.

31. However, he approved of the merging of articles 5 and 6 into a new article 5 but thought that the “federal clause” should be retained in article 7. There again, a parallel could be drawn with the rules of State immunities, which were very similar to the rules of State responsibility.

32. During its consideration of the topic of jurisdictional immunities of States and their property the Commission had itself defined the State by the criterion of territorial unity.<sup>6</sup> It might therefore be asked why that reference was justified with respect to immunities but not with respect to responsibility. It could also be argued that for the purposes of immunities, a State was nothing other than a State and required no further definition.

33. The Austrian Länder (provinces) illustrated the question of territorial governmental entities enjoying independence within a State, for they could conclude treaties with other States provided that the subject matter fell within their competence as independent entities. That prompted the further question of deciding against whom the other contracting States should take countermeasures in the event of a violation: the province or the State? In his view, it was the whole State which was responsible for the implementation of treaties. It might therefore be useful to refer to territorial governmental entities in article 7 in order to clarify which rules were to be applied in situations of that kind.

34. He did not subscribe fully to the interpretation of “elements of the governmental authority” given in the first report. The comments of the Special Rapporteur seemed to assimilate the content of that term to “State function”. There were in fact two different concepts in play, for “elements of the governmental authority” referred to the practice and “function” referred to the content. According to paragraph 190, the current case was concerned with the content and not with the practice.

35. The term in question posed another problem by referring only to elements of the governmental authority although it certainly implied much more than that. The elements of the governmental authority were only a part of the powers of the State. It was interesting to note that the draft articles on the jurisdictional immunities of States and their property used the same term in article 11, when the acts of an agent of the State triggered its responsibility

<sup>5</sup> For the commentaries to articles 10 to 15, see *Yearbook . . . 1975*, vol. II, document A/10010/Rev.1, pp. 61 et seq.

<sup>6</sup> For the draft articles and the commentaries thereto, see *Yearbook . . . 1991*, vol. II (Part Two), document A/46/10, pp. 13 et seq.

only if the agent performed functions closely linked with the exercise of governmental authority. Those functions were obviously limited to acts *de jure imperii*, so that the term “elements” in article 8 encompassed only the acts *de jure imperii* of the State.

36. If the term “functions” was not acceptable, an explanation should be given in the commentary, for example by citing the use of that term in the context of jurisdictional immunities of States and their property. Apart from those considerations, which were discussed in paragraph 190 of the first report, he generally approved of the content of draft article 7.

37. In paragraph 198 of the first report, with reference to article 8, the Special Rapporteur proposed deleting the phrase “it is established that”. Those words might in fact be necessary, since there was a difference between organs created by law and other agents, as was clear from the terminology used by France. In the first case, the existence of a law creating the organ was sufficient to establish responsibility. In the second case, the applicant State must approve that the author of the act had acted on behalf of the State. The procedure for the establishment of proof would be quite different in the case of an organ.

38. The problem raised by the Special Rapporteur in connection with the *Loizidou v. Turkey* case was very important, because it came up much more often than was desirable. There was, for example, the case in which the House of Lords had characterized the German Democratic Republic as a dependent or subordinate entity created by the Union of Soviet Socialist Republics for the purposes of exercising indirect control. Given the political and legal implications of that type of situation, it would be better not to disregard the possibility. Before invoking a State’s responsibility, the other States should first provide irrefutable proof of the existence of such a situation in the context of the particular case.

39. There was another question of more recent relevance: whether an organ of the State acting on the instructions of the International Tribunal for the Former Yugoslavia fell within the scope of article 8. Without going so far as to say that the acts of the organ were attributable to the Tribunal and not to the State concerned, that case or other similar examples could be mentioned in the commentary to article 8.

40. Turning finally to article 10, he said that it was not very wise to replace “competence” by “authority”. As he had just pointed out, “authority” covered exclusively acts *de jure imperii* and was not defined in terms of content, in contrast to what was envisaged in article 10. The result was to assign an excessively narrow meaning to terminology which should be applicable to ordinary organs. It would perhaps be better to retain “competence” and include an explanation in the commentary.

41. Mr. GOCO said that he was not sure about the exact definition of “Government”. It had been said that the Government was only a part of the State or that it was an institution composed of all the agents responsible for the conduct of public affairs. The Special Rapporteur would appear to be advancing a new qualification of the term. In his own opinion, the Government represented the whole

of the State and, as such, was of great importance in connection with the attribution of responsibility.

42. Mr. HAFNER said that Montesquieu had been the first to speak about the separation of powers. Of course, the Government was only a part of the State. The judiciary, for example, was independent of the Government but it was also part of the State. That was why a broader definition of the term must be adopted. Unfortunately, it was difficult to find an alternative term and the only way of solving the problem was to give an explanation in the commentary.

43. Mr. CRAWFORD (Special Rapporteur) said that “Government” should be understood to mean the executive, the legislature and the judiciary; the phrase “elements of the governmental authority” was just as widely accepted.

44. Mr. DUGARD said that he shared the Special Rapporteur’s dissatisfaction with the term “act of the State” and with its inverted commas in the title of chapter II of the draft articles. It might cause confusion among common law specialists accustomed to the act of State doctrine. The term should be retained with the inverted commas removed, but it would then be a good idea to adopt the new title “Attribution of conduct to the State under international law” as proposed in paragraph 147 of the first report.

45. The reference to internal law in article 5 might also cause confusion in the commentary, which stated on the one hand that States might take refuge in internal law to escape their obligations and then went on to state the opposite. It was interesting in that connection to compare the statements of the former Special Rapporteur, Mr. Roberto Ago, in paragraphs (7) and (8) of the commentary to that article:<sup>7</sup> in paragraph (7) he said that every State was entitled to organize itself as it saw fit, and in paragraph (10), that that had no effect on international law—which was the more relevant position. Nevertheless, he could himself agree to delete the reference to internal law, and the Special Rapporteur should rework the commentary to clarify the issue.

46. Most of the difficulties arose in connection with unlawful entities. The Special Rapporteur had mentioned the situation of the Turkish Republic of Northern Cyprus (“TRNC”) in the *Loizidou v. Turkey* case. Mr. Hafner had mentioned the case of the German Democratic Republic. The case of South Africa might also be added. Accordingly, the concept of direction and control should be mentioned in article 8, subparagraph (a), in order to cover the case of the “TRNC”, a State created following a military intervention.

47. On the other hand, that move was not certain to cover situations in which military control was less obvious, as in the case of the Bantustans, the homelands in South Africa. At the time several Governments had considered that the South African Government was responsible for the acts of the governments of the homelands although no military control was actually exercised there and under the internal law of South Africa they were

<sup>7</sup> Ibid.

totally independent (which had not been entirely the case in the political reality). Internal law had been cleverly manipulated to conceal the subordination of the Bantustans. Nevertheless, in 1987 the French Government had protested to the South African Government after a French national, Pierre Albertini, had been imprisoned by the Government of Ciskei and sentenced to four years' imprisonment for having refused to testify in a political trial.<sup>8</sup> The South African Government had replied that it had no control over the executive or judiciary of Ciskei and that the French Government should therefore address its complaints to the Government of the State in question. The French Government had refused to do so, stating that it would not accept the credentials of the new Ambassador of South Africa to France as long as Pierre Albertini remained in prison in Ciskei. Following that protest the French national had been quickly released.

48. The British Government had also held the South African Government responsible for the practices of the homelands in a trade dispute with the Trust Bank of South Africa. In 1992 the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa set up by ILO to consider South Africa's labour practices had found the South African Government responsible for ensuring compliance with international labour law in the Bantustans.<sup>9</sup>

49. It was not certain that the provisions proposed by the Special Rapporteur would cover cases in which a State created a puppet entity, concealing the fact that it exercised political authority over that entity, and its internal law freed it from any responsibility for the acts of its puppet. The language of article 5 was particularly unfortunate owing to its double reference to internal law. The reference should therefore be deleted. The proposed amendments to article 8 would no doubt cover cases in which control, in particular military control, was clearly exercised, as in the case of the "TRNC". But if the State which was pulling the strings exercised only political control and if its internal law freed it from any responsibility, it was not certain that the provisions as drafted would regulate the problem of attribution of responsibility in a satisfactory manner.

50. Mr. CRAWFORD (Special Rapporteur) said that he concluded from the statements just made that the concept of "territorial governmental entities" should be retained in article 5, for no distinction was made between the acts of such entities exercising some elements of governmental power and other acts. Such entities were currently referred to in paragraph 1 of article 7 in the same terms as organs of the State were referred to in article 5. He endorsed the proposal to have those entities appear in article 5.

<sup>8</sup> See J. Charpentier and E. Germain, "Pratique française du droit international", *Annuaire français de droit international*, 1987 (Paris), vol. 33, pp. 1009-1010.

<sup>9</sup> See ILO Governing Body: *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa*, document 253/15/7 (International Labour Office, Geneva) May-June 1992.

51. If adopted, that solution would cover the case in which the State which had constituted the territorial governmental entities escaped its responsibilities. It would be noted in that connection that if a State created a territorial governmental entity which then obtained its independence and set up a new State, the new State would become responsible for its own acts. In contrast, as in the case of the Bantustans, when the entity did not acquire independence and remained a territorial governmental entity, the State which had established it remained responsible for its conduct. Thus the solution would be to insert paragraph 1 of article 7 in article 5 in order to deal with the problems flagged by Mr. Dugard and other members of the Commission.

52. Mr. KABATSI said that the Commission might well adopt Mr. Pellet's proposal and send the draft articles to the Drafting Committee, for they were based on principles broadly accepted by the greatest experts in public law. In any event, he wished to make two comments.

53. The first concerned terminology. The Special Rapporteur had said that he preferred "attribution" to "imputability", for the reasons given in paragraph 146 of his first report. The terms were in fact interchangeable, but "imputability" had already entered into the usage and was used by ICJ. "Attribution" was no doubt more suitable in some cases, especially the ones addressed in article 10.

54. His second comment related to the proposal to merge article 5 with article 6, a move recommended by the requirements of textual economy. But the topic in question was so important that the draft articles should be made as transparent as possible, and that consideration took precedence over the requirements of economy.

55. Mr. SIMMA said that the text under consideration was remarkably clear, a quality enhanced by the pertinence of the analysis contained in the commentary.

56. At the previous meeting the Commission had been unsure whether the phrase "shall be considered as an act of the State" should be retained in article 5. The language of the French version was in fact very cumbersome and should certainly be amended.

57. Article 5 raised the very important question of whether to refer to "internal law". In paragraph 163 of his first report, the Special Rapporteur placed too much emphasis on his distinction between law and practice. He explained that one reason for deleting the reference to internal law was that in many systems the status of some entities was determined not by the law but by practice or tradition. But that did not seem too problematical. On the other hand, the reasons for the retention of the reference were rather convincing. In fact, considerations of legal certainty came into play and tended to limit the scope of general references to internal law. The same tendency could be seen in the law of treaties. Article 7 of the 1969 Vienna Convention, for example, showed that international law itself provided that certain acts connected with the conclusion of treaties, if committed by certain persons, were regarded as being committed by the State. The best thing would be not to mention internal law in the

body of the article but to discuss it instead in the commentary. It was a good idea to merge the main points of article 6 with new article 5.

58. With regard to the “federal clause” in article 7, he noted that he was himself originally from a subdivision of a federal State, and he was astonished to find himself in the same boat as the inhabitants of the Bantustans mentioned by Mr. Dugard. Most speakers had rightly stressed the need to restore the reference to federal entities. But the Special Rapporteur had in fact explained in his introduction that such a reference would not be absolutely necessary since article 5 referred to “any State organ”. But federal entities might risk not being regarded as merely “organs”. Furthermore, federal entities were the only category of organ, within the meaning of article 5, having an international legal capacity, that is to say, the capacity to act on their own authority. Mr. Hafner had already given the Commission examples from the Austrian practice.

59. With regard to violations of treaties concluded by federal entities, it was not clear that the Special Rapporteur was right in thinking that it was the responsibility of the entity which was triggered and not that of the whole federal State. In Germany, for example, the Länder could conclude treaties with the consent of the central Government. The responsibility of the federal State was clearly involved. For example, in the late 1970s funds had been collected in several German universities to arm African liberation movements. Germany’s international responsibility had then been invoked on the ground of friendly relations among States. The Ministry of Foreign Affairs had replied that the Federal Government did not have the constitutional power to compel the Länder to stop the collections but that Germany would regard itself as responsible for any act or omission of its component units. One last reason for retaining the reference to federal entities in article 5 was the deletion of article 2.

60. In paragraph 188 of the report the Special Rapporteur recommended that article 7, paragraph 1, and the reference to territorial governmental entities in article 7, paragraph 2, should be deleted. He then added in the footnote to that statement that the deletion was consistent with the position taken in the 1969 Vienna Convention, and with the literature on federal States in international law. But the reason for the elimination of article 6 from the 1969 Vienna Convention, which dealt with the case of federal entities, had been connected with the historical circumstances of the time, more specifically with the relations between the Province of Quebec and Canada. Was it still necessary to defer to events which had taken place more than 30 years ago? The literature on federal States mentioned by the Special Rapporteur dealt not with the case of territorial governmental entities but rather with the capacity to conclude treaties invested in federal entities.

61. The new wording proposed by the Special Rapporteur for article 8, subparagraph (a), in paragraph 284 of the first report, circumscribed more closely the person or group of persons in question. Several speakers had already noted that that wording, which was perhaps too restrictive, might leave some situations outside the scope of the draft articles. They were certainly disregarding a

number of additional considerations. First of all, there was the language of proposed new article 15 *bis* (Conduct of persons not acting on behalf of the State which is subsequently adopted or acknowledged by that State) which was designed to cover some of those situations. Then there was the fact that the text in question spoke only of “attribution”; in other words, if the acts of groups or entities were regarded as acts of the State pursuant to article 8, subparagraph (a), there would be a legal void into which some concrete situations might disappear.

62. Mr. ROSENSTOCK said that he too was ready to send the draft articles to the Drafting Committee and that he was totally in agreement with the Special Rapporteur’s recommendations. Those who had raised some doubts about the Special Rapporteur’s work on draft article 5 were not in disagreement with him on the substance. Since no objection had been raised to article 4, which defined the nature of the act in question, it would be odd to create a legal loophole by defining the identity of the authors of that act too loosely.

63. The importance of the determinative function of international law, from the standpoint both of the act and of its author, had been amply demonstrated in the cases cited in paragraph (6) of the commentary to article 4 adopted on first reading.<sup>10</sup> It was the text of article 5 itself which was somewhat unfortunate in that it unintentionally gave the impression that if the internal law of a State did not provide explicitly that its constituent entities were organs of the State, their acts were not attributable to the State. The solution was not then to rely on article 7 for a correct interpretation of article 5. The importance of clarity on that point had been highlighted by the arguments presented in the arbitration between Texaco Overseas Petroleum Company and California Asiatic Oil Company and the Government of the Libyan Arab Republic<sup>11</sup> and in the anonymous example given by the Special Rapporteur (2553rd meeting).

64. The Special Rapporteur’s proposal to regroup articles 5 and 6 and paragraph 1 of article 7 was both clear and economical. The Drafting Committee would be hard put to improve on it, but it would be difficult to incorporate the question of “internal law” in the proposed new article 5 without resorting again to the earlier ambiguous language or without mentioning considerations which would be better placed in the commentary. Territorial governmental entities should not be mentioned in article 10. They could be mentioned in article 5 without too much risk, provided that their inclusion did not further complicate that article to the point of blurring its clarity and laying it open to mistaken interpretations.

65. Mr. LUKASHUK drew attention to the positive aspects of the draft articles: on the one hand, they gave concrete expression to the principle of State responsibility and, on the other hand, they embodied the principle of the difference between the State and its component units. Since those two important principles were the cornerstone of the text, the Special Rapporteur should reconsider a

<sup>10</sup> See 2553rd meeting, footnote 9.

<sup>11</sup> *Ibid.*, footnote 11.

passage of the commentary which did not seem to do them justice. In paragraph 154 (a) he stated that a State was only responsible if the conduct in question was attributable to it and involved a breach of an international obligation owed by the State to persons or entities injured thereby. But responsibility in international law concerned the relations between States; the subjects of international law were States and not physical or moral persons. The violation of the rights of physical persons by an organ of the State, for example, the rights guaranteed by the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights came within the jurisdiction of that State and not an inter-State jurisdiction.

66. With regard to article 5, he was glad that the Special Rapporteur had used, in paragraph 157, the phrase “may exercise international functions”. There were of course cases in which political parties or religious organizations were not organs of the State but still exercised functions of authority, sometimes very important ones. It was therefore impossible to endorse the arguments of those speakers who had asserted that only internal law could determine an organ’s status. Such arguments were contradicted by the 1969 Vienna Convention, as Mr. Simma had just explained.

67. The last phrase of article 5, which states “provided that organ was acting in that capacity in the case in question”, could be deleted because it addressed a rare case, the situation created was perfectly clear, and the text would thus be shorter.

68. Turning to article 7, he said that he had doubts about the responsibility of the component units of a federal State. To disregard the specific elements of a federation would be an unjustifiable error and would cause great complications, as the Special Rapporteur indicated in his comments. The solution might be to insert in article 7 itself a clause incorporating the substance of paragraph 188 of the first report, to read: “exceptional cases where component units in a federal State exercise some limited international competencies, for example, for the purposes of concluding treaties on local issues”. That provision might be further expanded to cover regions and not just federal States. Regions had a transboundary dimension, and it would be necessary sooner or later to address their situation.

69. Article 8, subparagraph (b), seemed too vague, as the Special Rapporteur himself acknowledged. It should be drafted in more specific terms in order to provide a better definition of the cases which it covered.

70. He too thought that draft articles 5 to 8 and 10 should be sent to the Drafting Committee.

*The meeting rose at 1 p.m.*

## 2555th MEETING

*Tuesday, 4 August 1998, at 12.10 p.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

State responsibility<sup>1</sup> (*continued*) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>2</sup> A/CN.4/490 and Add.1-7,<sup>3</sup> A/CN.4/L.565, A/CN.4/L.569)

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 5 TO 8 AND 10 (*concluded*)

1. Mr. ECONOMIDES said that he was generally in agreement with the new wording of article 5 (Attribution to the State of the conduct of its organs) proposed in paragraph 284 of the first report of the Special Rapporteur on State responsibility (A/CN.4/490 and Add.1-7) and welcomed in particular the deletion of the provision “having that status under the internal law of that State”, for two reasons. The first was that in most cases, the words mostly were redundant, for “organ of the State” meant all the organs of the State which had that status under internal law. Secondly, in a few exceptional cases the provision could be too restrictive. It was possible, for example, that some organs of the State might not have that official status under internal law. Furthermore, Mr. Dugard had cited the different example of the puppet states which had existed in South Africa under the apartheid regime and the puppet state which Turkey had created in northern Cyprus after having invaded and occupied that country in violation of international law. In the *Loizidou v. Turkey* case the European Court of Human Rights had found that it was Turkey, and not its puppet state, which had been responsible for the violations of Mrs. Loizidou’s rights under the European Convention on Human Rights.

<sup>1</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>2</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>3</sup> *Ibid.*

2. The words “be considered” should also be deleted, as Mr. Pambou-Tchivounda had proposed (2553rd meeting). The last phrase of new article 5, beginning with the words “and whatever the position”, which were purely descriptive, might not be really necessary. But if it was decided to retain that language for the purposes of illustration, it should be supplemented by the insertion of a reference, after the function and position of the organ, to its nature, that is to say, whether it was a central organ or an organ of a territorial governmental entity. It would also be better for the draft articles to give a definition of the term “State”, either in article 5 or elsewhere. It should be made clear, for example, that “State” meant any State under international law, whatever its structure or organization—unitary, federal, and so on. Draft articles on State responsibility must in fact define the concept of State, even if only in very general terms.

3. He had some doubts about the new wording of article 8 (Attribution to the State of conduct in fact carried out on its instructions or under its direction and control) proposed in paragraph 284 of the first report, which seemed more restrictive than the former language and reduced the scope of a State’s responsibility for unlawful acts. The article stated two restrictive criteria—that instructions must have been given or that direction and control must have been exercised; and the latter two elements were moreover presented as cumulative. Such a provision would allow a State which recruited, financed, trained and owned their regular troops to commit unlawful acts, without giving the troops express instructions and without exercising true control over them, to escape its international responsibility. That issue warranted attention. Moreover, the wording of article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State) as adopted on first reading had been more clearly in the progressive development vein.

4. The beginning of article 8, that is to say, the introductory sentence and subparagraph (a), were poorly drafted, at least in French, and they should be reworked as follows: “The conduct of a person or group of persons acting on the instructions or under the direction and control of that State is an act of that State.” Lastly, subparagraph (b), which addressed an extremely specific situation, should be dealt with in a separate provision.

5. Mr. YAMADA said that the part of the Special Rapporteur’s excellent first report, on chapter II of part one of the draft (The “act of the State” under international law) and the proposed draft articles, prompted no opposition on his part, but he did wish to make two points. The first concerned the reference to “internal law” in article 5. He agreed with the Special Rapporteur’s proposal to delete the reference and with his reasons for doing so. At the same time, to say that the question of knowing whether an organ was or was not an organ of the State was governed by international law was a rather abstract proposition. The domestic organization of the structure of the State had a decisive role, even a conclusive one in some cases, in determining an organ’s status. If in a particular State an entity had not been accorded for all practicable purposes the status of an organ of the State, either by domestic organizational law or by other laws, including those conferring on State employees the status of public servant, or by the practice, and if the State had no intention in its

treatment of the entity to escape its responsibility, then the act of such an entity could not be attributed to the State. He hoped that the Special Rapporteur would provide a full and detailed commentary on the role of the bona fide domestic organization of the State’s structure.

6. Secondly, there was perhaps an overlap between the provisions of article 7 (Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority), paragraph 2, and article 8. Was there a clear difference between the entities referred to in article 7 and the persons or groups of persons referred to in article 8? The Special Rapporteur had called the Commission’s attention to the recent trend for privatization of State functions. That question must be adequately addressed in the Drafting Committee. There was in fact a rapid and large-scale transition to smaller government throughout the world. That transition could be effected by various modalities. On the one hand, the State could maintain a monopoly of its functions but delegate them to public agencies or even to private entities. On the other hand, the State might abandon its particular functions entirely to the private sector. Between those two extremes the State might retain an organ to exercise a particular function and at the same time invite the private sector to participate in that same function, in order to improve efficiency by means of competition. In the latter two cases, the acts of non-State entities should not be attributed to the State. The draft articles must be amended to take account of that development.

7. Mr. PELLET said that he did not understand Mr. Yamada’s position on the first point. Without a reference to the internal organization of the State as each State determined it in its sovereign freedom, article 7 became virtually useless. Article 7 was necessary precisely because the State was organized in one way or another and divided the governmental authority between itself as a legal person and other entities to which it accorded legal personality pursuant to its internal laws. Mr. Yamada’s explanation was no more convincing than the explanation given by the Special Rapporteur, which it followed. The existence of two separate articles, article 5 on the State and its organs and article 7 on the other entities authorized to exercise elements of the governmental authority, was justified only because internal law was taken into consideration. As he had already said, he deeply regretted the deletion of the reference to internal law in article 5 proposed in paragraph 284 of the first report. What was at issue was the State’s legal personality, which only internal law could define.

8. Mr. CRAWFORD (Special Rapporteur) said that the existence of legal personality under internal law was not decisive. There were many States in which most of the ministries, if not all indeed, had separate legal personality under internal law. That was true, for example, of many ministries of oil and gas, and equally true of the Trade and Industry Ministry of the United Kingdom of Great Britain and Northern Ireland. Yet those entities were organs of the State. It was thus simply wrong to identify the State with a single legal entity under internal law.

9. Of course, as Mr. Yamada had said, international law did not have an independent concept of what the State ought to be. On the other hand, international law regarded

the “label” which a State affixed to an entity as decisive. Many States did not in fact use the terminology, including the word “organ”, of article 5. If an international jurisdiction found in a given case that, pursuant to the constitution and laws of the State in question, an entity had acted in the capacity of an organ of the State, that is to say, as a component unit of its internal structure, the question was settled. But there were more complicated cases, such as that of the police in the United Kingdom. The mere existence of legal personality was not decisive, and many factors had to be taken into consideration. He was not absolutely against a reference to internal law as an important criterion in article 5, but he could not accept a provision which would render decisive the fact that under internal law a State defined an entity as not being an organ of the State.

10. Mr. BENNOUNA said that the disagreement between the supporters and opponents of a reference to internal law should not become a question of principle. The Commission must demonstrate pragmatism and legal realism. Neither side denied that internal law played an extremely important role in attribution or that every State had the right—it was a question of the internal aspect of the right of peoples to self-determination—to organize itself as it saw fit. Nor was it disputed that a State could not rely on its internal law to escape its responsibility, but the internal law of a State could be relied upon to establish its international responsibility. The conclusion must be that there was a continuum between internal law and international law in that connection.

11. Mr. PELLET said that it was indeed a question of principle, namely the principle of the freedom of every State to organize itself as it saw fit. Of course, care must be taken to ensure that the practical considerations mentioned by the Special Rapporteur were taken into account, but that was in fact done in article 4 (Characterization of an act of a State as internationally wrongful), according to which a State could not shelter behind its internal law in order to escape its responsibility. The Special Rapporteur’s argument that the functions stemming from the exercise of elements of the governmental authority were distributed differently in different States had its answer in article 7, where it was made clear that, regardless of that distribution, the entity in question could trigger the State’s responsibility. The Special Rapporteur had said that he was not against a reference to internal law if it was accompanied by a reference to international law, but what form would such a solution take? The reference to internal law in the draft articles proposed by the former Special Rapporteur, Mr. Roberto Ago,<sup>4</sup> was reasonable.

12. Mr. CRAWFORD (Special Rapporteur) said that there was a crucial difference between article 7, paragraph 2, and article 5. Article 5 provided that the conduct of an organ of the State was attributable to that State in all cases in which the organ acted in that capacity, whereas article 7 provided that the only acts attributable to the State were those resulting from the exercise of elements of the governmental authority. The question arose in many international arbitrations of whether the acts in question were *acta jure imperii* or *acta jure gestionis*.

Such a question could not arise in the context of article 5. Article 7 was necessary because of the number of entities which were not organs of the State but exercised State functions, for example, private airlines which exercised functions in connection with immigration. Internal law was certainly the most important factor but it was not the only one, and sometimes even the practice could be more relevant than the texts. In any event, he was convinced that the Drafting Committee would be able to produce language which would comfort the advocates of a reference to internal law in article 5.

13. Mr. ROSENSTOCK said that nobody was denying that the State was free to organize itself as it wished, but he could not see the logic according to which that freedom would have a decisive influence on the international responsibility of the State for the act of one of its entities.

14. Mr. HAFNER said that excessive importance should not be attached to the separate legal personality of an entity in order to justify saying that it was not an organ of the State. The word “organ” was not in fact used in the Austrian Constitution, but the Austrian Parliament, for example, was indeed regarded as an organ of the State. Accordingly, the fact that an entity had a separate legal personality from that of the State was not decisive. He would like to know whether the Special Rapporteur thought that a central bank would fall within the scope of article 5 or of article 7.

15. Mr. CRAWFORD (Special Rapporteur) said that he endorsed Mr. Hafner’s comments on the role of legal personality in attribution and on the term “organ”. There could not be a general rule for central banks. Some such banks enjoyed so much independence that they would fall within the scope of article 7, paragraph 2, while others were so closely connected to and controlled by the State that they would come under article 5. But it must be made clear that the fact that a State declared that its central bank was independent, when it was not, could not be decisive for the purposes of article 5.

16. Mr. LUKASHUK said that, in view of the principle embodied in article 4, the issue in article 5 was not about the provisions of internal law but about the function of the entity in question, irrespective of the law. If some members wanted internal law to be mentioned in article 5, it was easy to do so, perfectly logically, by adding at the end of the article the words “under internal law”.

17. Mr. ILLUECA outlined the genesis of the draft articles under the aegis of the former Special Rapporteur, Mr. Roberto Ago, and pointed out that in paragraph 146 of his first report, the current Special Rapporteur stated that when first proposing the group of articles the former Special Rapporteur had used the term “imputability” and that the same term had been used by ICJ in later cases. “Imputability” had currently been replaced by “attribution”. In view of the reasons advanced, following the former Special Rapporteur,<sup>5</sup> for using “imputability” and of the term’s use by the Court, the Commission should perhaps think seriously about the question and examine the possibility of reverting to “imputability”, which was much better, in Spanish at least.

<sup>4</sup> See *Yearbook . . . 1971*, vol. II (Part One), pp. 214 et seq., document A/CN.4/246 and Add.1-3.

<sup>5</sup> See 2553rd meeting, footnote 4.

18. The reference to internal law should be retained in article 5. Contrary to what some members seemed to fear, in particular the Special Rapporteur, such a reference would not invest internal law with absolute, exclusive or overwhelming importance. The reference to internal law did not prevent the responsibility of a State coming into play when there was a violation of international law, even if the provisions of its internal law conflicted with the international law. The principle was in fact embodied, for treaty purposes, in article 27 of the 1969 Vienna Convention.

19. During the debate some members had manifested a certain coolness towards or even mistrust of States in connection with the way in which they described the entities which exercised their powers. Such mistrust was unjustified, and the choices made by States in that area deserved the greatest respect. The problem was no doubt one of drafting, and it was certainly possible to reconcile the different positions. The positions of Mr. Pellet and Mr. Hafner were both logical and legally well-founded; they should therefore be taken into account by the Drafting Committee. It should also give serious consideration to the proposal by France, in the comments and observations received from Governments on State responsibility (A/CN.4/488 and Add.1-3), referred to in paragraph 159 of the first report, to replace the vague term “organ of the State” by “any State organ or agent” both in article 5 and in articles 6, 7, 9, 10, 12 and 13.

20. Mr. HAFNER asked the Special Rapporteur what criteria would be used to define an organ of the State in article 5 if the reference to internal law was deleted. It would be useful to mention in the commentary the criteria for defining what an organ of the State was, especially as article 7 referred to “an entity which is not part of the formal structure of the State”. An explanation of that point should be given in the commentary.

21. Mr. CRAWFORD (Special Rapporteur) said that he acknowledged the need to define what an organ of the State was, especially as most States did not use the term “organ”. Many factors must be taken into consideration in that connection, including the structure of the organ, its responsibility vis-à-vis the central Government, and whether its employees had the status of public servants. It would also be necessary to examine what the courts had decided in the similar context of State immunity, where distinctions had had to be made between the State and its various entities. He had certainly never said that internal law was not relevant, only that the State could not redefine itself in order to enjoy immunity before the courts of other States by recourse to a legal provision stating that a certain entity was not an organ of the State. Such a provision was relevant but could not be decisive.

22. Mr. GALICKI said that it had become essential to define what an organ of the State was, and that it was impossible to disregard internal law in that connection. Article 5 used the term “organ of the State”, and the members of the Commission were in agreement that international law did not define “organ”. Nor did the term appear in the legislation of all States, a fact which might create problems. Article 7 referred to “an entity which is not part of the formal structure of the State”. It might therefore be possible to replace “any State organ” in article 5 with

“any entity which is part of the formal structure of the State”. That language covered both the organs and the agents of the State and it might even satisfy the advocates of the retention of a reference to internal law in article 5. The use of the same language would establish a clear distinction between the entities referred to in article 5 and those referred to in article 7. However, if the Commission decided to retain the current wording of article 5, it should be borne in mind that the concept of organ of the State had its origins in internal law and that every State was free to decide which of its organs should be regarded as organs of the State. The differences between internal legislations in that regard certainly created difficulties, but States could not be deprived of their sovereign right to decide what was part of the formal structure of the State and what was excluded therefrom.

23. Mr. MIKULKA said that he was not sure that Mr. Galicki’s proposal was valid. An entity was a fiction: although the term could be applied to territorial governmental entities, it could not designate either the Government or the Parliament of a State. In any event, that was not the usual meaning of the term. It would therefore be a mistake to transfer the idea of entity from article 7 to article 5. As it stood, the Special Rapporteur’s article 5 appeared adequate, but he would nevertheless like to know what the Special Rapporteur thought about Mr. Lukashuk’s proposal. The adoption of that proposal might perhaps satisfy the members who wished to retain a reference to internal law but avoid attaching too much weight to it, as the Special Rapporteur wished.

24. Mr. ROSENSTOCK said that, as far as the scope of the application of articles 5 and 7 was concerned, an overlap would be unimportant but a void would constitute a serious problem.

25. Mr. CRAWFORD (Special Rapporteur) said that he had himself thought about the solution proposed by Mr. Lukashuk, for he understood the doubts of some members of the Commission, even if he thought them unjustified. As he had already explained several times, he had never claimed that internal law was not important or that it should be disregarded. To some extent he shared Mr. Galicki’s position, but thought that it would be useful to preserve the existing terminological distinctions between the two articles. Mr. Lukashuk’s proposal might be considered in the Drafting Committee and it might provide comfort for some members. In reply to Mr. Pellet, who thought that the question was one of principle, he pointed out that the definition of the State, including its various organs, for the purposes of State immunities had never given rise to any problems, and nobody had thought it necessary at the time to say that internal law should determine the meaning of terms in international conventions.

26. He drew the Commission’s attention to the opinion which he had stated in paragraph 284 of the first report concerning article 5, namely that the term “any State organ”, in the context of article 5, avoided the question of whether the organ exercised elements of governmental authority within the meaning of article 7, paragraph 2. The only question was whether an organ of the State was acting in that capacity. Organs of the State performed many acts whose status for the purposes of immunity or other purposes—*acta jure gestionis*—was not relevant for

the purposes of attribution. It was possible, for example, to conclude commercial contracts which committed the State, and if they had been concluded with an entity subject to United Nations sanctions, there would be a violation of the international obligations of the State concerned. Only two questions arose with respect to article 3 (Elements of an internationally wrongful act of a State). First, was the conduct attributable to the State? If it was the conduct of an organ of the State, the answer was yes. Secondly, did the conduct constitute a violation of the international obligations of the State?

27. Mr. HE said that he was happy with the structure of part one, chapter II, and the proposals contained therein. The new chapter II and its articles constituted a considerable improvement over the text considered on first reading. However, he was not sure that all the elements relating to the act of the State had been included in the proposed text. As several members had stressed, the concept of organ and agent of the State had changed considerably. The new article 7 (Attribution to the State of the conduct of separate entities empowered to exercise elements of the governmental authority), proposed in paragraph 284 of the first report, dealt with entities which were not part of the formal structure of the State but were empowered by the internal law of the State to exercise elements of governmental authority. However, entities which were not empowered by internal law to exercise such powers could carry on activities on the instructions of the State or under its direction and control. Did such entities fall within the definition given in article 7, paragraph 2, or within the category of the groups of persons addressed in article 8? As currently drafted, articles 7 and 8 were not clear on that point. He supported the Special Rapporteur's position on use of the term "attribution", for the reasons given in the first report, without prejudice to the use of "imputability" in other contexts, following the example of ICJ. He would like the draft articles to be sent to the Drafting Committee as quickly as possible.

28. Mr. AL-KHASAWNEH said that he was not entirely convinced of the need to delete the reference to internal law, for the reasons given by Mr. Hafner and for three other reasons. First, to draft a provision on the basis of the principle that the State was going to try to escape its responsibility by omitting expressly to specify in its internal law the organs whose conduct could be attributed to the State meant a presumption of bad faith on the part of the State; that contradicted the fundamental principle that good faith must be assumed at the outset. Secondly, the problems which might be caused by a reference to internal law could be solved by adopting a broad definition of law in the commentary. Lastly, a State's responsibility could still be triggered by its subsequent attitude to the conduct in question: whether it approved that conduct, displayed due diligence, and so on. The other changes to article 5 were acceptable, including the incorporation of article 6.

29. The new wording of article 7 constituted an improvement on the earlier language. The retention of the provision "provided the entity was acting in that capacity in the case in question", which had been deleted from article 5, was justified by the fact that the article was addressing entities which, in normal situations, did not act on behalf of the State. However, the provision would be

clearer if it read "provided that it is established that, in the case in question"; it might also be useful to expand the scope of the rule to cover not only the fact of having acted in that capacity in the case in question but also in similar cases. The wording of article 8 made it even less necessary to delete the reference to internal law in article 5.

30. Mr. FERRARI BRAVO said that, whatever the fate of the reference to internal law in article 5, it would still be present in the sense that the term "acting in that capacity", could refer only to internal law, even if it was developed by international law. The earlier wording was therefore preferable. But article 5 gave rise to a more important problem, one connected with the deletion of the provision "provided that organ was acting in that capacity in the case in question". The Special Rapporteur had replaced it with "whether the organ exercises constituent, legislative, executive, judicial, or any other functions", but the interrelationship between those two clauses remained to be clarified by the Drafting Committee. The Drafting Committee would also have to study articles 5 and 7 in conjunction with each other because, depending on the structure of the State in question, the same situation could come under either article 5 or article 7. It was odd that in article 8 the Special Rapporteur did not go as far as his predecessor. The language which he used instead of "acting on behalf of the State" reduced the scope of the responsibility and complicated the attribution of the conduct to the State.

31. Mr. GOCO said that in many countries with written constitutions, the constitution and administrative law determined all the organs and other entities authorized to exercise elements of the governmental authority. Those elements of authority could include "constituent" functions, which were essential and reserved for the State, or "administrative" functions, which the State could entrust to the private sector. The Special Rapporteur's proposed language—"whether the organ exercises constituent, legislative, executive, judicial or any other functions" therefore seemed restrictive and redundant as long as the meaning of "organ" was clear. It would also be useful to differentiate article 5 from article 7 by means of the criterion of forming part of the formal structure of the State.

32. With regard to the choice between "attribution" and "imputability", it was necessary to establish that the conduct in question was ultimately the conduct of individuals or groups of individuals acting within the general framework of the Government. Perhaps it would be better to speak about the conduct of the Government and not of the State. The problems raised by privatization could be solved by applying the criterion of governmental intervention or links with governmental activities.

33. Mr. CRAWFORD (Special Rapporteur) said that there seemed to be a general agreement on the new title of chapter II and on the merging of articles 5 and 6. Some members even thought that the content of article 6 would be better placed in the commentary, but two points of clarification contained in article 6 ought to be retained in article 5, in one form or another, since they made the purpose and scope of that article clearer. The phrase "acting in that capacity" was also needed in article 5 in order to underline the difference between article 5 and article 7, that is to say, that the attribution of the conduct to the

State was the rule in the case of organs of the State but the exception in the case of entities which were not part of the formal structure of the State.

34. The several statements on the very complicated question of the relationship with internal law pointed to a fear, totally unjustified, of excluding all reference to internal law. The concepts of capacity, organ, function, and organization of the State all depended on the law, but also on the practice, and "the law" was not understood by everyone to include the practice. It was even possible that "organ" might have a specific meaning in international law. It was largely by means of an analysis of the structure of the State that the shape of the concept of "organ" could be determined. Mr. Lukashuk's proposal might perhaps solve the problem. In any event, his own proposal was a response to the very clear concern of several Governments to prevent the definition of the entity in question in internal law from being used to escape a responsibility which would normally be attributed to the State.

35. With regard to the deletion of paragraph 1 of article 7, the elimination of any mention of territorial governmental entities might in fact lead to mistaken interpretations, but the problem could perhaps be solved by transferring the reference to article 5. Its retention in article 7 would only create countless overlaps between the two articles. The reference to internal law in paragraph 2 of article 7 should be retained owing to the exceptional nature of the situations addressed, which was flagged earlier in the article, and all the situations in which a non-State entity was not authorized by internal law would then come under article 8.

36. Article 8 contained two provisions which were in fact rather distinct but not so distinct as to require two separate articles. The reformulation of the French version of the introductory part of the article by Mr. Economides was undoubtedly an improvement. It had never been his intention in subparagraph (a) to reduce the scope of the article by replacing "on behalf of" by "on the instructions or under the direction and control of". The latter formulation might indeed appear very broad but it was also vague, in what was an important article. Clarification was required in that connection, especially since the former Special Rapporteur, Mr. Ago, the author of the initial version of article 8, had subsequently explained the article in an obviously too restrictive sense. He had himself therefore tried to restore the true scope of article 8 in the light of the statements in which the former Special Rapporteur restricted the scope of the term "on behalf of" exclusively to cases in which express instructions had been given.<sup>6</sup> No member of the Commission had proposed such a restriction, but the Drafting Committee should see to it that the scope of article 8 did not become too broad either, for the omnipresence of the State meant that, in extreme situations and by natural causality, anything could be attributed to it. In their broadest meaning, the terms "on behalf of" or "under the control of" might extend the scope of article 8 to include conduct which should not be attributed to the State—any conduct of a public enterprise for example. His proposed language was designed to exclude that natural causality and to indicate as clearly as possible where the outer limit was located.

<sup>6</sup> See *Yearbook* . . . 1971 (footnote 4 above), pp. 262-267.

37. Article 8, subparagraph (b), addressed a very specific situation but one for which some case law did exist and which must therefore be covered by the draft articles. However, the title of article 8 really covered only subparagraph (a), and it might therefore have to be amended. Lastly, the principle stated in article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity) was accepted by everyone, and the debate had not thrown up anything which could not be solved by the Drafting Committee.

38. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer articles 5, 7, 8 and 10 to the Drafting Committee.

*It was so agreed.*

#### ARTICLES 9 AND 11 TO 15 *BIS*

39. Mr. CRAWFORD (Special Rapporteur), introducing articles 9 and 11 to 15 *bis* of part one, chapter II, of the draft articles, contained in chapter II, section C, of his first report, said that the main articles on attribution, the consideration of which the Commission had just concluded, were supplemented in chapter II by articles on sometimes very specific problems, some of which took the form of negative provisions. The articles did not say that certain conduct was not attributable to the State as an exception to the main articles but that the conduct was not attributable to the State unless it could be so attributed pursuant to the draft articles. It was obvious that such an approach was logically invalid: article 3 provided that State responsibility came into force only if the conduct was attributable to the State; subsequent articles provided that certain conduct was attributable to the State; and then came further articles providing that other conduct was not attributable to the State unless it could be so attributed pursuant to the draft articles. Those latter articles might have some explanatory value but they were logically invalid. However, some of them, in particular article 13 (Conduct of organs of an international organization), addressed very serious problems. They were perhaps unnecessary as articles but some of their elements were necessary or raised important questions. Draft articles 9 and 11 to 15 *bis* addressed four different problems: the problem of the organs of the State acting on behalf of another State (arts. 9 and 12); the problem of international organizations acting on behalf of States (arts. 9 and 13); the problem of insurrectional movements (arts. 14 and 15); and the problem raised by articles 11 and 15 *bis*, which did not fall into any category.

40. It was difficult to offer definitive solutions to the problems addressed in articles 9 (Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization) and 12 (Conduct of organs of another State), because they would have to be revisited under chapter IV (Implication of a State in the internationally wrongful act of another State) and because articles 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act) and 28 (Responsibility of a State for an internationally wrongful act of another State) did not exhaust the question of joint action by States. The comments received so far showed that States would not object if the Commission

considered the problem of joint action in greater detail than in the draft articles, and he intended to do so in his next report. The conclusions reached by the Commission on article 9 following the forthcoming debate would therefore be only provisional.

41. However that might be, it often happened that States acted on behalf of other States and that questions of attribution then arose. That was the situation addressed by article 9, which dealt with the conduct of organs placed at the disposal of a State by another State. Except in the case covered by article 9, the fact that an organ was acting in the territory of another State did not mean that its conduct could be attributed to that other State; that point was made in article 12.

42. It frequently happened that States placed their organs at the disposal of other States for the exercise of various functions. A number of very interesting examples of such situations were given in his first report: one classical example, far from unique, in paragraph 220, was that of the United Kingdom Privy Council, which had acted as the final court of appeal for a number of independent States within the Commonwealth. It was clear in such cases that the appeal court in question was acting as a jurisdiction of last resort of the State in which the appeal had been lodged, and that any problem which might be caused by its decisions was therefore attributable to that State. Another example was that of the Auditor-General of New Zealand<sup>7</sup> who had acted as auditor in another State in accordance with its Constitution and was thus acting in the capacity of auditor of that State with all the consequences of such action (para. 227).

43. The commentary to article 9<sup>8</sup> stressed that the concept of “placed at the disposal of” must be given a restrictive interpretation, and that was an important point. For example, the European Court of Human Rights had found that Swiss customs and police officers exercising their functions in Liechtenstein had not been placed at the disposal of Liechtenstein for the purposes of responsibility, for they were exercising, with the agreement of Liechtenstein of course, elements of Swiss governmental authority (para. 224).<sup>9</sup> Although that was a very specific case, article 9 did seem useful and, insofar as it concerned States, he recommended its retention.

44. Turning to article 12, he said that it was odd that the commentary<sup>10</sup> did not analyse the *Corfu Channel* case, which was indeed the *locus classicus* of a State acting in the territory of another State. ICJ had made it very clear in that case that the fact that conduct had occurred in the territory of a State was not sufficient for attributing it to that State. Nevertheless, under article 12, the fact that the conduct had taken place in the territory of the State was not legally relevant: it did not reverse the burden of proof and did not *ipso facto* bar attribution, not that anybody

had ever suggested that it should. Why then should that factor be singled out? Paragraph 1 of article 12 could of course be explained in the commentary, but the article did not seem to have any use, and it also created the problem of implying that the fact that a State was acting in the territory of another State with its consent was not legally relevant—which was not accurate. That fact was not legally sufficient, but that was another matter. Many factors were legally relevant but not legally sufficient, but there was no reason for addressing them in draft articles. They could be dealt with in the commentary. For those reasons he proposed that article 12 should be deleted and that the situation which it addressed should be dealt with in the commentary to article 9 or, which was perhaps preferable, in the context of joint action by States in chapter IV.

45. The second problem requiring solution concerned international organizations. Article 9 addressed the case in which organs were placed at the disposal of a State by an international organization, and article 13 contained another negative-attribution clause on international organizations acting in the territory of a State. Several difficulties arose in that connection. First, while it was easy to find convincing cases in which organs of the State had been placed at the disposal of other States in accordance with article 9, it was very difficult to find similar examples relating to organs of international organizations. There were of course one or two examples which might be discussed, but no patent case was known. Moreover, the United Nations prohibited its organs from engaging in that type of practice, as did the European Union. Thus, the first difficulty with article 9 was that it addressed a situation of which there were no examples.

46. A second difficulty appeared in article 13. While the acts of a State in the territory of another State were legally significant and relevant but not sufficient for the purposes of attribution, as the decision in the *Corfu Channel* case had confirmed, the fact that an international organization carried on activities in the territory of a State was not legally relevant. International organizations had no territory but they must of course operate somewhere. It could not be asserted, for example, that since the United Nations had its Headquarters in the United States of America its conduct was attributable *prima facie* to the United States. An international organization must by definition be relatively independent of the host State. It was therefore peculiar to assert that its conduct in any given territory was a ground for attribution.

47. The proposition contained in article 13 was therefore rather problematical from that standpoint. And there was a third difficulty: since the adoption of the draft articles, major questions of principle had emerged with respect to the responsibility of States for acts of international organizations—either joint action by States within the framework of international organizations, or decisions taken by States in international organizations proposing or adopting projects which were or were deemed to be damaging to other States, or the specific responsibility of the members for the acts or debts of an international organization.

48. That fundamental issue of the law of international organizations must be examined. The work which had produced the language of article 9 with respect to interna-

<sup>7</sup> *Controller and Auditor-General v. Davison*, New Zealand, Court of Appeal, Judgment of 16 February 1996, *International Law Reports* (Cambridge, 1997), vol. 104, pp. 526 et seq.

<sup>8</sup> See 2553rd meeting, footnote 9.

<sup>9</sup> Council of Europe, Applications Nos. 7289/75 and 7349/76, *X and Y v. Switzerland*, decision of 14 July 1977, *Yearbook of the European Convention on Human Rights*, 1977, vol. 20 (The Hague, Martinus Nijhoff, 1978), pp. 372-413.

<sup>10</sup> See 2554th meeting, footnote 5.

tional organizations and of article 13 was certainly praiseworthy but poorly managed. Article 9 was adequate for organs of the State but not for international organizations, since it complicated rather than simplified things. On a provisional basis, therefore, it was necessary to delete the reference to international organizations in article 9 and to delete article 13. In order to avoid any misunderstanding, it would be necessary to insert an express reservation based on article 73 of the 1969 Vienna Convention. He intended to insert in the general saving clause of the draft articles a reservation which would read:

“These draft articles are without prejudice to any question which may arise with respect to the responsibility under international law of an international organization or of a State for the conduct of an international organization.”

That would make it possible to consider the issue in the context of the law of international relations, where it rather seemed to belong.

49. The third problem was connected with the question of the conduct of organs of an insurrectional movement. The draft articles had tried to solve it as in the preceding cases by devoting two articles to it. It was odd that the authors of the draft articles had spent more time on those secondary problems than on the principal problems posed by attribution which the Commission had already begun to consider. Article 14 (Conduct of organs of an insurrectional movement) contained a negative-attribution clause on insurrectional movements, characterizing the responsibilities of such movements and of States in the terms of other articles in the same chapter. In contrast, articles 9 and 15 (Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State) contained the only positive-attribution clauses in the whole series of articles under consideration.

50. Article 15 dealt first of all with the acts of an insurrectional movement which became the new Government of a State (for example, the case of a civil war resulting in a change of government). Paragraph 2 dealt with insurrectional movements whose acts led to the creation of a new State. It created a rule which did not fit well in the classical framework of international law but seemed well-established, that is to say, that the conduct of organs of an insurrectional movement which became the Government of a new State was attributable to the new State, a situation which introduced an element of retroactivity. There was, for example, the case of the conduct of Poland's National Committee during the period preceding the recognition of the new Polish State in 1919. The basic assumption of the clause on insurrectional movements was that a State was not responsible for the acts of insurrectional movements committed outside the fundamental elements of authority addressed in articles 5, 7 and 8 and the special cases addressed in article 15. Those articles had been criticized in the subsequent doctrine on insurrectional movements on the ground that they did not make a distinction between national liberation movements and internal insurrectional movements having no legal status or only a very limited one under international law, for the purposes of application of certain provisions of the law of armed conflicts, for example. No matter how well-founded such criticism might be, it disregarded the dis-

inction which had to be made between attribution and violation of obligation. It was obvious that an insurrectional movement was different from a liberation movement under international law for specific purposes.

51. The very famous paragraph 4 of article 1 of Protocol I to the Geneva Conventions of 12 August 1949, which had given rise to much controversy, drew a distinction between liberation movements and insurrectional movements falling within the scope of Protocol II. Questions had to be asked about the obligations which such movements must fulfil and the rules which they must apply, but that had nothing to do with attribution. The Commission must concern itself exclusively with attribution to a State and not with the attribution of conduct to the movements in question.

52. Notwithstanding the relevance of that criticism, which should be discussed in detail in the commentary, it was still necessary to deal with the case of insurrectional movements on the basis of the important arbitration case law on their responsibilities. Since there had been no objection on the part of Governments, he proposed to combine articles 14 and 15 into a single negative-attribution article, the text of which was reproduced in paragraph 284 of his first report, in order to preserve the substance of the two articles but in a more condensed form.

53. As stated in the commentary to articles 14 and 15, a State was not generally responsible for the acts of insurrectional movements. The new article could reasonably be included among the negative-attribution articles by providing for two exceptions to the negative clause. That amounted to saying that the conduct of an organ of an insurrectional movement established in opposition to a State or its Government was not regarded as an act of that State under international law unless the insurrectional movement became the new Government of that State (an aspect substantially covered in article 15, paragraph 1) or unless the conduct was regarded as an act of that State pursuant to other articles (a situation comprehensively covered in article 14). The difference was that the State's responsibility would not be engaged in respect of acts occurring within the framework of an insurrection which were not committed by the insurrectional movements themselves.

54. He had tried to convey that nuance by using the term “the conduct of an organ of an insurrectional movement” and to take into account at least the general terms of the principle contained in Protocols I and II to the Geneva Conventions of 12 August 1949 and in the jurisprudence as to the threshold beyond which an insurrectional movement became an organization and up to which its activities were limited to local rioting or disturbances which fell within the scope of other rules. That concept was reflected in the phrase “established in opposition to a State or to its Government”.

55. In paragraph 2 of article 15 a distinction had to be made between the cases in which an insurrectional movement achieved its ends and became the Government of the new State or the new Government of the former State and the no doubt commoner case in which, in civil wars in particular, a movement might cause the partition of the country, so that the Government, in order to safeguard national unity, concluded an agreement with the movement in question for creation of a Government of national

reconciliation. Article 15 could not apply in that case, because it would be unwise and unrealistic to attribute to the State the conduct of the insurrectional movement prior to the agreement. The Drafting Committee would have to endeavour to accommodate that point, for otherwise existing Governments which had been neither overthrown nor replaced and had shown a spirit of conciliation by incorporating elements of insurrectional movements in the Government would be too heavily penalized: they would in fact pay for their policy of reconciliation by being required to shoulder the full responsibility for the acts committed by the insurrectional movements during the insurrection.

56. The last question concerned the attribution to a State of acts which were not connected with the conduct of an organ, or the conduct of an entity referred to in article 7, paragraph 2, or the conduct referred to in article 8, or the conduct in the special cases cited in article 9 or article 15: the acts of private persons. The problem with article 11 (Conduct of persons not acting on behalf of the State) in its current wording was that it seemed to say that the conduct of private persons was not attributable to the State without really saying that. It often happened that the responsibility of States was triggered. If a way was found to take account of the very extensive commentary to article 11 in the draft articles and make the limits of attribution to the State clear, article 11 would no longer be necessary.

57. There was a second problem which did not appear in the draft articles, for reasons which had originally been rather vague but which had currently become clearer as a result of the case concerning *United States Diplomatic and Consular Staff in Tehran*, in which it had been established by the courts which heard the case at the time that the Government of the Islamic Republic of Iran had endorsed the conduct of the private parties concerned. And that was not the only example. There was also the *Lighthouses* case,<sup>11</sup> which had established that the Greek Government had endorsed the conduct of the independent Government of Crete before the annexation of Crete by Greece. The Government had been deemed responsible *ab initio* for that conduct despite the widely held view that a new State did not usually succeed to the State responsibility of the predecessor State.

58. The cases in which a State endorsed conduct which was not attributable to it included the case of civil conflicts in which an administration or territory could escape the control of the State but in which, under the peace agreement, the Government ratified the acts which had occurred in the territory and accepted responsibility for them. There were thus many situations in which the State endorsed conduct which was not its own. For the purposes of article 15, a distinction must be drawn between conduct which was merely approved by the State and conduct which was truly endorsed (as in the case concerning *United States Diplomatic and Consular Staff in Tehran* and the *Lighthouses* case). It was for that purpose that he had proposed new article 15 *bis* (Conduct of persons not acting on behalf of the State which is subsequently adopted or acknowledged by that State), the text of which was reproduced at the end of paragraph 284 of the first

report. The point might seem elementary, but it was necessary, for the purposes of attribution, for the State to accept that the conduct in question should be treated as its own conduct. Article 15 *bis* was therefore an essential addition to chapter II for the regulation of the situations which he had just described, and it had the added benefit of preserving the essence of article 11 in a clearly more workable article. The very long commentary to article 11 should be reproduced in the commentary to article 15 *bis* to explain and clarify the exceptions to the rule of attribution.

59. By preserving article 9 on the organs of the State, by combining articles 14 and 15 into a single article (which had the added benefit of not giving more space to insurrectional movements than they warranted), by adopting article 15 *bis*, which contained a provision previously appearing in article 11, and by adopting a saving clause on international organizations, the Commission would not only preserve the substance of the draft articles but substantially improve them as well.

*The meeting rose at 1.10 p.m.*

## 2556th MEETING

*Wednesday, 5 August 1998, at 10.10 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

**State responsibility<sup>1</sup> (continued) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>2</sup> A/CN.4/490 and Add.1-7,<sup>3</sup> A/CN.4/L.565, A/CN.4/L.569)**

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPporteur (continued)

ARTICLES 9 AND 11 TO 15 *BIS* (continued)

1. Mr. HAFNER said that the set of draft articles under consideration raised very complicated problems, espe-

<sup>1</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>2</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

<sup>3</sup> *Ibid.*

<sup>11</sup> Decision of 24/27 July 1956 (France v. Greece) (UNRIIAA, vol. XII (Sales No. 63.V.3), pp. 161 et seq.).

cially as international relations had evolved since the articles had been drafted. New modalities of cooperation had appeared between States, between States and international organizations, and between international organizations. One example was the Memorandum of Understanding on the administration of Mostar between the European Union and Bosnia and Herzegovina on the administration of the town of Mostar during the transitional period.<sup>4</sup> Article 1 of the Memorandum provided that the administration of Mostar should be entrusted to the European Union, although it did not have the status of international organization. It might be wondered therefore who was responsible for the acts of the town's administrative authorities.

2. Article 9 (Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization) addressed two specific cases, the first of which concerned an organ of a State sent to another State in order to assist it. The Special Rapporteur gave several examples of that situation, and there was nothing to be added. The situation was more complicated in the second case, when an organ exercised functions on behalf of another State but within the limits of its own competence. The term "placed at the disposal of" must be carefully defined in that connection, it being understood that the context was exclusively the status of relations between States. It might also happen that a State was obliged under international law to comply with orders given to it by an international organization or even by another State. For example, consideration would have to be given to the case in which a State exercised consular functions in the interest or on behalf of another State. Such a case had occurred when Austria had concluded a bilateral treaty with Switzerland for the reciprocal exercise of consular functions. There was also the famous article 8, subparagraph (c), of the Maastricht Treaty, pursuant to which every State member of the European Union undertook to provide consular and diplomatic protection for the nationals of the other member States. Another example was provided by the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency drafted under the auspices of IAEA: that text envisaged the possibility of offering assistance to another State in the event of an accident and contained detailed regulations on claims for reimbursement and compensation, according to which the State requesting assistance was answerable in actions brought by third States against the provider of the assistance, which the requesting State must release from all responsibility.

3. The Commission should therefore consider that type of situation in connection with article 9 and the possibility of also applying the *lex specialis* clause to that part of the draft articles. Similar cases had occurred in which a State had acted on the orders of an international organization because it had no other choice. Was the responsibility of that State engaged in such a case? The problem arose most frequently in the area of human rights, when the organization giving the orders was not subject to the same obligations as the State which carried them out. There were many examples in which legal bodies had given orders to States, posing the problem of responsibility, and

such cases might occur frequently in the future in connection with the International Tribunal for the Former Yugoslavia and the International Criminal Court.

4. At first sight it appeared wise to delete article 13 (Conduct of organs of an international organization) as the Special Rapporteur proposed. On second thought, however, it would be remembered that States sometimes tried to impose on the host State responsibility for the acts of an international organization. Another problem arose in that connection, the problem of the links between an international organization and States which were not members of the organization. If the question of responsibility was treated separately, the result would be that non-member States would be compelled to recognize the legal personality of the international organization. But article 13 was intended precisely to cover all the cases in which non-member States must recognize the responsibility or non-responsibility of the host State, which also implied recognition of the legal status of the international organization. That was a fundamental international problem which could not easily be solved, and if the draft articles passed over it in silence, it would be essential to insert a saving clause on international organizations.

5. He was in favour of combining articles 14 (Conduct of organs of an insurrectional movement) and 15 (Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State) into a new article 15 (Conduct of organs of an insurrectional movement), as proposed by the Special Rapporteur in paragraph 284 of his first report on State responsibility (A/CN.4/490 and Add.1-7). But account must also be taken of the fact that an insurrectional movement did not necessarily lead to the formation of a new Government. It could happen that the insurrectional movement became only a part of the Government. The Special Rapporteur's language ("which succeeds in becoming the new Government of that State") did not cover the case in which the insurrectional movement was represented in the existing Government. There was a further case—when the Government respected to some extent the aspirations of the insurrectional movement by according it a degree of independence in a territory forming part of the structure of the State. That scenario might not be covered by article 15.

6. To sum up, he accepted the principle of including an article 15 *bis* (Conduct of persons not acting on behalf of the State which is subsequently adopted or acknowledged by that State) proposed in paragraph 284 of the first report, for the draft articles would be incomplete without it, and he approved of most of the deletions proposed by the Special Rapporteur, provided that the problem of international organizations was mentioned in a saving clause.

7. Mr. CRAWFORD (Special Rapporteur) said that he wished to clarify two points raised by Mr. Hafner. First, the difficulty of article 13 did not lie in the proposition which it contained but rather in a much more important problem which it touched upon—that of the responsibility of States for the acts of international organizations, which was only partially a problem of attribution. The issue was such a broad one that the wisest option was to insert a saving clause and then to delete article 13, because it was

<sup>4</sup> See *Bulletin of the European Union*, No. 6-1994, p. 84, point 1.3.6.

impossible both to refer to a problem and also to state that it would not be dealt with. As Mr. Hafner had said, it was such a difficult question that it had to be given special treatment.

8. Secondly, the text of article 13 did not cover cases in which an insurrectional movement became part of a reconstituted Government. It was only when an insurrectional movement succeeded in replacing the existing Government that the rule applied. It was a rule of exception which he had wished to expand. Moreover, a Government which had not been defeated by an insurrectional movement would hardly take the trouble to initiate a process of reconciliation by welcoming members of the movement into the Government if, by so doing, it had to assume responsibility for the acts committed earlier by the insurrectional movement, which were very often illegal, even anti-constitutional, under internal law. It was thus better to keep to the current wording, so as to avoid discouraging reconciliation, which was in itself highly desirable.

9. Mr. DUGARD said that the question of insurrectional movements must be discussed in the commentary to articles 14 and 15. The text by the former Special Rapporteur, Mr. Ago,<sup>5</sup> was somewhat outdated on that point: it did not take account of decolonization since 1960 and although making a few brief references to national liberation movements it generally addressed only the initial stages of the practice of States in the matter.

10. The first question was whether the term “insurrectional movement” was still relevant. Many liberation movements would be unhappy to be treated as mere insurrectional movements. But was it really possible to distinguish national liberation movements recognized by the competent regional organizations and by the United Nations from those which did not enjoy such recognition? The issue went far beyond the Commission’s mandate, but it should still consider using some other formula.

11. In paragraph 272 of his first report, the Special Rapporteur proposed deleting paragraph 3 of article 14 of the draft articles adopted on first reading on the ground that it deals with the international responsibility of liberation movements which are, *ex hypothesi*, not States. His intention was therefore to draw a distinction between the responsibility of States and the status of State. The Commission had carefully avoided the question of the recognition of States. But could it continue to avoid it in the case of insurrectional movements which had received some recognition? One example was provided by the Palestine Liberation Organization (PLO) before the Declaration of Principles on Interim Self-Government Arrangements, signed by the Government of the State of Israel and the Palestine Liberation Organization, the representative of the Palestinian People (Oslo Accords),<sup>6</sup> for it had been recognized as representing the State of Palestine by about 50 States. In those circumstances, could an unlawful act have been attributed to the PLO on the ground that it was no longer simply an insurrectional

movement? The debate on that issue was still continuing, even within the framework of the Oslo Accords: could Israel in fact be held responsible for the acts of the Palestinian Authority in the areas placed under its control?

12. The case of Namibia raised another problem in that connection, the problem of the identity of its Government after the withdrawal of the mandate: was the Government the United Nations Council for Namibia or the de facto Government of the South African regime? As to whether the Commission should take situations of that type into account, it was considerations of the same kind which had led to the drafting of paragraph 4 of article 1 of Protocol I to the Geneva Conventions of 12 August 1949, which was designed to ensure that liberation movements enjoyed the benefits of international humanitarian law while imposing on them a number of responsibilities and obligations. Perhaps the Commission should take a similar approach and try to regulate the responsibility of such movements for the unlawful acts which they had committed.

13. Lastly, there was the question of the responsibility incurred by a State for acts committed by an insurrectional movement in its territory. In paragraph 263 of his first report, the Special Rapporteur said that the State was not responsible unless in very special circumstances where the State should have acted to prevent the harm. That formula was a little too categorical, for a State was not freed from its responsibility if it failed to put an end to the activities of an insurrectional movement operating in its territory against another State. That issue would require more detailed examination.

14. Mr. BROWNLIE said that he was glad that the Special Rapporteur had made some cuts in the text, because the formulations by the former Special Rapporteur, Mr. Ago, were often too convoluted and difficult to apply. That was true in particular of the negative-attribution principles. The Ago text said nothing about the question of the attribution of the conduct of a non-State entity. In the meantime several cases, such as the case concerning *United States Diplomatic and Consular Staff in Tehran*, had provided striking illustrations of the problem.

15. He was not sure that the responsibility of a State should not be entailed in respect of the acts of insurrectional movements. Whatever the principle adopted, and whatever exceptions might be provided to a negative principle, there must be no doubt about the continuity of the primary rules. It must be made perfectly clear in the commentary to paragraph 3 that the provisions for general attribution applied without prejudice to specific primary rules, especially when such rules contained obligations of result. In other words, a State could systematically rely on the pretext of civil disturbances to escape from an obligation. Of course, the draft articles embodied the principle of *lex specialis*, as well as containing a saving clause on international organizations, but a saving clause must also be included with respect to the content of specific primary rules in the provision on insurrectional movements.

16. Mr. SIMMA, replying to Mr. Dugard on the meaning of “insurrectional movement” and on the case of national liberation movements, said that “insurrectional movement” was already an old term but that “national liberation movement” was scarcely less old. If current events

<sup>5</sup> See 2554th meeting, footnote 5.

<sup>6</sup> A/48/486-S/26560, annex; see *Official Records of the Security Council, Forty-eighth Year, Supplement for October, November and December 1993*, document S/26560.

in Kosovo and the Congo were considered in the light of the case addressed in article 15, it would not be immediately apparent that the activities in question were activities of national liberation movements. It would be wrong to discard the existing terminology too quickly.

17. Mr. HAFNER said that he agreed with Mr. Simma on the traditional term "insurrectional movement".

18. With regard to one of the questions raised by the Special Rapporteur concerning the phrase "succeeds in becoming the new Government", the case in which there had been civil disturbances in a State followed by elections in which 80 per cent of the electorate had voted for the party representing the insurrectional movement prompted the question whether the newly elected Government was responsible for the earlier acts of that movement. It was very difficult to determine the dividing line.

19. Mr. BENNOUNA said that the Commission should not involve itself in the problem of the status of liberation movements, insurrectional movements or any other movements, for that was not its mandate. As ICJ had said in its advisory opinion in the *Namibia* case, international responsibility depended on the effectiveness of the authority exercised and not on its legitimacy. What had to be determined, therefore, was whether a State exercised real authority in a territory; if it did, it was responsible for what happened there. If the exercise of effective authority was interrupted, for example if the central authorities lost control of an area, and if the insurrectional movement exercised *de facto* authority and thus assumed governmental functions, it would also assume international responsibility on behalf of the State. The problem was one of the succession of responsibility.

20. In more general terms, the Commission should not reopen every issue on second reading. It must simply return to the difficult points and consider the proposed changes to draft articles which did indeed reflect current positive international law.

21. Mr. KABATSI said that he agreed with Mr. Bennouna that the Commission would be heading for serious difficulties if it tackled the problem of the status of insurrectional movements.

22. He could support the idea of merging articles 14 and 15 into a single article, provided that the simple situation addressed in those articles still did not allow any variation. As Mr. Hafner had said, there were many different scenarios: an insurrectional movement might become a member of the former Government; it might also be authorized by the Government to govern a part of the territory; parts of a Government might support insurrectional groups, and so on. To admit all those possibilities on the ground of not discouraging reconciliation seemed a little too simplistic. Complicated situations arose every day in the world, and a State often participated in some way or another in the acts of insurrectional movements. The State should therefore bear a part of the responsibility, especially when harm was caused to third countries. The issue was too important to be disregarded. The best thing would be to address explicitly the variations of the situation covered in articles 14 and 15, in a separate article, if necessary.

23. Mr. MELESCANU said that he endorsed Mr. Bennouna's position. In order to regulate the case of insurrectional movements the Commission must set two limits to responsibility. The upper limit was the situation in which the insurrectional movement became the new Government of the State. That possibility was duly addressed in article 15, paragraph 1. The lower limit was the general responsibility of the State for everything which happened in its territory. It was easy to conceive of many different intermediate situations, each with its own specific features.

24. The Commission would be wrong to start a debate, probably a fruitless one, on the status of insurrectional movements. It was not from that angle that it should try to clarify the situation. It might be possible for the commentary, which should be further expanded, to give explanations about the various forms and various goals of insurrectional movements. In any event, the analysis would have to be based on the principle of effectiveness rather than on the principle of legitimacy. It would have to bear in mind the ambiguous example of the PLO, which exercised certain State functions while Israel exercised others.

25. Mr. MIKULKA said that Mr. Dugard had convinced him that further thought should be given to the term "insurrectional movement". The draft articles were 20 years old, and their terminology was a little dated. The new situations which had emerged in the meantime justified new approaches to the legal concept of insurrectional movement and the adaptation of the draft articles, to bring them up to date, as it were.

26. He agreed in principle with Mr. Brownlie. If the insurrectional movement itself took responsibility for the acts occurring in the territory of a State, that did not necessarily mean that the State was excused from its international responsibilities. Article 15, paragraph 1, proposed in paragraph 284 of the first report, did not lead to that conclusion. It said in fact that the conduct of an organ of an insurrectional movement "shall not be considered an act of that State", which did not mean that the State itself was responsible for the failure to carry out its international obligations. The commentary to the article was perfectly relevant, but it must not contradict what was said in article 1 (Responsibility of a State for its internationally wrongful acts).

27. Mr. Hafner was right to draw attention to the case of an insurrectional movement which became the new Government of a State. But in what concrete situation could it truly be said that an insurrectional movement became a new Government? It was inconceivable that more than a part of the movement would come to power. That aspect of the question warranted further consideration. Moreover, there was perhaps no point in mentioning that case in article 15 since article 15 *bis* addressed it.

28. He was not sure about the reference to articles 5, 7, 8, 9 or 15 *bis* in article 15, paragraph 1 (*b*), proposed in paragraph 284 of the first report, for they did not seem relevant. For example, could it truly be said that the conduct of an organ of an insurrectional movement was the conduct of an entity "empowered by the law of that State to exercise elements of the governmental authority", in the

terms of proposed new article 7 (Attribution to the State of the conduct of separate entities empowered to exercise elements of the governmental authority). Could it be said that an insurrectional organ was acting “on the instructions of, or under the direction and control, of that State”, in the terms of subparagraph (a) of proposed new article 8 (Attribution to the State of conduct in fact carried out on its instructions or under its direction and control)? With regard to the latter provision, the insurrectional movement might conceivably be acting at the instigation of a second State. The reference was therefore all the more unfortunate.

29. Mr. ECONOMIDES said that article 15 adequately regulated the case of an insurrectional movement which became a new Government. However, it did not mention the legal situation during the insurrection itself. It was not clear whether the responsibility for unlawful acts should be attributed to the State or the insurrectional movement before the movement took power, if it ever did so. As Mr. Bennouna had explained, the answer to that question must be based on the principle of effectiveness, that is to say, on an assessment of the reality of the transfer of power from the organs of the State to the organs of the insurrectional movement. The qualifier “established” in the first sentence of paragraph 1 of the article was also certainly referring to the concept of effectiveness.

30. The Commission might adopt an interpretative provision removing the international responsibility of insurrectional movements from the scope of the draft articles. But it would still have to deal fully with the question of the responsibility of the State, which was in fact its task. In the transitional situation which he had just described, the State still remained responsible for its inaction and its failure to fulfil its international responsibilities. Traditional law held that the State was always internationally responsible for what happened in its territory. Thus, even if the responsibility for the events was attributed to an insurrectional movement, the State would be no less responsible, during the struggle itself, for its own failings.

31. Mr. ADDO said that the Commission could not leave the legal concept of insurrectional movement out of the draft articles. Strictly speaking, article 15, paragraph 1, stated the obvious: it had to be either the insurrectional movement or the State which was responsible for what happened in the territory. But, as several speakers had already pointed out, the real legal problem was caused by an insurrectional movement which became the new Government of the State. History offered the example of Namibia in its relations with South Africa: could it be asserted that the new Namibian State should take responsibility for the acts of South Africa? Article 15 did not offer an answer to that question.

32. Mr. GALICKI said that he agreed that the draft articles should contain a provision such as article 15 to regulate the case of insurrectional movements. Of course, the appropriateness of the qualifier “insurrectional” was debatable, but for the moment it was the only term which the Commission had found. Article 15 stated that, in general terms, the conduct of an insurrectional movement was not regarded as an act of the State but added that it could be so regarded in certain circumstances. It was established and had already been stated that an insurrec-

tional movement could in fact be responsible for what happened in the territory of a State. The problem therefore came down to drawing the boundary between the two areas of responsibility.

33. More specifically, it was necessary to know the extent to which the conduct of an insurrectional movement could be imputed retroactively to the State created by the acts of that movement. The State was of course responsible for what happened in its territory, but should it be responsible for everything? And what of the responsibility of an insurrectional movement which, as such, acceded to power? Even more specifically, must the part of the insurrectional movement which came to power assume responsibility for the acts of the other part?

34. Mr. Mikulka was right to refer to the problem of the reference in paragraph 1 (b) to articles 5, 7, 8, 9 and 15 *bis*, in paragraph 284 of the first report. He had indeed explained the reasons why. The solution might perhaps be to make the reference more explicit, especially with respect to articles 7, 8 and 9.

35. In any event, the problem of the responsibility of insurrectional movements must be settled by reference to the practice of States. That practice offered very different situations, a multiplicity of cases, and many examples of ambiguous situations. He therefore recommended that article 15 should be drafted in as general terms as possible, as it already was in fact. Addition of more detail would lead to prolixity and the adoption of what might be termed a casuistic approach.

36. Mr. CRAWFORD (Special Rapporteur) said that he was very close to Mr. Bennouna and Mr. Melescanu with regard to the general design of article 15. The first thing to bear in mind was that the article was concerned with the general problem of the attribution of responsibility and not with the question of the primary rules which the State or the insurrectional movement might have broken. As had been pointed out, that consideration did not emerge very clearly from the wording of the article as adopted on first reading.

37. Mr. Mikulka has noted that, by definition, an insurrectional movement could not be regarded as an organ of the State—a point which went without saying. But there remained the case, referred to in article 8, subparagraph (b), of a group of persons which was in fact exercising elements of the governmental authority in the absence of the official authorities; it would no doubt be necessary to return to that provision. In general terms, the intention of article 15 was to bring within the scope of the draft articles everything which might be attributable to the State under international law. The question of whether the State honoured its international obligations was quite another matter.

38. As Mr. Bennouna had recommended, the Commission should avoid dwelling on the legal status of “insurrectional movements”. Some such movements, national liberation movements for example, could have greater obligations under international law, under the Protocols additional to the Geneva Conventions of 12 August 1949 for instance. Yet again, however, the Commission had to regulate only the question of the attribution of State responsibility. The question of the responsibility of insur-

rectional movements was not under consideration. However, some members had doubts about the division of international responsibility during the insurrectional action. It was of course possible to take the position that the leaders of insurrectional movements had some responsibility, under humanitarian or human rights law for example. There was also the trend in the Inter-American Commission on Human Rights to emphasize the *erga omnes* character of the prescriptions of those two areas of law. But the Commission was only concerned with the responsibility of States and not with that of insurrectional movements. In the case in question it was impossible to say that the State was responsible for acts committed during the insurrection, unless there were other reasons for imputing them to the State. The situation seemed perfectly clear.

39. There was a fundamental problem of approach which highlighted the somewhat unusual nature of article 15. The article provided in fact that acts which were not attributable to the State at the time when they were committed might be attributable to it a posteriori as a result of a subsequent event, for example the success of an insurrectional movement. Similarly, article 15 *bis* provided that the State "acknowledged" the conduct of an entity which was not its own entity. That was in fact a case of succession, with the special feature that it was a de facto succession and not a legal succession. Furthermore, however unusual it might appear, the situation had been generally confirmed by the case law, and the Commission was merely codifying the practice. The article as adopted on first reading also seemed to have been well received by States.

40. Article 15 *bis* offered a way out of the unusual situation: the new Government was not required to accept responsibility for the acts of the insurrectional movement which had brought it to power; it simply had the option of doing so. According to article 15, it had an obligation to do so. The case of Namibia was relevant in that respect, for on acceding to independence Namibia had acknowledged not only the conduct of the South West Africa People's Organization (SWAPO) but also the acts of South Africa, whose de facto regime imposed on Namibia had been illegal under international law. Namibia had not been obliged to do so, and article 15 *bis* would not have imposed such an obligation on it.

41. A more specific but equally pertinent question was emerging: what happened if the insurrectional movement ended with elections and the establishment of a Government which included representatives of the movement? When power was taken by force of arms it could be assumed that there would be at least continuity of the persons involved, but elections created a new situation with an interruption of the causal link with the earlier situation. Although that was a very interesting point of doctrine, he recommended not going any further than the existing text proposed for article 15, which was based on the current practice and on many precedents. The language could of course be improved, but it would be impossible for it to cover all possible cases. Article 15 *bis* was there to deal with borderline cases.

42. Mr. HE said that he did not think that the term "insurrectional" had become devalued. However, the Commission should not try to study the political aspects

of insurrectional movements. Some speakers had rightly pointed out that the attribution of responsibility to such movements was a problem which the draft articles could not disregard, if only because a line had to be drawn between the responsibility of insurrectional movements and State responsibility. The provision under consideration should therefore be formulated in very broad terms. So broad in fact that it might be necessary to have two articles, and thus cover all the situations.

43. Mr. ADDO said that the group of articles under consideration dealt essentially with the circumstances in which unlawful conduct could not be attributed to a State (arts. 11-14). Strictly speaking, there would be no need to consider under the topic any conduct which was not attributable to a State.

44. Article 9 dealt with the attribution to a State of the conduct of organs placed at its disposal by another State or by an international organization. The Special Rapporteur had been right to retain the article but to delete the reference to international organizations, which warranted detailed separate treatment.

45. Article 11 (Conduct of persons not acting on behalf of the State) provided that the conduct of persons or groups of persons not acting on behalf of a State should not be considered as an act of that State under international law. That was stating the obvious and, as the Government of the United States of America had stated in its comments under article 8, in the comments and observations received from Governments on State responsibility (A/CN.4/488 and Add.1-3), the provision added nothing to the draft articles. It should therefore be deleted, as the Special Rapporteur was proposing.

46. Article 12 (Conduct of organs of another State) did not add anything either, since it merely reaffirmed the rule of attribution, and should also disappear. The Special Rapporteur gave convincing reasons for deleting article 13 as well. The essential principles asserted in paragraph 1 of article 14 and paragraphs 1 and 2 of article 15 should indeed be brought together in a single article.

47. Articles 9 and 11 to 15 *bis* as proposed by the Special Rapporteur should be referred to the Drafting Committee.

48. Mr. PELLET said that he approved of many of the simplifications and deletions proposed by the Special Rapporteur but wondered whether he was not going too far in some cases.

49. He endorsed the deletion of the reference to international organizations in articles 9 and 13, but a specific provision should be added to the effect that the draft articles did not address either the responsibility of international organizations or the responsibility of States resulting from their relations with such organizations. Such a provision might be inserted in article 1, which the Drafting Committee should consider in conjunction with articles 9 and 13.

50. Article 9 provided suitable treatment for the very specific problem which it addressed, that is to say, the conduct of an organ placed at the disposal of a State by another State. It was a pity that it did not address the much more common case of the representation of a State by another State: for example, Switzerland took care of a number of official matters for Liechtenstein, Italy for San

Marino, and France for Monaco. It might not be sufficient to say in such cases that a State was placing certain organs at the disposal of another State. The problem which came up in practice was the problem of the partial representation of a State. Article 9 should therefore be expanded, either by amending its wording to show that that situation was indeed covered, or by adding a second paragraph, or indeed by drafting a separate article. It would also be desirable to make it clear in the commentary whether, in such cases, the responsibility rested with the representing or the represented State and what the consequences were for their relations with each other, that is to say, whether one could take legal action against the other.

51. He approved of the deletion of the reference to territorial governmental entities in article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity) proposed by the Special Rapporteur in paragraph 284 of his first report, provided that it was reintroduced in article 1. On the other hand, he was not convinced by the replacement of *compétence* by *pouvoir*. *Compétence* was in fact the most suitable term in French, for it was usually defined as authority circumscribed by the law, whereas *pouvoir* was a simple fact.

52. The Special Rapporteur's reason for deleting articles 11 and 12—that they were negative-attribution provisions—was not sufficient in view of the usefulness of the clarification which the articles provided. While the deletion of article 11 was indeed justified, for it contained merely a negative confirmation of the provisions of articles 5 (Attribution to the State of the conduct of its organs), 7 and 8, that was not true of article 12. The Special Rapporteur's comments (paras. 246-252) showed that the place where the unlawful act occurred had an effect on the determination of the responsibility. But the Special Rapporteur did not draw any consequences from that consideration. Perhaps he ought to compose a draft article to regulate the problem. Article 15, as proposed in paragraph 284 of the first report, was also drafted in negative form, although it could have read: "State responsibility is entailed when the insurrectional movement triumphs", which would have been more consistent. However, as a whole the new article was more satisfactory than articles 14 and 15 as adopted on first reading, although it did give rise to some problems. The Special Rapporteur had himself stated (para. 271) that it was difficult to assimilate national liberation movements to insurrectional movements. He had nevertheless retained only the term "insurrectional movement", on the ground that the same regime applied to both kinds of movement. That was true, but "insurrectional movement" had a negative connotation, whereas "national liberation movement" had a rather positive one. He therefore proposed that the language of the new article 15 should be amended by inserting "of a national liberation movement or" before "an insurrectional movement".

53. There was no need to state that such movements were established in opposition to a State or to its Government, since that was obvious. But some thought should be given to the implications of recognition of a national liberation movement or an insurrectional movement for the application of State responsibility. That question might be considered in the context of part two of the draft articles. It was perhaps a question of the regime of the responsibil-

ity of insurrectional movements and not of the regime of State responsibility.

54. The draft articles should also address the question of the place where the acts occurred, rightly highlighted by Mr. Bennouna, who had cited the example of Namibia. The situation was one in which a State exercised effective authority in a territory and was therefore responsible in principle for what happened there, except in exceptional circumstances, and it was not clear that the draft articles addressed that fundamental principle.

55. There was also a problem connected with the deletion of the saving clauses in paragraph 2 of article 14 and the second sentence of paragraph 1 of article 15 as adopted on first reading. Draft article 15 *bis*, which he endorsed, did not replace those clauses. A second paragraph should therefore be added to article 15 *bis* (or included as article 15 *ter*) stating that any provision excusing a State from its international responsibility applied without prejudice to the responsibility of the State for acts connected with national liberation wars or insurrections if the conditions stated in articles 5 to 18 were met. That idea lay at the heart of the law of responsibility for the acts of insurrectional movements, for which there already existed a body of extremely detailed rules reflecting the concern to maximize the responsibility of the State. The main thing was to stipulate that, even in the case of a war or an insurrection, the State was no less responsible if it had not done everything that it could to prevent the harm in question. The deletion of the saving clauses would cause that idea to disappear. The Special Rapporteur seemed to have made a minor mistake when, in order to illustrate the exceptional nature of article 15, he said that the provision was the only one which established responsibility *ex post facto*. But articles 21 (Breach of an international obligation requiring the achievement of a specified result) and 22 (Exhaustion of local remedies), and in particular, article 26 (Moment and duration of the breach of an international obligation to prevent a given event), also did so.

56. The draft articles were basically ready to be sent to the Drafting Committee.

57. Mr. BENNOUNA said that he was not sure that article 15 *bis* established or addressed responsibility *ex post facto*. The provision, about which he had some reservations, should state that the subsequent recognition by the State of the conduct of an insurrectional movement constituted an element of proof and not an element of attribution. A State's responsibility was triggered not at the time when it recognized the acts but at the time when it committed them. In other words, the acts were attributed to the State at the time when they occurred, and their subsequent recognition by the State constituted proof of that attribution.

58. Mr. CRAWFORD (Special Rapporteur), replying to Mr. Pellet's comments on the question of the representation of States addressed in article 9, said that it was not only a problem of attribution. In fact, the question of representation raised a series of problems connected with joint action by States, which also came within the scope of chapter IV (Implication of a State in the internationally wrongful act of another State) of part one of the draft articles. The question should therefore be addressed in that context, for article 9 concerned only one very specific

aspect, that of attribution. The Commission might return to the question when it considered chapter IV.

59. He said that there would in fact be no difficulty in retaining “competence” in the French version of article 10.

60. With regard to the negative formulation of article 15, he had merely said that the Commission should avoid negative formulations in the articles concerning attribution, except when they constituted exceptions to a normal situation. Insurrectional movements within the meaning of article 15 were indeed an exception. However, the Drafting Committee would have to give detailed consideration to the various issues raised in the very interesting discussion of insurrectional movements.

61. One of the reasons why he preferred the negative formulation was that he had agreed to the introduction of the concept of territorial governmental entity in article 5 and that some insurrectional movements established in a territory sometimes constituted such entities. It would however be necessary to make an exception for insurrectional movements established in opposition to a State or to its Government. The concept of territorial governmental entity was not defined anywhere in the draft articles adopted on first reading, and the commentary did not offer a detailed analysis of such entities. The wording of article 5 would therefore have an effect on the wording of article 15. The other issues raised by Mr. Pellet could be dealt with by the Drafting Committee.

62. Turning to the point made by Mr. Bennouna, he said that article 15 *bis* could indeed cover a number of different situations: a State might acknowledge the conduct as its own but it might also decide of its own free will to endorse conduct which was not imputable to it. That happened, for example, when the State did not exist at the time of the acts or when it did not exercise territorial sovereignty in the area in which the acts occurred. However, it was not entirely pointless to have a general provision covering a number of situations and offering a degree of flexibility. Once a State had endorsed or espoused an act, the question of attribution no longer arose and it was not necessary to pose it. The analytical approach taken by Mr. Bennouna had not therefore altered his own opinion on the question.

63. Mr. BENNOUNA said that he was generally in agreement with the deletions proposed by the Special Rapporteur. He agreed that the question of the responsibility of an international organization, an organ of an international organization, or a State acting in the context of an international organization did not fall within the scope of the topic of State responsibility and required separate treatment. Moreover, it appeared that, as part of the Commission’s long-term programme of work, Mr. Brownlie intended to propose the topic of the responsibility of international organizations.

64. The attribution to a State of the conduct of organs placed at its disposal by another State was indeed a very rare case. The example given by the Special Rapporteur, in paragraph 220 of his first report, concerning appeals to the United Kingdom Privy Council, was specific to the law of the Commonwealth and was an academic hypothesis which had hardly any concrete applications. The case mentioned by Mr. Pellet was entirely different: it con-

cerned joint action by several States and the possibility of a challenge to one of them, which might if necessary take legal action against the others. The problem had risen in particular in the context of the launching of satellites. That situation did not seem to be covered by the draft articles, and the Special Rapporteur should consider introducing an additional provision to cover it.

65. He approved of the negative formulation of article 15, for the situation in question was taken to be an exception. However, the wording of the article might be improved to show clearly that a State was responsible if it did not take all necessary measures to maintain order during an insurrection. There were currently a number of situations in the world in which the State in question had not taken all the necessary measures and might, in some way, be accused of passive complicity, it being clearly understood that if the State lost effective control of the situation that exceptional fact would release it from its responsibility. Furthermore, as the Special Rapporteur and Mr. Pellet had said, even if the reference to international organizations was deleted, the saving clause concerning such organizations must be retained.

66. It would be useful for article 15 *bis* to address two situations: the one in which a State endorsed conduct which was not attributable to it, and the one in which the subsequent conduct of a State (by way of declarations or acts) provided proof that earlier conduct was attributable to it. That distinction should be brought out in the text more clearly. He was not sure whether the regime of responsibility was the same both in the case in which the conduct was not attributable to the State but the State nevertheless endorsed it and in the case in which the conduct was attributable in the first place.

67. Mr. ROSENSTOCK said that some members had strayed from the point in speaking of State responsibility for acts committed by an insurrectional movement. That was not the issue. But in some circumstances it might be held that a State was internationally responsible because it had not guaranteed security during an insurrection. The text should therefore say that a State was responsible not for the conduct of an insurrectional movement but for its own failure to prevent that conduct. It would be sufficient to mention the point in the commentary without raising it in the article itself.

**Reservations to treaties (*continued*)\* (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,<sup>7</sup> A/CN.4/L.563 and Corr.1)**

[Agenda item 4]

CONSIDERATION OF DRAFT GUIDELINES OF THE GUIDE TO PRACTICE PROPOSED BY THE DRAFTING COMMITTEE AT THE FIFTIETH SESSION

68. Mr. SIMMA (Chairman of the Drafting Committee), introducing the report of the Drafting Committee (A/CN.4/L.563 and Corr.1), said that the report dealt exclusively with the topic of reservations to treaties, to which

\* Resumed from the 2552nd meeting.

<sup>7</sup> See footnote 2 above.

the Drafting Committee had devoted five meetings from 27 to 31 July. It had examined guidelines 1.1 to 1.1.6, 1.1.8 and 1.4 proposed by the Special Rapporteur in his third report on reservations to treaties (A/CN.4/491 and Add.1-6). Since it had other matters to deal with, the Drafting Committee had decided to defer to the next session its consideration of guidelines 1.1.7 and 1.2 concerning interpretative declarations. Furthermore, as the draft text consisted of a set of guidelines, the Committee had decided to retain for the moment the form and structure proposed by the Special Rapporteur, the purpose of which was to establish a clear distinction, including a visual one, between guidelines and prescriptive articles. The Drafting Committee and the Commission would have an opportunity to review that mode of presentation on completion of the consideration of the guidelines on first reading.

69. However, the Drafting Committee had altered the order followed in the third report of the Special Rapporteur. The text currently began with a definition of reservations, then dealt with the various possible forms and combinations of reservations, and finally with practices which would not be regarded as constituting reservations. The text currently contained a saving clause. The Drafting Committee had found that arrangement more rational. In the report of the Drafting Committee the number of each guideline was followed, in square brackets, by the number of the original guideline in the third report of the Special Rapporteur.

70. In the first section of his Guide to the Practice the Special Rapporteur had proposed a definition of “reservation”. It was not a new definition but a composite version of the definitions already contained in the 1969 and 1986 Vienna Conventions. He had deliberately tried to draft a definition which would be sufficient in itself without departing from the definitions contained in those Conventions, his purpose being to avoid any confusion. The definition currently appeared in guideline 1.1, to which the Drafting Committee had not made, and could not make, any change.

71. Guideline 1.1.1 (Object of reservations), was numbered 1.1.4 in the third report of the Special Rapporteur. In order to avoid any mistaken interpretation of the term “object”, the commentary would state clearly that the guideline did not address the substance of the reservation itself but rather the text to which the reservation referred, that is to say, one or more provisions of a treaty or the treaty as a whole. The only changes made by the Drafting Committee to the Special Rapporteur’s text were, first, to replace “implement” by the term “apply” used in the 1969 and 1986 Vienna Conventions and, secondly, to add the phrase “or an international organization” (A/CN.4/L.563/Corr.1) in order to bring the text into line with the definition which preceded it. The commentary would state clearly that the use of “may” should not be interpreted as having an effect on the question of the permissibility of reservations, which would be considered at a later stage. One member had entered reservations about the usefulness of the guideline.

72. When introducing guideline 1.1.2 to the Commission the Special Rapporteur had explained (2542nd meeting) that it had a limited but important function, namely to eliminate the apparent differences between the definitions

of “reservation” in article 2, paragraph (1) (d), and article 11 of the 1969 and 1986 Vienna Conventions. The Committee had reworked the text in order to bring out its purpose more clearly. It had removed the emphasis on the “moment” at which a reservation was made, since that detail was not significant in the context of the guideline. The term “when” had disappeared in favour of “Instances in which” in order to introduce the idea of “how” or “the occasion on which” reservations were made. Furthermore, since the definitions of “reservation” in the 1969 and 1986 Vienna Conventions had been incorporated in guideline 1.1, it was useful to mention that guideline in guideline 1.1.2—hence the wording adopted by the Drafting Committee: “Instances in which a reservation may be formulated under guideline 1.1”. The guideline’s title (Instances in which reservations may be formulated) corresponded to its content.

73. In guideline 1.1.3 (Reservations having territorial scope), which was numbered 1.1.8 in the third report of the Special Rapporteur, the Drafting Committee had made only one change to the original text—the deletion of the phrase “regardless of the date on which it is made”. The question of the time when reservations could be made would be dealt with later in the chapter on the formulation of reservations. Guideline 1.1.3 had been the subject of a long discussion, which had focused more particularly on whether a unilateral statement by which a State purported to exclude the application of a treaty as a whole to a given territory constituted a reservation. Most of the members had concluded that, in the light of the practice of States, the general definition of reservations in guideline 1.1, which mentioned only “certain provisions of the treaty”, should not be interpreted too restrictively and that, accordingly, a unilateral statement excluding the application of the whole of the treaty to a given territory could be assimilated to a reservation since it also constituted a limitation on the application of the treaty. However, some members had not shared that opinion and had reserved their position.

74. Guideline 1.1.4 (Reservations formulated when notifying territorial application), was numbered 1.1.3 in the third report of the Special Rapporteur. According to his definition, the reservations in question were unilateral statements which met the following two conditions: first, they were made on the occasion of a notification of the territorial application of a treaty; secondly, they purported to exclude or modify the legal effect of certain provisions of the treaty in their application to the territory in question. The Drafting Committee had thought it better to reverse the order of those two conditions in order to show clearly from the outset that the guideline defined a certain type of reservation.

75. Guideline 1.1.5 (Statements purporting to limit the obligations of their author) incorporated the central idea of guideline 1.1.6 proposed by the Special Rapporteur. It had three elements: limitation of the obligations of the author of the statement; limitation of the rights which the treaty created for the other parties; and a time element. In the light of the debate in the Commission and after lengthy reflection, the Drafting Committee had decided to delete the time element, which seemed irrelevant in the context. The second element—limitation of the rights of other parties to the treaty as a result of the limitation of the

obligations of the State making the statement—had also been deleted, because the second limitation did not always entail the first. The Committee had concluded that the main point was that a unilateral statement by which a State or an international organization limited its obligations under a treaty effectively constituted a reservation. There was no need at the current stage to examine the effects of such a unilateral statement.

76. Guideline 1.1.5 proposed by the Special Rapporteur had therefore been reformulated as guideline 1.1.6 (Statements purporting to increase the obligations of their author) to express that approach clearly. “Designed” had been replaced by “purporting” in the English version of the title. Guideline 1.1.6 incorporated the central idea of the Special Rapporteur’s guideline 1.1.5. The Drafting Committee had rearranged the order to create a logical sequence. Guideline 1.1.5 had dealt with a particular form of practices which were not reservations. Some members had found the provision redundant, since the purpose of the Guide to Practice was to describe reservations and not to define what could not be regarded as a reservation. However, many members had preferred to retain the guideline, on the ground that the purpose of the Guide was to be useful to Governments and that it was sometimes better, for the purposes of clarity at least, to describe some practices which appeared to be reservations but were not.

77. The text adopted by the Drafting Committee covered two cases. The first was the case of a unilateral statement by which a State or an international organization purported to assume obligations going beyond those imposed by a treaty. The second was the case of a unilateral statement by which a State or an international organization purported to accord to itself a right not appearing in the treaty. Those two types of statement did not constitute reservations within the meaning of guideline 1.1.

78. The Drafting Committee had stressed in that connection that it might happen that a State or an international organization, by means of unilateral statement, substituted another obligation for its obligation under a treaty without the substitution constituting a reservation. However, the Drafting Committee had thought it wiser to deal with that case in the commentary rather than in the guideline itself. Situations of that kind were not common in practice and their complexity called for detailed drafting and explanations which would be out of place in the brief space of a guideline.

79. Guideline 1.1.7 (Reservations formulated jointly), corresponded to guideline 1.1.1 proposed by the Special Rapporteur. Although the language was different, the meaning remained unchanged: the guideline took account of the fact that it was sometimes more convenient for several States or international organizations to formulate a reservation jointly. It merely confirmed that such a joint formulation did not affect the unilateral character of the reservation. It had been pointed out in the Drafting Committee that it sometimes happened that such joint reservations were formulated in such a way as to produce a degree of interdependence between the States or international organizations concerned. However, that issue was without prejudice to the unilateral character of the reservation with respect to the other parties to the treaty addressed by the statement, but the point should be

explained in the commentary in order to avoid any ambiguity.

80. The last guideline adopted by the Drafting Committee, the numbering and title of which would be decided later, was based on guideline 1.4 proposed by the Special Rapporteur. This title (Scope of definitions) had not been thought sufficiently close to the content of the guideline, which could be assimilated to a saving clause. Unlike the Special Rapporteur’s proposal, the Drafting Committee’s text dealt only with reservations, for it had not yet considered the guidelines on interpretative declarations. Until it had done so, it would not be able to decide whether two separate saving clauses were needed, one in the section on reservations and the other in the section on interpretative declarations, or whether it could combine the two clauses, as the Special Rapporteur had done in guideline 1.4.

81. The Drafting Committee had decided to add “and its effects” after “permissibility” in order to meet the concerns stated in the Commission about the applicability of that saving clause to the legal regime of reservations. The end of the Special Rapporteur’s text had been deleted, on the ground that it was redundant to state that the definition of reservations determined the application of the rules governing reservations. Lastly, the Drafting Committee had made a drafting change, replacing “unilateral declaration” in the English text by “unilateral statement”, the term used in all the other guidelines on the definition of reservations.

82. Mr. LUKASHUK said that he endorsed the work done by the Drafting Committee but wondered whether the formulation of guideline 1.1.1 was not so broad as to lose sight of the limits established by the 1969 and 1986 Vienna Conventions. It should include a reference to the limits within which reservations could be formulated.

83. Mr. BENNOUNA said that he found the use of the term “more generally” rather awkward in such an important provision as guideline 1.1.1. Furthermore, the phrase “to the way in which a State, or an international organization, intends to apply the treaty as a whole” went beyond the scope of reservations *stricto sensu* and encroached on the topic of interpretative declarations.

84. Mr. GOCO said that the title of guideline 1.1.4 would be clearer if it referred to the territorial application “of a treaty”.

85. Mr. ELARABY said that guideline 1.1.5 addressed only the limitation of the obligations of the author of the reservation and omitted to mention the limitation of the rights of the other parties, although both those elements appeared in the Special Rapporteur’s text of guideline 1.1.6. That omission created difficulties with regard to interpretative declarations, and no decision should be taken on the whole text until the guidelines on such declarations had been considered.

86. Mr. MIKULKA said that he shared Mr. Bennouna’s doubts about the end of guideline 1.1.1, which turned a statement as to the manner in which a State intended to apply the treaty into a reservation.

87. Mr. KABATSI pointed out that guideline 1.1.6 contained two elements—obligations and rights—although its title mentioned only obligations.

88. Mr. Sreenivasa RAO said that he shared the doubts expressed about guideline 1.1.1. The way in which a State intended to apply a treaty was determined by a positive logic and could not be assimilated to the notion of reservation, which had a negative connotation. There was also a divergence between the title of guideline 1.1.2 (Instances in which reservations may be formulated) and its content, which addressed the means of expressing consent to be bound by a treaty.

89. Mr. PELLET (Special Rapporteur) said that the whole constituted by guidelines 1.1.5 and 1.1.6, which were poorly drafted in his view, had been adopted by the Drafting Committee by a very large majority but against his recommendation.

90. Mr. SIMMA (Chairman of the Drafting Committee) pointed out, with regard to the limits referred to by Mr. Lukashuk, that there was a saving clause on the permissibility and the effects of reservations. As to the comments on guideline 1.1.1, the adopted formula certainly rubbed shoulders occasionally with the concept of interpretative declaration, but most of the members of the Drafting Committee had thought that it should be retained in the definition of the object of reservations.

91. Mr. Goco's proposal on the title of guideline 1.1.4 was a good one. The comments of Mr. Kabatsi and the Special Rapporteur addressed a very complicated issue, in connection with which the Drafting Committee had decided, by a very large majority, to take up the question of substitution in the commentary and not in a guideline. However, the title of guideline 1.1.6 might usefully refer also to the rights of the author State. Mr. Sreenivasa Rao's comment on guideline 1.1.2 was pertinent, but the Committee had decided to retain the phrase "means of expressing consent" for lack of a better alternative.

*The meeting rose at 1.15 p.m.*

## 2557th MEETING

*Thursday, 6 August 1998, at noon*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu,

Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

### Reservations to treaties (*continued*) (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,<sup>1</sup> A/CN.4/L.563 and Corr.1)

[Agenda item 4]

#### CONSIDERATION OF DRAFT GUIDELINES OF THE GUIDE TO PRACTICE PROPOSED BY THE DRAFTING COMMITTEE AT THE FIFTIETH SESSION (*continued*)

1. Mr. BENNOUNA said that the wording of guideline 1.1.1 (Object of reservations) should be less problematic since, as the Special Rapporteur had pointed out, it dealt not with the definition of reservations but with their object. He still had doubts, however, about the concept of reservations having territorial scope (guideline 1.1.3), which did not seem to be entirely consistent with article 29 of the 1969 and 1986 Vienna Conventions. As far as guidelines 1.1.5 (Statements purporting to limit the obligations of their author) and 1.1.6 (Statements purporting to increase the obligations of their author) were concerned, considering the position taken by the Special Rapporteur, it might be advisable to ask the Drafting Committee to review them and to consider the possibility of combining them into a single guideline. At any rate, guideline 1.1.5 did not contribute anything to the draft, but worked against the principle of useful effect, and guideline 1.1.6 envisaged hypothetical situations that were highly unlikely to occur.

2. Mr. AL-BAHARNA said that he found guideline 1.1.1 to be rather superfluous, inasmuch as the object of reservations was implicit in the definition itself, in the expression "in their application to that State or to that international organization". Hence, at least, the phrase "the way in which a State, or an international organization, intends to apply" should be deleted from the guideline. Guideline 1.1.2 should be redrafted along the following lines: the expressions "instances in which" and "include all the means of expressing" should be deleted, and the word "mentioned" should be replaced by the words "in accordance with". Guideline 1.1.6, including its title, should be reworded to indicate clearly that it referred to the obligations and rights of the author of the reservation. Drafting changes should also be made in guidelines 1.1.3 (Reservations having territorial scope), 1.1.4 (Reservations formulated when notifying territorial application) and 1.1.5, as well as to the final guideline, which had not yet been numbered.

3. Mr. CRAWFORD said that the problem posed by guideline 1.1.6 lay in the fact that it did not make a clear distinction between cases in which a State made a unilateral statement undertaking obligations going beyond

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

those envisaged in the treaty—which did not constitute a reservation—and cases in which a State made a unilateral statement purporting to increase its obligations under a treaty while at the same time expecting reciprocity. In the latter case, there would indeed be a reservation, since the legal effect of the treaty would be modified.

4. Mr. LUKASHUK said that guidelines 1.1.3 and 1.1.4 were related and could be combined. The commentary to guideline 1.1.7 (Reservations formulated jointly) should include an explanation of the legal ties which a reservation formulated jointly would establish between its authors, particularly with regard to the power each one would have, to withdraw “its” reservation unilaterally.

5. Mr. ELARABY said he endorsed the proposal for deleting from guideline 1.1.1 the phrase “the way in which a State, or an international organization, intends to apply”. Maintaining that phrase would affect the right of States to make interpretative declarations, and hence the guideline would not be truly consistent with the practice of States. With regard to guideline 1.1.6, the Commission should wait to see how it would fit into the overall picture after the guidelines on interpretative declarations had been examined.

6. Mr. SIMMA (Chairman of the Drafting Committee) explained that, in regard to guideline 1.1.7, the Drafting Committee had unanimously agreed that in defining joint reservations it would not be necessary to take a position on the legal ties between the authors of such reservations, and that that matter should be discussed in the commentary. The proposal to delete a phrase from guideline 1.1.1 was unacceptable for two reasons: on the one hand, the reservations envisaged in that guideline referred to the way in which the reserving State intended to apply the treaty and, on the other hand, the amended text would be opposed by all members of the Commission who considered that a reservation on a treaty as a whole would be impermissible or would not constitute a reservation at all. The only real problem seemed to be the one posed by guideline 1.1.6; perhaps the Drafting Committee should be asked to review guideline 1.1.6 in conjunction with guideline 1.1.5.

7. Mr. GALICKI said that guideline 1.1.3 should not envisage excluding the application of a treaty as a whole but only some of the provisions of a treaty.

8. Mr. ECONOMIDES said he did not agree with the argument that, when a State made a statement which had the effect of increasing its obligations while calling for reciprocity on the part of another State, that constituted a reservation because it entailed modifying the legal effect of the treaty. The legal effect of the treaty did indeed change, but only as the result of two unilateral statements establishing an agreement that was collateral to the treaty; in no way did that constitute a reservation. A reservation always had a limiting effect and could not extend beyond the clauses of the agreement. The wording of guideline 1.1.6 was therefore correct from the legal standpoint.

9. Mr. CRAWFORD said he could not think of a specific example, but the situation he had referred to would be one in which a State would accede to a convention on the condition that a given provision of the treaty should have a certain meaning, and the State’s interpretation of

the provision went beyond the meaning intended in the treaty.

10. Mr. PELLET (Special Rapporteur) said it was reasonable for members of the Commission to want to have their positions on the draft guidelines reflected in the summary record, and he would make every effort to include those views in the commentary. The main problems were those which referred to guideline 1.1.1 and to guidelines 1.1.5 and 1.1.6, which seemed inseparable. As far as guideline 1.1.1 was concerned, aside from all drafting considerations, it could not reasonably be said that there was no point in including it. It was useful in that the Vienna definition, which it simply reproduced, stated that a reservation was a unilateral statement whereby a State purported to exclude or to modify the legal effect of certain provisions of a treaty. Actually, that was not always the case, and many reservations did not deal with specific provisions of a treaty (general reservations). Guideline 1.1.1 was meant to reflect that reality.

11. In that regard, Mr. Elaraby’s position would seem untenable, since he himself acknowledged that the phenomenon in question did occur, and therefore he could hardly say, at the same time, that it should not be taken into account. It remained to be seen whether such statements would or would not constitute reservations. Saying that a unilateral statement constituted a reservation was not the same as saying that it was or was not permissible: it was simply a definition. Once the definition was established, the questions raised by Mr. Elaraby could be addressed; the constant repetition of certain State positions would seem to indicate that it was permissible.

12. The problems posed by guidelines 1.1.5 and 1.1.6 were somewhat different. Mr. Economides was right on one point, namely, that in the Vienna definition it was clear that a reservation purported to modify the legal effect of certain provisions of a treaty. That definition was being corrected, in the light of actual practice, by way of guideline 1.1.1, which referred specifically to “the treaty as a whole”. When a State attempted to increase its rights, as well as the obligations of other States, and did so in a positive way by adding to general law, the State was no longer modifying the legal effect of certain provisions of the treaty, it was trying to modify the provisions themselves. That was not at all the same thing. That did not mean that in proposing something that was actually an amendment to a treaty, a State was doing something impermissible; it simply meant that the legal effect of the provision was not at issue, but rather that the provision was to be changed. One example would be the matter of the Shield of David, the “reservation” whereby Israel had sought to increase its rights under the treaty, as well as the obligations of other States, without amending the treaty itself.<sup>2</sup>

13. The Drafting Committee had perhaps tried to conclude its examination of a technical and complex subject rather hastily; the Chairman of the Committee had ended the discussion with a vote. The formulations that had been adopted were not entirely satisfactory; guideline 1.1.5 appeared to state the obvious, and guideline 1.1.6 dealt

<sup>2</sup> See 2549th meeting, footnote 6.

jointly but not exhaustively with some very different problems.

14. He therefore supported the proposal of the Chairman of the Drafting Committee that guidelines 1.1.5 and 1.1.6 should be referred to a future drafting committee, in order to allow the Commission to agree on formulations that would be somewhat more consistent.

15. Mr. RODRÍGUEZ CEDEÑO said that the Commission seemed to have unanimously agreed that the second scenario envisaged in guideline 1.1.6 did not constitute a reservation. On the other hand, in the first scenario, when a State undertook obligations going beyond those imposed on it by a treaty, it was performing an autonomous legal act which, strictly speaking, was unilateral in nature, as noted by the Commission in other areas.

16. A commentary should therefore be included on those provisions on which there was no consensus, and the two paragraphs on which the Commission had not reached agreement should be re-examined by the Drafting Committee.

17. Mr. ROSENSTOCK said it was not clear that the statements in question were unilateral in the traditional meaning of the term. The distinction was not a gratuitous one; on the contrary, it was essential if the parties to a multilateral treaty wanted to avoid finding themselves subsequently committed to additional obligations to which they had not agreed. That did not necessarily mean that the wording of the draft was perfect or that it provided the best definition of what did or did not constitute a reservation.

18. Mr. AL-KHASAWNEH said that several members of the Commission had formulated reservations or interpretative declarations regarding the document on reservations to treaties. That raised the question of whether the document would really be useful in determining what did or did not constitute a reservation. The interaction between the Drafting Committee and the Commission should not be so inflexible that members who had not attended the Drafting Committee's discussions were not allowed to express their views on drafting matters in the plenary meeting. The Special Rapporteur had rightly allowed some provisions to be returned to the Drafting Committee in order to enable the Commission to reach a consensus. The matter raised by Mr. Elaraby was also very important and should be referred back to the Drafting Committee.

19. He would like to ask for clarification on some points relating to guidelines 1.1.3 and 1.1.4. In his view, those guidelines did not make a distinction between the following two cases: that of a State formulating a reservation concerning the application of a treaty to part of its own territory, and the case of third States formulating a reservation regarding the application of a treaty to part of a territory (as in the case of Berlin). The distinction might not have any legal effect if the situations were considered basically similar, but the matter should perhaps be mentioned. In that case also, the question should be referred back to the Drafting Committee.

20. Mr. ELARABY said that the text of guideline 1.1.1 went considerably beyond the Vienna definition; that was

not necessarily wrong, since the Commission had indeed been entrusted with re-examining the guidelines, but it raised a number of problems. The definition overlapped with the definition of interpretative declarations, and it should therefore be re-examined when the time came to review the concept of interpretative declarations. The Commission could then define the scope of each of the two concepts and try to reach a consensus.

21. Mr. Sreenivasa RAO said he agreed with the speakers who had suggested that guideline 1.1.1, as well as guidelines 1.1.5 and 1.1.6, should be sent back to the Drafting Committee in order to enable the Commission to reach a consensus. On the matter of procedure, he pointed out that the work of the Drafting Committee and the discussions in the Commission were complementary; since plenary meetings ranked above those of the Drafting Committee, they should not be precluded from dealing with certain drafting matters.

22. Mr. SIMMA (Chairman of the Drafting Committee) said that it would facilitate matters if guideline 1.1.1 could be discussed at the end of the debate on the definition of interpretative declarations and on the distinction between such declarations and reservations. If the Special Rapporteur agreed to send the question back to the Drafting Committee, he would not object, although he felt that guideline 1.1.1 was suitable in its current form. Indeed, during the debate at the forty-ninth session on the admissibility of certain reservations relating to human rights, many examples had been given of reservations that were similar to those mentioned by Mr. Al-Khasawneh and Mr. Elaraby. Since Mr. Elaraby had been absent at that time, no one had pointed out that the statements being discussed were in fact reservations. The Commission should wait until a definition of interpretative declarations had been reached before deciding to adopt guideline 1.1.1.

23. Mr. CRAWFORD said it would not be right to send to the Sixth Committee a draft guideline on which the Commission had left so many questions pending. The Drafting Committee could quickly re-examine the objections that had been raised on drafting matters, on the understanding that if it rejected them they would not be taken up again by the Commission.

24. Mr. PELLET (Special Rapporteur) said it was unacceptable that some members of the Commission should express dissatisfaction with some of the guidelines and request that they be sent back, when the Commission had already agreed on the general orientation of all guidelines that were to be sent to the Drafting Committee. He did agree that guidelines 1.1.5 and 1.1.6 should be sent back to the Drafting Committee, which had not been able to discuss them in depth; however, he wished to point out that if the Drafting Committee, when it met, decided to amend yet again the text of the guidelines being reconsidered, he would not write any commentary. He urged the Commission to adopt all the guidelines except guidelines 1.1.5 and 1.1.6.

25. Mr. ECONOMIDES said that the Drafting Committee might not have time to review the points that had been raised and submit new texts that would be acceptable to all members of the Commission; in any case, the Special Rapporteur would not have time to draft the commen-

taries. He proposed that some guidelines should be placed in square brackets, with an explanatory note stating that the provisions in question had not been adopted by the Commission and would be re-examined at a later stage. That way, the draft guidelines could be sent to the Sixth Committee, whose comments would be useful to the Commission at its next session.

26. Mr. SIMMA (Chairman of the Drafting Committee) said he would prefer it if, as proposed by the Special Rapporteur, the Commission simply adopted the guidelines, except for guidelines 1.1.5 and 1.1.6. If the Commission wished to place some guidelines in square brackets, he would accept such a decision, but he agreed with the Special Rapporteur that at the current stage in the Commission's work, it would be neither normal nor useful to try to rewrite the draft guidelines.

27. Mr. ELARABY said that since the Special Rapporteur was prepared to send draft guidelines 1.1.5 and 1.1.6 back to the Drafting Committee, he saw no reason for not sending back draft guideline 1.1.1 as well. It was extremely important for the Commission to determine the scope of reservations and of interpretative declarations. He was willing to accept any solution that would allow the Commission to re-examine guideline 1.1.1.

28. Mr. AL-KHASAWNEH explained that in saying he did not understand draft guideline 1.1.3, he had meant that he could not accept it any more than he could accept draft guideline 1.1.1. He hoped the Commission would re-examine those guidelines in good faith.

29. Mr. PELLET (Special Rapporteur) said he took note of the fact that Mr. Al-Khasawneh could not accept a text in the drafting of which he had not participated. With regard to Mr. Elaraby's comments, he stressed that the problems posed by guideline 1.1.1 and by guidelines 1.1.5 and 1.1.6 were very different. The Drafting Committee had changed the original order of the guidelines because most of the others depended on guideline 1.1.1. Neither guideline 1.1.3 nor guideline 1.1.5 would make sense unless it was borne in mind that a reservation could apply either to a specific provision or to an entire treaty.

30. It seemed to him that there was general agreement among members of the Commission that it would not be possible to disregard general reservations. There was, however, profound disagreement on the matter of whether a statement purporting to increase the rights of its author could be considered a reservation. In the case of guideline 1.1.1, the Drafting Committee had seen it as referring to reservations as defined in the preceding paragraphs, and had therefore excluded interpretative declarations from the beginning. He urged the Commission to adopt guideline 1.1.1.

31. Mr. BENNOUNA said that, in his view, the compromise proposed by Mr. Economides in connection with draft guideline 1.1.1 provided a way out and addressed the concerns of Mr. Al-Khasawneh and Mr. Elaraby, as well as those of the Special Rapporteur. He proposed that the Drafting Committee should include an explanatory note indicating that the Commission had adopted the draft guideline provisionally and reserved the right to review it, if necessary, and to confirm it when it discussed interpretative declarations.

32. Mr. PELLET (Special Rapporteur) said he was prepared to accept Mr. Bennouna's proposal and to explain, either in a note or in the commentary (possibly at the beginning), that guideline 1.1.1 referred only to reservations, and would be re-examined in the light of the Commission's decision on the matter of interpretative declarations. With regard to guidelines 1.1.5 and 1.1.6, the Commission could either decide to follow that same procedure or to adopt the suggestion made by the Chairman of the Drafting Committee, which seemed reasonable since he [the Special Rapporteur] would not have time to draft commentaries for the Sixth Committee.

33. Mr. MIKULKA said he endorsed Mr. Bennouna's proposal, but felt that the explanation should be included in the commentary. The Special Rapporteur should indicate that the Commission had realized there was a category of reservations that applied to treaties as a whole, but had decided that the relevant guideline should be formulated in the context of the definition of interpretative declarations.

34. Mr. ELARABY said that he also endorsed Mr. Bennouna's proposal.

35. Mr. AL-KHASAWNEH, noting that the Special Rapporteur did not seem to want to refer guideline 1.1.3 back to the Drafting Committee, asked for a vote on the matter.

36. Mr. BENNOUNA suggested that the following week, when the Drafting Committee met to re-examine draft guidelines 1.1.5 and 1.1.6, it should also consider draft guideline 1.1.3.

37. Mr. SIMMA (Chairman of the Drafting Committee) said it was his understanding that the Commission was about to reach agreement on draft guideline 1.1.1, and that draft guidelines 1.1.5 and 1.1.6 were to be referred back to the Drafting Committee. However, he did not think that the Drafting Committee would have time, during the current session, to prepare a text that would satisfy everyone; it would be better to leave those draft guidelines for the next session.

38. The CHAIRMAN asked Mr. Al-Khasawneh whether he maintained his request that the Commission take a vote.

39. Mr. AL-KHASAWNEH said that the wording of draft guideline 1.1.3 was not suitable and should be corrected. He thought it was reasonable to ask the Drafting Committee to re-examine it. If he did not get satisfaction, he would have to ask for a vote.

40. Mr. ECONOMIDES said it appeared that a solution had been found for draft guideline 1.1.1, and that the only objections remaining were to the last phrase of guideline 1.1.6, "or purports to assume a right not contained in a treaty", and the expression "the application of a treaty" in draft guideline 1.1.3. The Drafting Committee should be able to settle those problems quickly, unless the Commission decided to place the draft guidelines in square brackets, noting that they would be taken up again at the next session. At any rate, he felt that it would not be wise to take a vote on some of the guidelines.

41. Mr. SIMMA (Chairman of the Drafting Committee) asked Mr. Al-Khasawneh if he would agree to the inclusion of explanatory notes to draft guidelines 1.1.1 and 1.1.3 stating that the Commission would take those guidelines up again at its next session.

42. Mr. AL-KHASAWNEH said he was prepared to accept any proposal that would make it clear that a problem remained and that the draft guideline would be re-examined at a later date.

43. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission accepted the last proposal made by the Chairman of the Drafting Committee.

44. Mr. PELLET (Special Rapporteur) said he would agree to having a vote taken, whatever the result might be, but in principle, he considered it irregular for a member of the Commission to keep insisting until he got his way when he did not really have grounds for making a judgement. However, he would ensure that the commentary reflected all the positions that had been expressed.

45. Mr. ROSENSTOCK said he questioned the usefulness of an explanatory note on draft guideline 1.1.3. He supported the Special Rapporteur, and felt that the problem raised by draft guideline 1.1.3 was different from the problem raised by draft guideline 1.1.1; in the latter case, the Commission might wish to reserve its position because its future work would help clarify the matter further.

46. Mr. SIMMA (Chairman of the Drafting Committee) explained that his proposal was not intended to address only the concern expressed by Mr. Al-Khasawneh. The question whether reservations could apply to treaties as a whole or only to some of their provisions had been raised by several members of the Commission, and concerned several draft guidelines, particularly draft guidelines 1.1.1 and 1.1.3. In draft guideline 1.1.3, the expression “purports to exclude the application of a treaty”—which was understood to refer to a treaty as a whole—referred to a problem which was quite similar, although not identical, to the one raised by draft guideline 1.1.1. It would therefore be reasonable for the Commission to re-examine that important question at its next session.

47. Mr. PELLET (Special Rapporteur) said that if the Commission intended the position taken on draft guideline 1.1.1 to extend to the entire set of draft guidelines, including draft guideline 1.1.3, he would be willing to accept the proposal of the Chairman of the Drafting Committee. He would also include the relevant explanations in the commentary.

*The meeting rose at 1.18 p.m.*

## 2558th MEETING

*Friday, 7 August 1998, at 10.15 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

### Cooperation with other bodies (*concluded*)\*

[Agenda item 9]

#### STATEMENT BY THE OBSERVER FOR THE AD HOC COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

1. The CHAIRMAN invited the Observer for the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe to brief the Commission on the work of the Council, and more particularly on the work of CAHDI.

2. Mr. BENÍTEZ (Observer for the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe) summarized and commented on the main points of a document that had been prepared and circulated exclusively for the use of the members of the Commission. He drew the Commission's attention in particular to the appendices to the document, especially appendix 3, which contained the text of a recommendation of the Committee of Ministers of the Council of Europe to member States on debts of diplomatic missions and permanent missions, as well as those of their members;<sup>1</sup> and appendix 4, with the text of a recommendation on the classification of documents concerning State practice in the field of public international law.<sup>2</sup> The Secretary General of the Council of Europe had transmitted the two recommendations to the Secretary-General of the United Nations, in the context of the United Nations Decade of International Law.<sup>3</sup>

3. The Second Summit of Heads of State and Government of the Council of Europe had adopted a declaration

\* Resumed from the 2554th meeting.

<sup>1</sup> Council of Europe, Committee of Ministers, 595th meeting of the Ministers' Deputies, recommendation No. R (97) 10 (12 June 1997).

<sup>2</sup> *Ibid.*, recommendation No. R (97) 11 (12 June 1997).

<sup>3</sup> Proclaimed by the General Assembly in its resolution 44/23.

and an action plan.<sup>4</sup> The latter included the establishment of a permanent court of human rights by the end of 1998 that would replace the European Commission of Human Rights and the European Court of Human Rights. Several members of CAHDI had been elected judges of the new court.

4. During the most recent meeting of CAHDI, in March 1998, there had been an in-depth discussion of that Committee's role. Some members believed that the Committee was above all a body where Governments could coordinate their positions, while others wished to place greater emphasis on its practical contribution to the development and codification of international law. In that regard, two current activities deserved mention.

5. The first activity concerned reservations to treaties. At the request of CAHDI, the Committee of Ministers of the Council of Europe had authorized the establishment of a group of specialists on reservations to international treaties under the Committee's auspices. The 1st meeting of the Group of Specialists on Reservations to International Treaties was held in Paris on 26 and 27 February 1998. It had decided to focus its future work on the following issues: whether the 1969 Vienna Convention met the requirements of all treaties, particularly, human rights treaties; who should determine the admissibility of reservations to international treaties; what the legal effects of illicit reservations to international treaties were; and whether there was a distinct regime or practice of the Council of Europe's member States regarding reservations to international treaties. The Group agreed on a pilot project that would assign to CAHDI the role of monitoring reservations to multilateral treaties, which meant that it would be responsible for examining all reservations in the sphere of universal treaties, especially those relating to human rights, and for advising the Council of Europe about any reservations that appeared problematic. In the case of reservations, CAHDI would be careful to avoid duplicating the Commission's activities; it believed it could make a practical contribution to the Commission's work, which would be focused more on the legal aspects of reservations.

6. The second activity was a pilot project initiated by the Council of Europe in 1994 on State practice relating to State succession and issues of recognition. A report would be prepared, in cooperation with several research institutes, on the basis of 16 contributions received from member States; it would be a further contribution to the United Nations Decade of International Law.

7. CAHDI was determined to continue and strengthen its cooperation with the Commission, in view of the usefulness of interaction between experts and Government delegations. However, it wondered if such relations should be of a formal nature or not. Under the 1971 agreement between the Secretariats of the United Nations and the Council of Europe, the United Nations and its agencies and bodies could take part in the work of all the inter-governmental committees of the Council of Europe. In the case of the Commission, the question was whether it

should be formally represented at the meetings of CAHDI and its subsidiary organs or whether Commission members should be invited on a personal basis. Some CAHDI members saw clear advantages to both formal and informal cooperation, but the majority believed that cooperation should be informal. Thus, at the most recent meeting, the Chairman had been authorized to extend invitations to members of the Commission on an individual basis, as had already been done in the case of the invitation to the Special Rapporteur on reservations to treaties, Mr. Pellet, who had taken part in the work of CAHDI on reservations. The Committee considered the Commission to be an important collaborator and was determined to strengthen cooperation between the two bodies.

8. Mr. MELESCANU said that there were two differences between CAHDI and the Commission. First, the former was part of a regional organization that concentrated its actions in one region, Europe, while the latter was an international body concerned with international law. Secondly, and above all, unlike CAHDI, the Commission was poor. Mutual benefit might be obtained from the second difference.

9. It was regrettable that two bodies were simultaneously working on almost identical topics, especially as the Commission had a large number of European members. A structural, formal relationship between the Commission and CAHDI should be established as soon as possible, at least for legal issues. Nothing prevented a member of the Commission who took part in the work of CAHDI from presenting the latter's official position and adding personal comments and opinions.

10. Such a structural relationship would have two components. First, the exchange of information, especially regarding planning of work in order to avoid duplication and optimize the contribution of the Council of Europe and CAHDI to the work of the Commission, which had at least a dozen European "representatives". Since Europe had many universities and experts in public international law, CAHDI might be able to call increasingly on central European universities and experts. Secondly, the contribution of the States members of the Council of Europe to the work of the Sixth Committee of the General Assembly and the Commission, which would be informed of their opinions and comments (harmonized, if possible) on certain relevant issues. The practice of the European countries and the European school of public international law should be given greater importance in the Commission's work.

11. Mr. LUKASHUK said that the document presented by the Observer for CAHDI could form the basis for closer relations between the Commission and the Council of Europe and CAHDI. The Council of Europe played a very important role in the progressive development of public international law and was not afraid to set aside certain traditional approaches. The same could be said of the principle of democracy, which was a principle of domestic and international law that the Commission could perhaps consider including in its agenda. The Council of Europe was to be commended for its initiative of classifying information on State practice; despite technological advances, such information was still relatively

<sup>4</sup> *2nd Summit of Heads of State and Government of the Council of Europe: An action plan for a united Europe, Strasbourg, 10-11 October 1997* (Council of Europe Publishing).

unknown, and that hindered the progressive development of public international law.

12. The Council of Europe should perhaps accord more importance to the teaching and dissemination of international law: in civil society, even among statesmen, knowledge of international law was very incomplete, and at the same time international law was incorporated into the domestic law of a great number of countries. That gave rise to problems with respect to training for and the preparation of jurists, for which adequate provision was unfortunately not made in most countries. Perhaps a convention on the teaching of international law should be drawn up.

13. Lastly, the Commission should establish more specific and more structured cooperation with CAHDI.

14. Mr. CRAWFORD welcomed the initiative of CAHDI of inviting Commission members on an individual basis and suggested that similar invitations could be sent to the Special Rapporteurs when the subject of their specific expertise was under discussion. He said that any opinions expressed by members were purely personal, however.

15. The amended model plan for the classification of documents concerning State practice in the field of public international law<sup>5</sup> mentioned in appendix 4 of the document circulated by the Observer for CAHDI, was very useful. The same could not be said of the disastrous classification adopted by the Congress of the United States of America.<sup>6</sup>

16. Mr. ECONOMIDES said that CAHDI also differed from the Commission in that it was an intergovernmental body and that its mandate focused on the exchange of views and coordination; the Commission was a body of independent experts with a mandate for study and reflection. Duplication of the work of the two bodies would presumably not occur because the Commission considered matters from a global perspective, and the regional practice of CAHDI could make a very useful contribution to the Commission's work. Lastly, CAHDI by no means neglected the issue of the teaching of law, and its classification of State practice was very useful for the rational study of that subject.

17. Mr. GOCO, noting that the members of CAHDI had agreed to establish informal links with the Commission, wondered what kind of formal arrangement could be envisaged. He said that it was very important for Commission members to know the reactions of States to Commission drafts, so they would like to know if, in that context, CAHDI could help to collect and summarize the comments made by the States in the region. Regional practice should contribute to defining an international perspective, but the particular concerns of the different regions also had to be considered. It was therefore necessary to determine the optimum linkage between the two dimensions.

<sup>5</sup> Recommendation No. R (97) 11 (see footnote 2 above), appendix.

<sup>6</sup> See M. Nash (Leich), "Contemporary practice of the United States relating to international law", *American Journal of International Law* (Washington, D.C.), vol. 90, No. 2 (April 1996), pp. 265-267.

18. Mr. FERRARI BRAVO said that, except for the special status granted to the United States and Canada, CAHDI had for a long time been a coordinating body for the action of the Governments of Western Europe alone, and there might have been some duplication with the corresponding bodies of the European Union. Today, the Council of Europe and the European Court covered a territory that stretched from Lisbon to Vladivostok and the size of the area posed some adjustment problems.

19. Regarding the activities of CAHDI, he said that public international law had taken shape in Europe before it had extended to the rest of the world. Europe had most of the relevant experience, but it needed direct links with the experience of other continents. CAHDI should consider inviting members of the Commission from other regions, as observers, if it wished to have an influence on the work carried out within the framework of the United Nations.

20. Mr. HAFNER said that the amended model plan for the classification of documents concerning State practice in the field of public international law was based on the 1968 plan,<sup>7</sup> which had been updated to take into account the subsequent development of public international law and a review of the use of the original plan by different countries. Although no classification was above criticism, it was essential that a plan should be able to stand the test of time, as had been the case with the 1968 plan. It therefore did not seem wise to already be considering updating the new plan with which there was no experience.

21. Mr. Sreenivasa RAO said that legal bodies from other regions were closely following the work of CAHDI. The model plan for the classification of documents concerning State practice in the field of public international law proposed by CAHDI was interesting but had a surprising omission—it made no mention of environmental law—and he wondered whether other European bodies would look at the issue.

22. Mr. MIKULKA, recalling the topics covered by the Commission and CAHDI, said he was surprised that the topic for which he had been appointed Special Rapporteur, that of nationality in relation to the succession of States, was absent from the programme of work of CAHDI. Some members of the Commission had considered the subject too "European"; perhaps CAHDI felt that it was too "East European".

23. Mr. BENÍTEZ (Observer for the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe) replied that the report that CAHDI was preparing on the Council of Europe pilot project on the collection and diffusion of documentation on State practice relating to State succession and issues of recognition contained a chapter on State succession and nationality. However, member States had provided relatively few comments on that aspect; which was all the more surprising because it was that type of concern that was at the origin of the elaboration of the European Convention on Nationality. The European Commission for Democracy through Law (Venice Commission) had prepared a report on the consequences of State succession for nationality.<sup>8</sup>

<sup>7</sup> See Council of Europe, Committee of Ministers, resolution (68) 17 (28 June 1968).

It therefore could not be said that the Council of Europe did not take an interest in the topic.

24. As to environmental law, part 19 of the model plan for the classification of documents concerning State practice in the field of public international law, on the legal aspects of international relations and cooperation in specific matters, contained a section on the environment; the subject might merit a separate chapter, however. As the 1968 model classification plan had not been updated for 30 years, CAHDI would probably not embark on updating the new plan in the near future.

25. The Council of Europe had undergone important changes, and CAHDI, which was still a body of government experts responsible for coordinating the views of its members with regard to the United Nations and the Commission, was currently also trying to make a specific contribution to the work of the Commission, while avoiding overlapping and interference, and also dissipation of effort. Moreover, CAHDI essentially considered the political aspects of problems while the Commission concentrated its action on the legal aspects. CAHDI was increasingly requesting the opinions of non-member Governments, which was why there were currently 15 States with observer status, including three permanent observers (United States, Canada and Japan).

26. Members of the Commission invited to take part in the work of CAHDI on an individual basis were supposed to contribute in their personal capacity, even though they might give an account of the Commission's discussions.

27. CAHDI was very aware of the need to develop the teaching of public international law, especially for government officials. The Council of Europe had adopted various cooperation and assistance programmes, such as the programmes Demodroit and Themis devoted to the dissemination of legal doctrine and to law training. The programmes had been only for central and eastern Europe, but recently it had been decided to extend them to all the Council's member States.

28. In reply to Mr. Melescanu's comments on the financial implications of cooperation between the Commission and CAHDI, he said that, following discussion of the question, all the members of CAHDI had recognized the need for links between the two bodies. The CAHDI secretariat had informed its members of the financial implications of participation in its meetings of a member of the Commission and said that it could not bear the cost of such participation. In the specific case of reservations, CAHDI had been fortunate to benefit from the presence of Mr. Pellet, at no cost. Mr. Pellet had not been invited because he was European: someone from another region of the world could equally well have been invited; however, in that case, CAHDI would have had to assume the cost of that person's participation because there was no provision for such expenses in the Council of Europe's budget. Contrary to what had been said, the Council of Europe was not rich. It had adopted a zero-growth budget for 1998, and there was little likelihood that things would change in 1999. Nevertheless, the members of CAHDI

had agreed that collaboration with the Commission was very useful and had decided to discuss it at their next meeting.

29. With regard to the structural relationship between the two bodies, the Commission needed to decide on the type of links that it wished to maintain with CAHDI. Under CAHDI rules, a representative of the Commission could participate in an official capacity; however, the Commission must decide if it wished to be represented officially and assume the corresponding financial obligations. The Commission could inform CAHDI once it had reached a decision, and CAHDI would discuss the matter.

30. During discussions on the Commission's long-term programme of work, a member had proposed the subject of the legal effects of corruption. The Council of Europe had been working on the topic since 1992. The Committee of Ministers of the Council of Europe had concluded the Agreement establishing the "Group of States against Corruption—GRECO",<sup>9</sup> which authorized participation on an equal footing by both member and non-member States of the Council of Europe (including some members of OECD). GRECO had the mandate to evaluate to what extent States members of the Council of Europe applied their contractual obligations to combating corruption. Its work would initially be based on a resolution adopted by the Committee of Ministers setting out 20 guidelines on combating corruption.

31. The Multidisciplinary Group on Corruption was negotiating a draft criminal law convention on corruption<sup>10</sup> with a much greater scope than the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, already adopted by OECD, since both passive and active corruption on the part of officials in the public administration, in the judiciary and the executive and in elective bodies, as well as corruption in the private sector and in international organizations, were qualified as a criminal offence. Important discussions were also under way with regard to reservations to that Convention. Lastly, another convention was being negotiated on liability for crimes of corruption, and a model code of conduct for public officials was also being drawn up. CAHDI was ready to contribute to any related work the Commission might carry out.

32. Mr. GALICKI said that, on the basis of his long experience with the Council of Europe, he wished to add some comments on the topic of nationality to those made by the Observer for CAHDI. He assured the Commission that the topic, in particular in the context of succession, received all due attention in the Council of Europe, not only in general, through the European Convention on Nationality, opened for ratification in 1997, but also in the context of the work of the Committee of experts on nationality, of which he was Vice-Chairman.

33. Draft recommendations would be submitted to the Committee of Ministers, including one on the reduction of cases of statelessness and another on improper appeals against legislative provisions on nationality. There had also been numerous studies on the topic of succession.

<sup>8</sup> Council of Europe (Strasbourg, 10 February 1997), document CDL-INF (97) 1.

<sup>9</sup> *Ibid.*, Committee of Ministers, resolution (98) 7 (5 May 1998).

<sup>10</sup> *Ibid.*, Parliamentary Assembly, document 8114, appendix II.

Furthermore, a conference on nationality was programmed for 1999, to mark the fiftieth anniversary of the Council of Europe.

34. However, the Council of Europe's statutory position with regard to cooperation and coordination with other bodies should be clarified; in particular, with its former sponsors, such as the European Committee on Legal Cooperation, in order to avoid any duplication of efforts. That being understood, cooperation between CAHDI and the Commission should be encouraged because it was mutually beneficial.

35. Mr. MIKULKA said that he felt that the Observer for CAHDI and Mr. Galicki had not replied to his question. He knew that the Council of Europe was working on the topic of nationality and was also aware of the work that had just been described, particularly with respect to the European Convention on Nationality, article 18 of which contained three or four paragraphs on State succession, whereas the Commission had produced a whole declaration on the topic.

36. What he wanted to know was whether there was ongoing communication between the Council of Europe and the Commission. He still did not know the position of CAHDI on his third report on nationality in relation to the succession of States<sup>11</sup> because, to date, there had been no response to it in the Council of Europe. It had been mentioned that a theoretical study would be carried out on the topic of nationality, but the study would take years, while the Council already had a plethora of documents on the topic, especially his third report, expanded by footnotes. References had been made to a mutually beneficial dialogue, but the Council remained silent. He therefore asked the Observer for CAHDI to transmit his remarks to the Committee at its next meeting so as to encourage its members to send him their comments.

37. Mr. LUKASHUK informed the Observer for CAHDI that the Commission was considering the topic of corruption and would find it most useful to receive documentation on the work that the Committee was carrying out on the topic, in the context of exchanges of information between the two bodies.

38. Mr. SIMMA said that, contrary to what Mr. Lukashuk appeared to believe, the Commission was not considering the issue of corruption. It was merely one of the topics that the Commission might study at a later date.

39. Mr. BENÍTEZ (Observer for the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe) said that if he had not replied adequately to Mr. Mikulka's question, it was because he had misunderstood it. Mr. Goco had wanted to know whether CAHDI had adopted a common position with regard to comments on the Commission's texts. The Committee had not yet considered the report in question, at least not formally. Normally, it tried to meet before the session of the Sixth Committee in order to be able to make a worthwhile contribution to its discussions. Previously, Mr. Eiriksson's presence on the Commission and in CAHDI

had ensured liaison between the two bodies. As Mr. Goco had said, States members of the Council of Europe, who were also members of CAHDI, received information on all the Commission's work, but CAHDI tended to focus its discussions on the work of the special rapporteurs of the Commission, who provided information on all its activities. CAHDI would consider Mr. Simma's report at its next meeting, at which he (Mr. Benítez) would also transmit Mr. Mikulka's views.

**Reservations to treaties (concluded) (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,<sup>12</sup> A/CN.4/L.563 and Corr.1)**

[Agenda item 4]

CONSIDERATION OF DRAFT GUIDELINES OF THE GUIDE TO PRACTICE PROPOSED BY THE DRAFTING COMMITTEE AT THE FIFTIETH SESSION (concluded)

40. Mr. SIMMA (Chairman of the Drafting Committee) proposed that the Commission should adopt the report of the Drafting Committee (A/CN.4/L.563 and Corr.1), subject to the following conditions: a footnote would be added to guideline 1.1 indicating that it would be reviewed in the light of discussions on interpretative statements, and that guideline 1.1 could be reworded, if necessary, following such a review; guidelines 1.1.5 and 1.1.6 would be referred to the Drafting Committee to be reviewed in the light of the opinions expressed by Commission members; lastly, guideline 1.1.3 would be reviewed in parallel to guideline 1.1.1 at the Commission's next session, and a footnote would be added to that effect.

41. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the report of the Drafting Committee.

*It was so agreed.*

**Organization of work of the session (concluded)\***

[Agenda item 1]

42. Mr. SIMMA (Chairman of the Drafting Committee) reported on the status of the Commission's work.

43. Messrs BROWNLIE, CANDIOTI, ECONOMIDES, LUKASHUK, PELLET, Sreenivasa RAO and ROSENSTOCK discussed how to ensure that the report of the Commission to the General Assembly covered everything that the Commission had achieved during its current session.

44. The CHAIRMAN suggested setting up a working group which, with the assistance of the secretariat, would help the Special Rapporteur on the prevention of transboundary damage from hazardous activities to finalize his commentary, for submission to the General Assembly.

<sup>11</sup> *Yearbook . . . 1997*, vol. II (Part One), document A/CN.4/480 and Add.1.

\*Resumed from the 2534th meeting.

<sup>12</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

*It was so agreed.*

**State responsibility<sup>13</sup> (continued)\* (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>14</sup> A/CN.4/490 and Add.1-7,<sup>15</sup> A/CN.4/L.565, A/CN.4/L.569)**

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR  
(concluded)\*

ARTICLES 9 AND 11 TO 15 *BIS* (concluded)\*

45. Mr. ECONOMIDES, referring to article 9 (Attribution to the State of the conduct of organs placed at its disposal by another State) proposed by the Special Rapporteur in paragraph 284 of his first report on State responsibility (A/CN.4/490 and Add.1-7), said that the provision was of no great interest and was the least pertinent of all the draft articles. Perhaps it could be eliminated, especially as the Special Rapporteur himself had said that the situation that it dealt with was extremely rare. Also, as had been observed, the idea of an organ placed at the disposal of a State by another State had connotations that were, if not exactly colonial, at least humiliating from the point of view of national sovereignty. One thing was certain, no State would like to find itself in the situation contemplated in the article. Lastly, the provision would have been acceptable if, as previously, it had been a question of international organizations as well as States. The elimination of the former was an additional reason to delete the article.

46. Article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity) proposed by the Special Rapporteur in paragraph 284 of his first report was acceptable on condition that, in the French version and as suggested by Mr. Pellet (2556th meeting), the term *compétence* was used rather than *pouvoir*. He also approved of the deletion of articles 11 to 14 because it improved the text.

47. Article 15 (Conduct of organs of an insurrectional movement), as proposed by the Special Rapporteur in paragraph 284 of his first report, was the trickiest article that the Commission had had before it at the current session, since it had to cover three different situations with regard to the attribution of responsibility. The first was the situation explicitly targeted by the provision, where an insurrectional movement became the new Government and assumed responsibility for wrongful acts that had occurred before it took power. Everyone agreed on that. The second was the situation that arose at the point where the insurrectional movement was “established”, to use the word employed in paragraph 1; that was to say, at the point where the movement controlled part of the territory of the State. Appreciation of that situation, on the basis of the principle of the “effectiveness” of power, did not

cause any problems either; the insurrectional movement was responsible until the end of the insurrection, whether or not it was successful. The third situation was much more difficult to discern in the draft article: it was the situation that existed until the insurrectional movement that opposed the Government was “established”, that was to say, up to the point where the movement controlled part of the territory, and it was ambiguous from the point of view of government responsibility. That situation remained implicit in the text and needed to be re-examined.

48. As to article 15 *bis* (Conduct of persons not acting on behalf of the State which is subsequently adopted or acknowledged by that State), proposed in paragraph 284 of the first report, he believed it to be an indispensable provision, as did the majority of the members. However, it would be appropriate to say that the conduct was “adopted and acknowledged” by a State, rather than “adopted or acknowledged”. It was better to strengthen a single condition than to set two weaker conditions. The Drafting Committee could perhaps review that aspect of the text.

49. Mr. CRAWFORD (Special Rapporteur) said that he was pleased that draft articles 9 and 11 to 15 *bis* that he had proposed had generally been well received. Article 15 had even been the subject of an exemplary mini-debate. The Commission’s discussion made it clear in any event that the issue of the responsibility of international organizations and States for wrongful acts committed by such organizations should be dealt with separately, as a different topic. Accordingly, no reference should be made to it in the draft articles. All Commission members seemed to agree that a saving clause should be kept, although they had not agreed on its wording. That was one of the matters which the Drafting Committee could deal with.

50. There had been no objection to the elimination of the case of international organizations in article 9. It was evident that the situation contemplated in that article was extremely rare. Although some members considered that the provision reeked of colonialism, as had been mentioned, in particular with regard to the reference to the United Kingdom Privy Council, in paragraph 220 of his first report, the Special Rapporteur had in mind much more recent situations that had nothing to do with colonialism, situations in which the State in question agreed that another State should place organs at its disposal. Article 9 thus did have its usefulness and it would be advisable to keep it. Its presence would cause fewer problems than its absence.

51. All the members of the Commission had agreed that articles 11 to 14 should be eliminated. Mr. Pellet had made a very pertinent comment about article 12 on a point which should be given further thought. However, that issue was peripheral to the problem of attribution that the draft before the Commission sought to settle, and it was evidently too soon for the Commission to deal with it. Although some members wished to delete the negative provisions of the draft, they had rightly recommended that the most pertinent passages of the commentary should be retained.

\* Resumed from the 2556th meeting.

<sup>13</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>14</sup> See footnote 12 above.

<sup>15</sup> *Ibid.*

52. The Commission had also agreed that articles 14 and 15 should be merged. The Drafting Committee could consider whether the new article 15 should be formulated in a positive or negative form. It could also consider the relationship between articles 15 and 5 (Attribution to the State of the conduct of its organs), namely, the relationship between the organs of “insurrectional movements” and “territorial governmental entities” of States. Any risk of confusion between the two should obviously be avoided.

53. Numerous questions had been raised about the wording used in new article 15. For example, the word “established” in paragraph 1 indicated that there really was an international practice with regard to insurrectional movements and that there was a threshold at which movements acquired a certain international status. As to whether they should be referred to as “insurrectional movements” or “national liberation movements”, the Drafting Committee could choose between the two terms or even use both, but it would be reminded that there were no longer many national liberation movements in the world today. Anyway, it was not for the Commission to analyse the international status of insurrectional movements. Similarly, the Commission was not called on to consider the issue of the responsibility of such movements in depth, even though they obviously bore responsibility.

54. The Commission had also accepted the principle underlying article 15 *bis*, regarding events that a State subsequently adopted or acknowledged. In view of the situations prevalent in the world today, that provision was absolutely necessary. Mr. Economides had proposed a modification which would be taken into consideration, and Mr. Bennouna had noted that the provision actually covered two different situations, depending on the point at which the State decided that the responsibility that it assumed should begin. However, it did not appear entirely necessary to emphasize the differentiation in the article, which was only supposed to settle the problem of attribution of responsibility.

55. Mr. PELLET said that the Special Rapporteur seemed to be using the term “attribution” in a much narrower sense than usual.

56. Mr. BENNOUNA said that it should be clearly stated that the status of insurrectional movements and national liberation movements was not one of the points that the Commission had studied, despite the personal political and historical sensitivities of its members. The issue was a matter of legal personality. It did not refer to a simple problem of terminology, even though one might hesitate to use the word “insurrectional”.

57. Mr. CRAWFORD (Special Rapporteur) replied that he was using the term “attribution” in the sense used in article 3 (Elements of an internationally wrongful act of a State). As to Mr. Bennouna’s comments, he endorsed them without reservation.

58. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft articles 9 and 11 to 15 *bis* to the Drafting Committee.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

## 2559th MEETING

*Wednesday, 12 August 1998, at 12.15 p.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

### Draft report of the Commission on the work of its fiftieth session (*continued*)\*

#### CHAPTER IX. *Reservations to treaties* (A/CN.4/L.562 and Corr.1 and Add.1 and 2 and A/CN.4/L.564)

##### A. Introduction (A/CN.4/L.562)

##### B. Consideration of the topic at the present session (A/CN.4/L.562 and Corr.1 and Add.1 and 2)

1. Mr. DUGARD (Rapporteur), introducing chapter IX of the draft report on reservations to treaties, said that the draft was an accurate reflection of the introduction by the Special Rapporteur on reservations to treaties and the debate in the Commission. Therefore, he urged its adoption.

2. Mr. PELLET (Special Rapporteur) said that he would point out to the secretariat some editorial changes to the draft which would not affect the substance. His only substantive suggestion was that footnote 1 in A/CN.4/L.562/Add.1 should be deleted, as the reference to Japan was inappropriate.

*Sections A and B, as amended, were adopted.*

3. Mr. ROSENSTOCK said that the Special Rapporteur might wish to look at footnote 6 in A/CN.4/L.562/Add.1 to see if it was optimally phrased.

*The meeting rose at 12.30 p.m.*

\* Resumed from the 2546th meeting.

## 2560th MEETING

Wednesday, 12 August 1998, at 3.10 p.m.

Chairman: Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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### International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (*continued*)\* (A/CN.4/483, sect. D, A/CN.4/487 and Add.1,<sup>1</sup> A/CN.4/L.556, A/CN.4/L.568)

[Agenda item 3]

#### CONSIDERATION OF DRAFT ARTICLES 1 TO 17 PROPOSED BY THE DRAFTING COMMITTEE AT THE FIFTIETH SESSION

1. Mr. SIMMA (Chairman of the Drafting Committee), introducing draft articles 1 to 17 on prevention of transboundary damage from hazardous activities adopted by the Drafting Committee (A/CN.4/L.568), said that the Drafting Committee had devoted seven meetings to the topic, from 8 to 12 June and from 5 to 10 August 1998. At its forty-ninth session, the Commission had decided to divide the topic of international liability for injurious consequences arising out of acts not prohibited by international law into two sub-topics, in order to address, first, the problem of prevention of transboundary damage from hazardous activities and then the question of international liability. The draft articles before the Commission dealt with the first sub-topic. At the current session the Special Rapporteur for the topic had proposed a set of articles (A/CN.4/L.556) drawn basically from the draft articles contained in the report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law at the forty-eighth session.<sup>2</sup> The numbers in square brackets indicated the numbers of the corresponding articles proposed at the forty-eighth session. The commentary to the articles, contained in the report of the Working Group at the forty-eighth session, carefully explained the scope of each article and the criteria essential to an understanding of it.

However, since the Commission was beginning a new quinquennium and had several new members, some further explanation was necessary.

2. Article 1 (Activities to which the present draft articles apply) defined the scope of the articles. It was identical to article 1, subparagraph (a), of the draft articles proposed by the Working Group at the forty-eighth session. It limited the scope of the draft articles to activities not prohibited by international law which created a risk of causing significant transboundary harm through their physical consequences. Three criteria were stated.

3. The first criterion was concerned with “activities not prohibited by international law” and made a crucial distinction between the articles on the topic under consideration and those on State responsibility. The second criterion was that the activities to which preventive measures were applicable must contain a risk of significant transboundary harm. The element of risk was intended to exclude from the scope of the draft articles activities which in fact caused transboundary harm in their normal operation. The qualifier “transboundary” was intended to exclude activities which harmed the territory of the State in which they were undertaken or activities which harmed the global commons but did not harm any other State. The phrase “risk of causing significant transboundary harm” should be taken as a single term and understood as defined in article 2.

4. The third criterion was that the significant transboundary harm must have been caused by the physical consequences of the activities. That was consistent with the long-standing view of the Commission that the topic should remain within a manageable scope and therefore exclude transboundary harm which might be caused by the economic, monetary, socio-economic or other policies of States. The activities should thus have physical consequences resulting in significant harm. The title of the article was the one adopted at the forty-eighth session.

5. There appeared to be a discrepancy between the title of the draft articles and their scope as defined in article 1. That was a matter which the Commission would have to resolve at some point. At the current stage the draft articles addressed a sub-topic of the topic of international liability for injurious consequences arising out of acts not prohibited by international law. They therefore dealt with activities not prohibited by international law. However, if the draft articles were to stand on their own, their title would have to be brought into line with their scope.

6. Article 2 (Use of terms) defined five more terms commonly used in the draft articles. The four terms defined in subparagraphs (a), (c), (d) and (e) had already been defined in article 2 of the draft at the forty-eighth session. Subparagraph (b) was new.

7. Subparagraph (a) defined the concept of “risk of causing significant transboundary harm” as a low probability of causing disastrous harm and a high probability of causing other significant harm. The adjective “significant” applied to both risk and harm. For the purposes of the articles, “risk” referred to the combined effect of the probability of the occurrence of an accident and the magnitude of its injurious impact. It was therefore the combined effect of those two elements which defined the

\* Resumed from the 2542th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1998, vol. II (Part One).

<sup>2</sup> See 2527th meeting, footnote 16.

threshold, which must be located at a level deemed significant. The use of “encompasses” was intended to highlight the fact that the spectrum of activities covered was limited and did not include, for example, activities in which there was a low probability of causing significant transboundary harm.

8. Subparagraph (b) was new; it did not define the harm but rather the scope for harm, indicating that it included harm caused to persons, property or the environment.

9. Subparagraph (c) defined “transboundary harm” as harm caused in the territory or in other places under the jurisdiction or control of a State other than the State of origin, regardless of whether the States concerned shared a common border. The definition was self-explanatory and made it clear that the draft articles did not apply to harm affecting the global commons but did apply to activities conducted under the jurisdiction or control of a State, on the high seas for example, having effects in the territory of another State or in places under the jurisdiction or control of another State and producing injurious consequences, for example for ships of another State on the high seas.

10. Subparagraph (d) defined “State of origin” as the State in whose territory or under whose jurisdiction or control the activities referred to in article 1 were carried out.

11. Subparagraph (e) defined “State likely to be affected” as the State in whose territory the significant transboundary harm was likely to occur or which had jurisdiction or control over any other place where such harm was likely to occur. The Drafting Committee had changed the tense of the verb “has occurred” in the draft article at the forty-eighth session to “is likely to occur” because that seemed more appropriate in the context of prevention.

12. Article 3 (Prevention) set forth the general obligation of prevention on which the entire set of draft articles was based. It had been drafted along the lines of article 4 of the draft at the forty-eighth session but differed from that text in not dealing with the obligation to take all appropriate measures to minimize the effects of harm once it had occurred, since the Drafting Committee had regarded that question as relating to liability and not to prevention.

13. Article 3 imposed on the State a duty to take all necessary measures to prevent or minimize significant transboundary harm. That might involve taking such measures as were required by abundant caution, even if full scientific certainty did not exist, to avoid or prevent harm which risked causing serious or irreversible damage. That idea was put well in principle 15 of the Rio Declaration<sup>3</sup> and was subject to the capacity of the States concerned. It was realized that the optimum and more effective implementation of the duty of prevention would require upgrading the input of technology in the activity as well as the allocation of adequate financial and manpower resources, accompanied by the necessary training for the management and monitoring of the activity. The operator

of the activity was expected to bear the costs of prevention to the extent that he was responsible for the operation. The State of origin was also expected to make the necessary expenditure to put in place the administrative, financial and monitoring mechanisms referred to in article 5. The Drafting Committee had noted that States made mutually beneficial arrangements with each other in the areas of capacity-building, transfer of technology, and financial resources. Such efforts served the common interest of all States to develop uniform international standards for regulating and implementing the duty of prevention.

14. Article 4 (Cooperation) was also based on the corresponding article of the draft at the forty-eighth session. However, once again the question of minimizing the effects of harm which had occurred was considered to be outside the scope of prevention. The Drafting Committee had also replaced “any” by “one or more”. The commentary would explain that the organizations referred to in the article were those which had the competence to assist the States concerned in preventing or minimizing significant transboundary harm. It would also explain that, in addition to such assistance, international organizations could provide a framework within which States would discharge their obligation of cooperation in matters of prevention under the article.

15. Article 5 (Implementation) was based on article 7 of the draft at the forty-eighth session. It stated the obvious: once a State had become a party to the draft articles it must take the necessary measures to implement them. Such measures might be of a legislative, administrative or other character, or might include, for example, the establishment of suitable monitoring mechanisms—a term which emphasized the continuing character of the duty established in the draft article.

16. Article 6 (Relationship to other rules of international law) was a simplified version of article 8 in the draft at the forty-eighth session. It made it clear that the draft articles were without prejudice to the existence, operation or effect of any other rule of international law, either treaty-based or customary, relating to an act or omission to which the draft articles might apply in the absence of such a rule.

17. Article 7 (Prior authorization) stated in the first part of the first sentence of paragraph 1 the basic rule that activities within the scope of the draft articles required the prior authorization of the State of origin. The Drafting Committee had felt it necessary also to spell out in that sentence an element previously included in the commentary to the corresponding article 9 of the draft at the forty-eighth session, namely that prior authorization was also required for a major change in a hazardous activity which was already authorized. As explained in the commentary, a “major change” would be one which increased the risk or altered its nature or scope. The second sentence of paragraph 1 addressed a different type of change, one transforming an activity without risk into an activity involving risk. The Drafting Committee had deleted the qualifier “major”, which had appeared in the draft at the forty-eighth session, since any change which would result in an activity falling within the scope of the draft articles would trigger the requirement of prior authorization.

<sup>3</sup> Ibid., footnote 8.

18. Paragraph 2 of article 7 dealt with activities within the scope of the draft articles which had already been carried out before the articles entered into force. That issue had been addressed separately in article 12 in the draft at the forty-eighth session. The Special Rapporteur's proposal was more general than that provision, which had spelled out the various procedural steps involved. The Drafting Committee had made two changes in the Special Rapporteur's text, deleting "prior", since the provision dealt with pre-existing activities, and the reference to paragraph 1, which could be misinterpreted as meaning that the two paragraphs dealt with entirely different situations.

19. The Drafting Committee had concluded that it was important to include a provision dealing with the consequences of the operator's failure to conform with the requirements of the authorization. Indeed, the rule of prior authorization contained in the article would lose much of its practical effect if the State of origin did not also have the obligation to ensure that the activity was carried out in accordance with the conditions established by that State when authorizing the activity. The manner in which the obligation was to be fulfilled was left to the discretion of States. Paragraph 3 of article 7 indicated, nevertheless, that in some cases the operator's failure might result in the termination of the authorization.

20. Article 8 (Impact assessment) was based on article 10 of the draft at the forty-eighth session. It provided basically that an authorization must be preceded by an assessment of the transboundary impact of the activity. Such an assessment would enable a State to determine the extent and the nature of the risk involved in the activity and consequently the type of preventive measures which it must take. The question of who should make the assessment was left to States. The article did not specify what the content of the risk assessment should be. Obviously, such an assessment could be meaningful only if it related the risk to the possible harm which might be caused.

21. Article 9 (Information to the public) was based on article 15 of the draft at the forty-eighth session. It provided that States must keep the public likely to be affected informed about the risk involved in an activity subject to authorization and also to ascertain the public's views. The article reflected a new trend in international law of seeking to involve in the State's decision-making processes those people whose lives, health and property might be affected and to give them an opportunity to present their views to decision makers. The obligation stated in the article was circumscribed by the phrase "by such means as are appropriate", which gave States a choice of the means by which information was provided to the public.

22. Article 10 (Notification and information), which corresponded to article 13 of the draft at the forty-eighth session addressed the situation in which the assessment provided for in article 8 indicated that the planned activity did indeed contain a risk of causing significant transboundary harm. Together with articles 11 and 12, article 10 provided for a set of procedures which were essential to any attempt to balance the interests of all the States concerned by giving them an adequate opportunity to find a way of taking reasonable preventive measures. The core idea of the article was that the State of origin had a duty

to notify the States likely to be affected by the activities. The text adopted by the Drafting Committee was slightly different from article 13 of the draft at the forty-eighth session. First, it reflected an idea contained in the commentary to article 13. The State of origin was currently required, "pending any decision on the authorization of the activity", to provide the States likely to be affected with "timely" notification of the activity. The current text was more finely nuanced and flexible than that at the forty-eighth session which provided for notification "without delay".

23. With regard to the time available to the States likely to be affected to reply, the draft at the forty-eighth session provided that in its notification the State of origin should indicate the time within which a response was required. Article 10 currently did not contain such a requirement. According to paragraph 2, the States likely to be affected should provide a response within "a reasonable time", a formula regarded by the Drafting Committee as more flexible. However, the Drafting Committee understood that, insofar as it applied to the time limits prescribed for procedures before an activity was undertaken, "a reasonable time" should be interpreted to mean that no authorization might be granted before the elapse of "a reasonable time". That point would be explained in the commentary.

24. Article 11 (Consultations on preventive measures) corresponded to article 17 of the draft at the forty-eighth session; it provided for consultations between the States concerned on the measures to be taken in order to prevent or minimize the risk of significant transboundary harm and attempted to strike a balance between two equally important considerations. First, it must be kept in mind that the article dealt with activities which were not prohibited by international law and which, normally, were important to the economic development of the State of origin. But, secondly, it would be unfair to other States to allow such activities to be conducted without consulting them or taking adequate preventive measures. Article 11 provided neither a mere formality which the State of origin had to complete, with no real intention of reaching a solution acceptable to the other States, nor a right of veto for a State likely to be affected. In order to maintain that balance, the article placed emphasis on the manner in which and the purpose for which the parties entered into consultations. They must do so in good faith, taking into account each other's legitimate interests. On the recommendation of the Special Rapporteur, the Drafting Committee had made a number of changes in paragraph 1. It had deleted the phrase "and without delay", which was implicit in the principle of good faith governing the consultations, and the reference to the duty of cooperation, already contained in more general terms in article 4.

25. Paragraph 2 had been left unchanged. In paragraph 3, which dealt with the situation in which consultations had failed to produce an agreed solution, the Drafting Committee, again on the proposal of the Special Rapporteur, had replaced "and may proceed with the activity at its own risk" by "in case it decides to authorize the activity to be pursued at its own risk", in order to make it clear that an activity which might cause significant transboundary harm might be carried out only with the authorization of the State of origin, as provided in article 7. The Drafting Committee had also simplified the

saving clause contained in the last sentence, which currently read “without prejudice to the rights of any State likely to be affected”. The Drafting Committee had considered whether, if the settlement procedure envisaged in article 17 had been put into motion as a result of the failure of the consultations, the State of origin had to await the result of that procedure before authorizing the activity. Most of the members had felt that, since the activities were not prohibited by international law, such a requirement would put an undue burden on the State of origin.

26. Article 12 (Factors involved in an equitable balance of interests) was identical, with the exception of subparagraph (*d*), to article 19 in the draft at the forty-eighth session. Its purpose was to provide some guidance to States in their consultations. In the search for an equitable balance of interests many facts had to be established and all the relevant factors and circumstances weighed. The article should therefore be interpreted in the light of the rest of the draft articles, in particular article 3, which placed the obligation of prevention on the State of origin. The opening clause of the article provided that “In order to achieve an equitable balance of interests . . . the States concerned shall take into account all relevant factors and circumstances”. It was followed by a non-exhaustive list of such factors and circumstances. In view of the wide diversity of types of activity covered by the draft articles and the different situations and circumstances in which they would be conducted, it was impossible to compile an exhaustive list of the factors relevant to all individual cases. Some factors might be relevant in a particular case, while others might not, and still others not contained in the list might prove relevant. Furthermore, no priority of weight was assigned to the factors and circumstances listed, since some of them might be more or less important according to the case.

27. Subparagraph (*a*) compared the degree of risk with the availability of means of preventing or minimizing the risk of harm. For example, the degree of risk might be high but there might be measures which could prevent or reduce it, or there might be good possibilities of repairing the harm. The comparisons were both quantitative and qualitative. Subparagraph (*b*) compared the importance of the activity in terms of its social, economic and technical advantages for the State of origin with the potential harm to the States likely to be affected. Like subparagraph (*a*), subparagraph (*c*) compared the risk of harm to the environment with the availability of means of preventing the damage or reducing the risk. Subparagraph (*d*) took into account the fact that the States concerned frequently embarked on negotiations concerning the distribution of the costs of preventive measures. In so doing, they proceeded from the basic principle derived from article 3 that the costs were to be borne by the operator or the State of origin. Such negotiations mostly took place when there was no agreement on the amount of the preventive measures and when the affected State contributed to the costs of the measures in order to be better protected than it might be by the preventive measures which the State of origin had to take. That link between the distribution of costs and the amount of preventive measures was reflected in particular in subparagraph (*d*). Subparagraph (*e*) provided that the economic viability of the activity in relation to the costs of prevention and the possibility of carrying out the activity elsewhere or by other

means or of replacing it with an alternative activity should be taken into account. Lastly, subparagraph (*f*) compared the standard of prevention demanded of the State of origin with the standard applied to the same or a comparable activity in the State likely to be affected. The rationale was that it might be unreasonable to require the State of origin to comply with a much higher standard of prevention than the States likely to be affected. However, that factor was not in itself conclusive.

28. Article 13 (Procedures in the absence of notification) addressed the situation in which a State had reasonable grounds to believe that an activity planned or carried out in another State might contain a risk of causing significant transboundary harm although it had not received any notification to that effect. The issue had been dealt with in article 18 of the draft at the forty-eighth session, but the Special Rapporteur had felt that it was preferable to use the language of article 18 of the Convention on the Law of the Non-Navigational Uses of International Watercourses, which envisaged a more progressive mechanism, and the Drafting Committee had shared his view. Thus, instead of immediately requesting consultations, as in the draft at the forty-eighth session, the State which believed that it was likely to be affected would first request the State of origin to notify the activity and transmit relevant information about it. It was only if the State of origin refused, on the ground that it was not required to do so—in other words, if it believed that the activity did not contain a risk of causing significant transboundary harm—that consultations might take place at the request of the other State. The Drafting Committee had felt that it was necessary to specify in paragraph 2 that the State of origin must respond “within a reasonable time”. Indeed, consultations were pre-empted as long as that response was not forthcoming, and the State which believed that an activity in the State of origin risked causing it significant transboundary harm would be left without recourse.

29. The Drafting Committee had made a further change in the text proposed by the Special Rapporteur for paragraph 3, according to which the State which believed that the activity was hazardous could request the State of origin to suspend the activity for six months. It had been felt indeed that the obligation imposed on the State of origin was unduly stringent. The articles dealt with activities which were not prohibited by international law. The Drafting Committee had therefore softened the obligation by requiring the State of origin to “take appropriate and feasible measures to minimize the risk”. Suspension of the activity would only be required “where appropriate”. There was thus a sliding scale of measures which the State of origin could take. Moreover, the commentary would make it clear that such measures would also depend on whether the activity in question was still proceeding or had been completed.

30. Article 14 (Exchange of information) indicated the steps which had to be taken after an activity had begun. The purpose of that stage, as of the previous ones, was to prevent or minimize the risk of significant transboundary harm. The provision had been taken verbatim from article 14 of the draft at the forty-eighth session, except for the addition of “available” before “information”. The article required the exchange of information between the State of origin and the States likely to be affected while

the activity was in progress. Prevention was not a one-off measure but a continuing effort. Therefore the duties of prevention did not terminate once authorization had been granted for the activity; they continued for as long as the activity continued.

31. The information which had to be communicated under the article included whatever would be useful and relevant for the purposes of prevention. The addition of "available" had been found useful by the Drafting Committee as a means of alleviating the burden on the State of origin, which would otherwise have been required to provide "all information relevant". The new language introduced a further nuance and was fairer. The information had to be exchanged "in a timely manner", which meant that when a State became aware of such information it should inform the other State quickly, so that there would be enough time for all the States concerned to consult each other about preventive measures. The obligation to exchange information became operational only when the States had information relevant to preventing trans-boundary harm.

32. Article 15 (National security and industrial secrets) reproduced article 16 of the draft at the forty-eighth session without any changes. The Drafting Committee had felt that article 15 adequately reflected a narrow exception to the obligation of the State of origin to provide information under other articles. That type of clause was not unusual in treaties requiring an exchange of information, including the Convention on the Law of the Non-Navigational Uses of International Watercourses. However, article 31 of the Convention dealt only with information about national defence or security, while article 15 also protected industrial secrets. Indeed, in the context of the topic it was highly probable that some of the activities might involve the use of sophisticated technology protected under domestic legislation on industrial property. As in all the provisions of the draft articles, an attempt had been made to balance the legitimate interests of all the States concerned. Thus, the State of origin, while allowed to withhold certain information, must "cooperate in good faith with the other States concerned to provide as much information as can be provided under the circumstances".

33. Article 16 (Non-discrimination) was based on article 32 of the Convention on the Law of the Non-Navigational Uses of International Watercourses. It set out the basic principle that the State of origin must grant access to its juridical and other procedures without discrimination on the basis of nationality, residence or the place where the damage had occurred. It obligated States to ensure that any person, whatever his nationality or residence and regardless of where the harm might occur, received the same treatment as that afforded by the State of origin to its nationals under its domestic law. The article should be understood as preventing States from discriminating on the basis of their legal systems and not as constituting a general non-discrimination clause with respect to human rights. In fact, the provision was about equal access by nationals and non-nationals and by residents and non-residents to the courts and administrative agencies of the States concerned.

34. Article 17 (Settlement of disputes) was a new provision proposed by the Special Rapporteur and did not have

an equivalent in the draft at the forty-eighth session. It was based on article 33 of the Convention on the Law of the Non-Navigational Uses of International Watercourses in that it envisaged compulsory resort to a fact-finding commission at the request of one of the parties if the dispute had not been settled by any other means within six months. Among those other means the Special Rapporteur had highlighted the binding procedures of arbitration and judicial settlement. However, the Drafting Committee had felt that it was also important expressly to mention other means of third-party settlement, in particular mediation and conciliation. As for the fact-finding procedure, the Drafting Committee had been aware that in practice the stipulation in article 17 that the parties should "have recourse to the appointment of an independent and impartial fact-finding commission" would not be sufficient for the actual establishment of such a commission. Indeed, in binding international instruments that type of provision was normally accompanied by a detailed procedure on the appointment and functioning of the fact-finding commission, as was the case, for example, in article 33 of the Convention on the Law of the Non-Navigational Uses of International Watercourses. However, since the nature of the draft articles on prevention had not yet been decided, the Drafting Committee had felt it premature to set out such a detailed procedure in the text. That point would also be explained in the commentary. With regard to the last sentence of article 17, concerning the report of the fact-finding commission, the Drafting Committee had considered it preferable to delete the phrase "shall be recommendatory in nature" since it could give rise to misunderstandings. Such a report would normally be limited to an account of the facts which the fact-finding commission had established and would not contain recommendations as such. The commentary would make it clear that the report was not binding in any way.

35. The CHAIRMAN invited the members of the Commission to comment on the draft articles.

36. Mr. BENNOUNA said that article 17, which the Chairman of the Drafting Committee had just introduced, was not complete and, as it stood, of very little use. Paragraph 1 merely listed the means of settlement, which were available to States anyway, and thus it added nothing to Article 33 of the Charter of the United Nations. While paragraph 2 mentioned the appointment of a fact-finding commission, it said nothing about the actual modalities of the appointment of the members and the functioning of such a commission. He therefore proposed that the draft article should be sent back to the Drafting Committee.

37. Mr. FERRARI BRAVO said that the Special Rapporteur was to be congratulated for having made a selection from the texts already drafted in his endeavour to identify the rules to underpin an outline of a codification text. In the end, having started with a very general title the Special Rapporteur had arrived at conclusions which were fairly close to the ones which he himself had reached as Special Rapporteur on the environment for the Institute of International Law.

38. Article 17 was indeed a little thin, but that did not mean that it was totally useless, for prevention was an area in which States had always been reluctant to accept binding procedures. Even the modest fact-finding

commission provided for in paragraph 2 was a first step. Article 17 was not perhaps definitive in its form, but it would be difficult to go any further at the current stage and there was no need to send it back to the Drafting Committee.

39. The CHAIRMAN, in response to a question from Mr. PELLET, suggested that the Commission should proceed article by article.

*It was so agreed.*

ARTICLE 1 (Activities to which the present draft articles apply)

*Article 1 was adopted.*

ARTICLE 2 (Use of terms)

40. Mr. PELLET said that he wanted to be sure that the term “or control”, which was used in article 2 and in articles 7 and 13, did indeed address the case of a State which exercised effective control in a territory which did not belong to it and must therefore be held liable for what happened in that territory.

41. Mr. Sreenivasa RAO (Special Rapporteur) said that that was indeed how “or control” should be understood, that is to say, in accordance with the interpretation given by ICJ in the *Namibia* case.

42. Mr. HAFNER said that the phrase “under the jurisdiction or control” had been the subject of a long debate in Stockholm in 1972,<sup>4</sup> since when it had usually been found in documents of the current type. It had been felt at the time that to speak solely of jurisdiction would immediately prompt the question of whether the jurisdiction was exercised lawfully. That was why “or control” had been added—in order to cover such questions as, for example, jurisdiction or control exercised over ships on the high seas. In other words, the addition of “or control” was designed essentially to circumvent a debate on the legality or illegality of the jurisdiction.

*Article 2 was adopted.*

ARTICLE 3 (Prevention)

43. Mr. PELLET said that he did not understand the reasons for the deletion of former article 3 proposed by the Working Group at the forty-eighth session and its replacement by the new article 3, which used virtually the same language as former article 4 proposed by the Working Group at the forty-eighth session. The deletion of the article had also removed the assertion of an essential principle, namely that the freedom of action of States had limits.

44. Mr. Sreenivasa RAO (Special Rapporteur) said that the old language had been removed out of a concern for brevity and in order not to overload the draft articles, but the essential underlying ideas and principles had not disappeared and had not been changed. As a whole, the draft

articles stated the limits on the freedom of action of States clearly and provided a regime to govern that question.

45. Mr. PELLET said that he agreed with the Special Rapporteur that other articles did contain the idea of a general duty of prevention found in the second sentence of former article 3. But the principle of the freedom of action of States and the limits thereto, which had been the essence of the whole text had completely disappeared. He proposed that the first sentence of former article 3, which was well drafted and said something fundamental, should be reproduced in an article 2 *bis*.

46. Mr. ECONOMIDES said that the very existence of the text under discussion proved not only that the freedom of States was not unlimited but also that it was very strictly limited. That was why it had been felt that the general duty of prevention, stated very strongly in article 3, would cover the whole of the first sentence of the former text, which could thus be deleted.

47. Mr. HAFNER said that he would be reluctant to reinsert the sentence in question, which was quite different from and went further than the current article 3. It was true that the Commission could and perhaps should address fairness between the generations and the duty to use natural resources in a reasonable manner, but its mandate did not extend that far.

48. Mr. BENNOUNA said that Mr. Pellet’s criticism was relevant and that the general principles stated in the first sentence of former article 3 could be inserted in the preamble of an eventual convention.

49. Mr. Sreenivasa RAO (Special Rapporteur) said that the commentary to article 3 would discuss the fundamental principle, which was a very general and universally accepted one.

50. Mr. PELLET said that he regretted the disappearance of the first sentence of former article 3 because he belonged to the school of legal objectivism, for which the will of the State was not everything in international law. In a world of internationalists there were too many people who thought that anything which was not prohibited was permitted. He would accept the decision to delete the sentence but thought it profoundly regrettable from a doctrinal standpoint.

*Article 3 was adopted.*

ARTICLE 4 (Cooperation)

51. Mr. GOCO said that the term “States concerned”, which appeared in article 4 and in articles 11 and 16, had not been included in article 2, on the use of terms, which defined only “State of origin” and “State likely”. Moreover, “State” was used without qualification in other articles. Did the different usages correspond to differences of substance?

52. Mr. SIMMA (Chairman of the Drafting Committee) said that the term “States concerned” had been used to avoid overburdening the text when the meaning was clear. In article 4 the States concerned were clearly the State of origin and the State likely to be affected. When “State” was used without qualification it could mean either the

<sup>4</sup> See *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum).

State as distinct from another institution or either the State of origin or the State likely to be affected. In every case the context clearly showed the meaning of the term used.

53. Mr. ECONOMIDES said that “States concerned” always meant the State of origin and the State likely to be affected, whereas “State” without qualification also covered the States parties to the future instrument or even States which were not parties but wished to apply the instrument. Those details should be made clear in the commentary.

54. Mr. AL-KHASAWNEH said that the phrase “shall cooperate in good faith” might give the impression, arguing *a contrario*, that States could cooperate “in bad faith”. Similarly, an *a contrario* argument might allow article 4 to mean that when the transboundary harm was not significant, States were not required to cooperate. Lastly, a logical sequence would require “minimizing” to be placed before “preventing”.

55. Mr. SIMMA (Chairman of the Drafting Committee) said that the phrase “shall cooperate in good faith” had been used in dozens of treaties. The term “significant harm” was also firmly established. In any event, there was no reason to raise *a contrario* arguments, and the Commission would not be able to rewrite the whole of the text in order to remove any risk of interpretations of that kind. Lastly, the terms “minimizing” and “preventing”, and their link with each other, had prompted a very lively debate in the Drafting Committee, which had concluded that the meaning of the article was that the primary requirement was to prevent harm but, failing that, at least to minimize the risk.

56. Mr. Sreenivasa RAO (Special Rapporteur) said that it had never been the Commission’s intention to minimize the importance of cooperation between States, regardless of how significant the harm was, even if in the current case the provision was addressing significant harm. All those points would be made clear in the commentary.

57. Mr. KABATSI said that in the English version “organization” should be in the plural. Article 1 spoke of a risk of causing harm but article 4 of reducing the risk of harm. Perhaps the verb “causing” should be inserted in article 4.

58. Mr. HAFNER said that the term “causing” used in article 1 had been taken from principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)<sup>5</sup> and principle 2 of the Rio Declaration. Unless care was taken with the punctuation, the introduction of “causing” in article 4 might change the grammatical object of the verb “preventing”.

59. Mr. GALICKI said that “causing” also appeared in articles 11 and 14, for example. Thus the problem affected the whole of the text.

60. Mr. CANDIOTI pointed out that “causing” already appeared in the Spanish version of article 4.

61. Mr. PELLET said that if “causing” was introduced in article 4 it should also be introduced in article 3. In both cases it might be difficult to reformulate the French version.

62. Mr. Sreenivasa RAO (Special Rapporteur) said that “causing” added nothing in the context of articles 3 and 4, since the risk of harm was the same thing as the risk of causing harm. Having consulted other members of the Commission, he proposed that articles 3 and 4 should remain as they were but, for the sake of consistency, the subsequent occurrences of “causing” should be deleted during the consideration of the articles in question.

63. The CHAIRMAN suggested that the Commission should adopt article 4 as it stood, bearing in mind the Special Rapporteur’s proposal and with “organization” put in the plural in the English version.

*It was so agreed.*

*Article 4 was adopted.*

#### ARTICLE 5 (Implementation)

64. Mr. PELLET said that the article was longer than the corresponding article 7 in the draft at the forty-eighth session: the phrase “including the establishment of suitable monitoring mechanisms” had been added. The provision was less anodyne than might be thought, for it imposed on States an obligation which some of them would find too burdensome. No doubt the Chairman of the Drafting Committee would give a detailed explanation of that point.

65. Mr. BENNOUNA said that the additional obligation which was worrying Mr. Pellet was not so burdensome, for States were already required under customary international law to monitor activities taking place in their territory.

66. However, he had doubts about the phrase “legislative, administrative, or other action”. Some thought should also have been given to constitutional action, since it could be relevant. A simpler but broader expression such as “States shall take the necessary measures of internal law” would have been sufficient.

67. Mr. SIMMA (Chairman of the Drafting Committee), replying to Mr. Pellet, said that the added phrase “suitable monitoring mechanisms” did not refer to some sophisticated technological apparatus but to a permanent and durable administrative arrangement equipped with the resources and capacity permanently to monitor the conduct of the activities which it had been created to monitor.

68. Mr. Sreenivasa RAO (Special Rapporteur) said that in fact “suitable monitoring mechanisms” might consist, for example, of a corps of inspectors, a monitoring body, a system of surprise inspections, exercises and intervention measures for the case in which harm had actually occurred. It had seemed essential to stress the establishment of such mechanisms because it was precisely at that level that States most often sinned, not for want of goodwill but for want of means.

<sup>5</sup> Ibid., part one, chap. I.

69. Mr. SIMMA (Chairman of the Drafting Committee), replying to Mr. Bennouna, said that the Drafting Committee had avoided using the term “internal law” anywhere in the text because it had realized that it would always give the impression that internal law took precedence over international law.

70. Mr. PELLET said that the article should mention not only “legislative, administrative and constitutional action”, as Mr. Bennouna was proposing, but also “measures of international law”. It would no doubt be simplest not to use any adjective and simply say “States shall take the necessary action to implement”. In any event, the commentary would explain very clearly the nature of article 5, which otherwise might be regarded either as imposing an obligation on States or as merely giving them some advice.

71. Mr. ECONOMIDES said that current article 7 mentioned a whole series of administrative procedures of authorization and control. States would therefore have some hard legislative work to look forward to. That was indeed what article 5 was talking about. International law had nothing to do with the case.

72. Mr. KABATSI said that although the measures envisaged in article 5 were certainly measures of internal law, it should not be forgotten that they might have an international aspect, since for example a State could “seek the assistance of one or more international organizations”, as article 4 rightly provided.

73. Mr. RODRÍGUEZ CEDEÑO and Mr. LUKASHUK said that they were willing to adopt article 5 as it stood.

74. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 5.

*It was so agreed.*

*Article 5 was adopted.*

75. Mr. ROSENSTOCK said that in one of his statements the Special Rapporteur had given the impression that article 5 was concerned with something other than an obligation of conduct. As he understood it, the provision just adopted was quite definitely concerned with an obligation of conduct.

### Membership of the Commission

76. The CHAIRMAN announced that Mr. Ferrari Bravo had tendered his resignation from the Commission in order to take up a seat on a European body. He offered him the Commission’s congratulations and thanks.

*The meeting rose at 5.55 p.m.*

## 2561st MEETING

*Thursday, 13 August 1998, at 10.15 a.m.*

*Chairman: Mr. João BAENA SOARES*

*Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.*

**International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (continued) (A/CN.4/483, sect. D, A/CN.4/487 and Add.1,<sup>1</sup> A/CN.4/L.556, A/CN.4/L.568)**

[Agenda item 3]

CONSIDERATION OF DRAFT ARTICLES 1 TO 17 PROPOSED BY THE DRAFTING COMMITTEE AT THE FIFTIETH SESSION  
(continued)

1. The CHAIRMAN invited the Commission to continue its consideration of draft articles 1 to 17 on prevention of transboundary damage from hazardous activities adopted by the Drafting Committee (A/CN.4/L.568).

ARTICLE 6 (Relationship to other rules of international law)

*Article 6 was adopted.*

ARTICLE 7 (Prior authorization)

2. Mr. PELLET, concerned that paragraph 2 seemed too rigid, questioned whether the provisions of the draft articles should be made retroactive. He asked whether any safeguards had been provided to protect the interests of those engaged in pre-existing activities.

3. Mr. Sreenivasa RAO (Special Rapporteur) said that the provisions of article 7 did not alter the international obligations of States. States must be presumed to authorize activities on their territory with due regard for safeguards and international law. Paragraph 2 simply obligated States to implement the requirement of authorization with respect to pre-existing activities. A constant review of activities in the light of new information or changing realities was in any case a normal part of

<sup>1</sup> Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

the process of ensuring that activities continued to respect changes in safeguards and international standards.

4. Mr. BROWNLIE said that to some extent article 7 broke new ground in that it formalized as part of an international standard a function which States in any case performed within their domestic jurisdiction, namely the exercise of control over activities taking place on their territory.

5. Mr. PELLET favoured the creation of an international standard but stressed that there should be some mention of the obligation of ongoing review and consultation.

6. Mr. MIKULKA shared the concerns expressed by Mr. Pellet concerning the retroactive nature of the provisions in paragraph 2. In his opinion, the second sentence of paragraph 1 should be part of the commentary, not part of the text.

7. Mr. Sreenivasa RAO (Special Rapporteur) said that the intent of paragraph 2 was not to prohibit activities but to accommodate them in the event of a new situation. Changing situations required new measures, but it remained up to the State concerned to decide upon the measures to be taken.

8. Mr. PELLET suggested that the word "prior" should be deleted from the title of article 7, since it certainly did not apply to paragraph 2, and further suggested that an additional article should be included to reflect the concerns expressed by members.

9. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 7, taking into account the comment by Mr. Mikulka and deleting the word "prior" from the title.

*Article 7, as amended, was adopted.*

#### ARTICLE 8 (Impact assessment)

10. Mr. PELLET said that, given the increasing importance of impact assessments and the growing body of legal cases involving environmental questions, the language in article 8 was disappointingly weak.

*Article 8 was adopted.*

#### ARTICLE 9 (Information to the public) and

#### ARTICLE 10 (Notification and information)

*Articles 9 and 10 were adopted.*

#### ARTICLE 11 (Consultations on preventive measures)

11. Mr. ECONOMIDES, referring to the minority position in the Drafting Committee concerning the relationship between article 11, paragraph 2, and article 17, said that an impartial inquiry should have priority over and precede any decision taken by a State concerning a disputed activity, since it was only right that international procedures should take precedence over national ones. If activities undertaken within a State could cause harm to another State, prevention of such harm was an important part of article 17. In addition, in cases of disputes between

States it was a basic principle of public international law that States should avoid any unilateral act which would aggravate the dispute or make a solution more difficult. Those points should be reflected in the summary record of the meeting as well as in the report of the Commission to the General Assembly.

12. Mr. PELLET said that the intent of the articles as currently drafted was for the parties to work together and take advantage of the normal consultative process to avoid harm. With the possible exception of article 11, paragraph 3, the dispute stage had not yet been reached.

13. Mr. ECONOMIDES said that there was a difference between a dispute per se and an activity's impact on another State. Also, the nature of the dispute was an important factor. Since the purpose of the draft articles was to avoid disputes, prevention must be a priority.

14. Mr. BROWNLIE said that, while the concerns of Mr. Economides were understandable, and while it was true that articles 11 and 17 set out a sequence of steps for the resolution of disputes, article 17 was not the final stage of article 11. The draft's intention was not the prevention of damage but rather a balancing of interests between the States concerned.

15. Mr. Sreenivasa RAO (Special Rapporteur) said that the Drafting Committee was attempting to define a process to be followed by the parties concerned, with various steps preceding article 17. He suggested that Mr. Economides could prepare an explanation of his position to include in the commentary, and that there could then be further discussion on second reading.

16. Mr. PELLET, speaking in support of the point raised by Mr. Economides, noted that the second sentence of article 13, paragraph 2, provided for States to enter into consultations pursuant to article 11 in cases of disagreement concerning the obligation to provide notification. Article 11 would therefore be used in fact to settle what could be described as a dispute, even though that was not the stated purpose of article 11.

17. Mr. GOCO wondered whether some wording could be found that would allow third-party States to initiate consultations or seek solutions, rather than restricting such steps to the State of origin and the State affected.

18. Mr. Sreenivasa RAO (Special Rapporteur) pointed out that the intervention of a third party would probably not be acceptable to the States concerned. Generally speaking, States were expected to refrain from interfering in each other's affairs. In any case, should mutual consultations fail, the provisions of article 17 would take effect and third parties would certainly play a role at that stage of the mediation process.

19. Mr. MIKULKA questioned the inclusion of the phrase "at its own risk" in paragraph 3 and requested a definition.

20. Mr. Sreenivasa RAO (Special Rapporteur) said that the phrase was explained in the commentary; it was designed to cover cases in which unforeseen costs arose, at a later date, from an authorized activity, and it implied

that the State authorizing the activity incurred a risk that could not be transferred.

21. Mr. SIMMA (Chairman of the Drafting Committee) said that the Drafting Committee had not recently debated the point. It had considered that the explanation provided by Mr. Sreenivasa Rao and contained in the commentary to the draft articles at the forty-eighth session<sup>2</sup> was convincing.

22. Mr. MIKULKA suggested that the phrase should be eliminated and asked whether that would entail any consequences.

23. Mr. PELLET wholeheartedly agreed with Mr. Mikulka that the phrase should be eliminated because it could have unexpected results. It had been used twice in the draft at the forty-eighth session but in a different context. If it was left in the current text with the same meaning as in the draft at the forty-eighth session, it prejudged the regime of liabilities and attributed a prior responsibility to the State which carried out an activity.

24. Mr. Sreenivasa RAO (Special Rapporteur) said that the Drafting Committee had considered the point very carefully at the forty-eighth session and had concluded that the phrase “at its own risk” could be included without referring to liabilities. It could also be eliminated. However, in the latter case, it should be borne in mind that the courts would have to decide who would bear costs in cases where a State took a unilateral decision that affected the interests of other States and the other States pressed for their rights.

25. Mr. HAFNER said that he would prefer to retain the phrase. Also, when paragraph 3 was compared with the draft at the forty-eighth session, there was a difference: previously only procedural rights had been protected, but currently the rights of “any State likely to be affected” were protected.

26. Mr. BROWNLIE said that the phrase should be removed as the reader of the articles would not have the explanations of the accompanying commentary. Moreover, the words “without prejudice” in paragraph 3, read in conjunction with article 6, resolved the problem.

27. Mr. ECONOMIDES said that the phrase should stay, as it served as a reminder that a State did not have unlimited competence and could incur liability.

28. Mr. AL-BAHARNA recalled that the phrase had been in the draft article for a number of years without eliciting objections.

29. Mr. Sreenivasa RAO (Special Rapporteur) said that the general opinion of the Commission appeared to be that the phrase should be eliminated and that the commentary should reflect the different points of view.

30. Mr. HAFNER asked whether paragraph 2 referred only to States which had embarked on consultations or had a more extended meaning.

31. Mr. Sreenivasa RAO (Special Rapporteur), supported by Mr. KABATSI and Mr. ROSENSTOCK, said

that both paragraph 1 and paragraph 2 referred to the same group and the word “concerned” should be added after “States” in paragraph 2.

32. Mr. AL-BAHARNA said that the word “concerned” was not needed if the order of paragraphs 2 and 3 was reversed. In his interpretation, paragraph 1 said that the States concerned would enter into consultations, paragraph 3 referred to the situation if consultations failed to produce an agreed solution, and paragraph 2 was addressed to all parties.

33. Mr. HAFNER said that the word “concerned” should not be introduced, as the exact phrase used in paragraph 2 had already been used in other conventions. Also, the order of the paragraphs should be retained.

34. Mr. ROSENSTOCK, supported by Mr. BENNOUNA, said that the commentary would make the meaning clear and it was therefore not important to include the word “concerned”. Moreover, the order of the paragraphs reflected the logical order of events and should stand.

35. Mr. RODRÍGUEZ CEDEÑO agreed that the order of the paragraphs should remain the same, although he suggested that paragraphs 1 and 2 should be combined. Moreover, the word “concerned” should be inserted or an explanation should be provided in the commentary.

36. Mr. SIMMA (Chairman of the Drafting Committee) said that the order could not be changed as paragraph 2 ensued directly from paragraph 1. He suggested that the text should be allowed to stand and that clarifications should be included in the commentary.

37. Mr. Sreenivasa RAO (Special Rapporteur) agreed with Mr. Simma. The commentary would read:

“States referred to in article 11, paragraph 2, are those States which have already entered into consultations and it is expected that during the course of their consultations they shall take into consideration the equitable balance of interests.”

He recalled that it had already been agreed to eliminate the word “causing” in paragraph 1.

*Article 11 was adopted.*

ARTICLE 12 (Factors involved in an equitable balance of interests)

38. The CHAIRMAN said that in subparagraph (f) the word “protection” should be replaced by the word “prevention”.

39. Mr. GALICKI said that in the English text the word “of” should be deleted from subparagraph (a) before the words “repairing the harm”. Moreover, he had two reservations. Subparagraph (d) currently referred to both “the States likely to be affected” and “the States of origin”, whereas earlier it had referred only to the former. Yet, the costs of prevention should not be apportioned on an equal basis. Also, it was unclear whether “are prepared” referred to a subjective readiness or an objective preparation to contribute.

<sup>2</sup> See 2527th meeting, footnote 16.

40. Mr. Sreenivasa RAO (Special Rapporteur) said that “prepared” referred to what States were ready to offer and should not alter the “balance of interests” to which the title and *chapeau* alluded. The words “as appropriate” were important in that regard.

41. Mr. GALICKI said that he accepted the explanation, and he suggested that the commentary should clarify the point.

42. Mr. PELLET observed that subparagraph (d), which referred to “States of origin” in the plural, should be brought into line with the rest of the text, which referred to “State of origin” in the singular. Moreover, he objected to the translation into French of the word “restored” in subparagraph (c), as it implied that the environment had to be returned to its original state, thereby placing undue emphasis on protection of the environment rather than on prevention of damage, which was the spirit of the draft articles.

43. Mr. SIMMA (Chairman of the Drafting Committee) said that the English term “restoring” was not equivalent to the French term used.

44. Mr. Sreenivasa RAO (Special Rapporteur) said that the intent was to encourage States to choose the most environmentally friendly option.

45. Mr. BENNOUNA said that the problem was one of translation, not of substance.

46. Mr. AL-BAHARNA enquired whether the term “restoring” was used in the major environmental conventions. If not, perhaps a formulation such as “repairing damage to the environment” would be appropriate.

47. Mr. Sreenivasa RAO (Special Rapporteur) said that the Drafting Committee had felt it best, if a phrase occurred in an earlier draft and if the commentary on the topic was clear, to retain that language rather than embark on new drafting at the current stage of consideration.

48. Mr. PELLET said that principle 2 of the Rio Declaration<sup>3</sup> used the phrase “not cause damage to the environment”, which might be appropriate in subparagraph (c). At any rate, the French version should be aligned with the English and Spanish versions.

49. Mr. ROSENSTOCK suggested that “restoring” could be replaced by “preserving”.

*The meeting was suspended at 11.45 a.m. and resumed at 12.15 p.m.*

50. Mr. HAFNER said that principle 7 of the Rio Declaration used the term “restore”. However, lengthy discussions of that term had taken place during the negotiations on the United Nations Convention on the Law of the Sea, in which a compromise had been reached because of the impossibility in many cases of restoring the environment to its prior state. The term “preserve” was preferable.

51. Mr. MIKULKA said that the relationship between subparagraphs (a) and (c) was unclear. Since “significant

transboundary harm” included environmental damage, he did not understand why “harm to the environment” was mentioned separately in subparagraph (c), thereby implying that environmental damage was not covered by subparagraph (a).

52. Mr. SIMMA (Chairman of the Drafting Committee) said that subparagraph (a) had been intended to refer to cases with a high degree of risk, counterbalanced by measures to reduce that risk, whereas in subparagraph (c) the risk was counterbalanced by the availability of means to prevent harm.

53. Mr. ROSENSTOCK said that the difference could be explained by looking at the definition of transboundary harm: the term “transboundary” meant activities occurring within the territory of an affected State, while “to the environment” was not as restrictive and could refer to the global commons, for example.

54. Mr. MIKULKA said that the latter type of activity appeared to lie outside the field of application of the article.

55. Mr. SIMMA (Chairman of the Drafting Committee) said that article 12 simply contained a listing of activities and factors to be taken into account, some of which went beyond the transboundary concept.

56. Mr. BROWNIE said that it was inappropriate to reopen consideration of the issue at the current stage.

57. Mr. Sreenivasa RAO (Special Rapporteur) said that the elements in question had been deliberately retained from an earlier draft because they provided a mechanism to eliminate unwitting damage to the global commons. The factors listed in the article were intended to help States to provide a better response with respect to harm than they otherwise might have.

58. Mr. GOCO said that article 12 was simply a listing of factors involved in an equitable balance of interests which was not intended to be exhaustive. He therefore urged its adoption.

59. Mr. MIKULKA said that he had not been convinced by the arguments advanced but would be satisfied if the commentary indicated that one member believed that the content of subparagraph (c) had already been covered by subparagraph (a).

60. Mr. PELLET said that he could support the suggestion to replace “restoring” by “preserving”.

61. Mr. SIMMA (Chairman of the Drafting Committee) suggested that in subparagraph (a) “of” should be inserted before “the availability of means” as a clarification. With regard to subparagraph (c), however, he doubted whether the terms “preserving the environment” and “restoring the environment” were equivalent. The latter term implied that a change in the environment had already occurred, and that action was required to bring it back to its former condition.

62. Mr. KUSUMA-ATMADJA said that he shared the concerns expressed by Mr. Mikulka and Mr. Pellet. Where transboundary harm was concerned, there was a difference between protecting and restoring the environ-

<sup>3</sup> Ibid., footnote 8.

ment. However, he would reserve any further comments until the next session of the Commission.

63. Mr. BROWNLIE said that, while he preferred the term “preserving”, the meaning of “restoring” was perhaps less rigidly fundamentalist and more relative than some members thought. He could therefore accept either of the terms.

64. Mr. ROSENSTOCK, referring to a point raised by the Chairman of the Drafting Committee, said that in determining whether to go ahead with an activity, it was necessary to make sure that the status of the environment after the activity had been undertaken would not be significantly worse than it had been before that activity was undertaken, without reference to a theoretical “state of nature”. If the word “preserving” was easier to work with in the other official languages, he would prefer to substitute that word, although the distinction between it and “restoring” in the English language was minor.

65. Mr. BENNOUNA said that the word *rétablir* could be used in the French version to indicate the idea of returning the environment to its former state. That change would accord well with accepted concepts of international responsibility, while avoiding excessive environmentalism.

66. The CHAIRMAN asked if there were any objections to replacing the word “restoring” by the word “preserving” in the English version, with appropriate translations in the other official languages.

67. Mr. HAFNER said that he would prefer to retain the word “restoring” and its equivalents in the other language versions, since it was used in principle 7 of the Rio Declaration.

68. Mr. PELLET said that he could accept the terms “restoring and preserving” as long as they did not imply a return to the original state of the environment.

69. Mr. ROSENSTOCK said that he could accept either of the terms, but that using both would imply a greater difference between them than he felt existed.

70. Mr. ECONOMIDES, supported by Mr. CANDIOTI, said that the two terms complemented each other but that he would prefer to place “preserving” first.

71. Mr. BROWNLIE said that inserting both words would have the effect of raising the standard, because, as used in an environmental context in English, the word “preserve” often did imply at least the desire to replicate an earlier state. He suggested that only “restoring” should be used, and that it should be explained in an appropriate commentary.

72. Mr. HE said that the two words also had different meanings in Chinese. He preferred that both should be included or, if only one was chosen, that an appropriate explanation should appear in the commentary.

73. Mr. Sreenivasa RAO (Special Rapporteur) said that the word “restoring” should be retained for the reason advanced by Mr. Brownlie, and that if necessary an explanation could be included in the commentary to the effect that the Commission had considered the possibility of

replacing it with “preserving”, but that the meaning intended in either case was to repair environmental damage to the extent technologically feasible.

74. Mr. SIMMA (Chairman of the Drafting Committee) said that the insertion of the word “of” between “and” and “the availability” in subparagraph (a) would clarify the distinction between that paragraph and subparagraph (c).

75. The CHAIRMAN said that, if he heard no objection, he took it that the Commission wished to adopt article 12 as amended by inserting the word “of” in subparagraph (a) and retaining the word “restoring” in subparagraph (c) with appropriate commentary.

*Article 12, as amended, was adopted.*

76. Mr. Sreenivasa RAO (Special Rapporteur), in response to concerns raised by Mr. Mikulka, read out the following paragraph for inclusion in the commentary to article 12:

“Subparagraph (c) of article 12, according to one view, should be deleted. It was suggested that subparagraph (a) already would have covered harm to the environment as given in the definition in subparagraph (b) of article 2. Besides, it was noted that the environment in general is not within the scope of this topic. Other members, however, felt that subparagraph (a) is more directly concerned with the degrees of risk and of availability of means of prevention, while subparagraph (c) deals with ensuring measures which are more environmentally friendly.”

ARTICLE 13 (Procedures in the absence of notification)

77. Mr. PELLET said that the reference to a six-month suspension period in article 13, paragraph 3, was troubling and incomprehensible. It appeared to impose an onerous burden on the State of origin, and the period of time specified seemed arbitrary as well.

78. Mr. SIMMA (Chairman of the Drafting Committee) said that the Drafting Committee had considerably softened the original wording of the paragraph by adding the words “appropriate and feasible” and “where appropriate”, thereby lessening the potential burden on the State of origin in such cases.

79. Mr. Sreenivasa RAO (Special Rapporteur) said that the six-month period had originally been arrived at after a difficult debate on the Convention on the Law of the Non-navigational Uses of International Watercourses. Moreover, the phrase “unless otherwise agreed” in paragraph 3 had been intended to cover every contingency, allowing States to freely undertake measures which suited them; the six-month time period was simply intended to be applied as a minimum in such situations, taking into account the difficulty and potential financial and economic effects of suspending large-scale projects.

80. Mr. PELLET said that, while it was acceptable to suggest the suspension of a project, it was entirely inappropriate for the Commission to stipulate a specific time period for such a suspension. He therefore proposed that the phrase “for a period of six months” should be deleted.

81. Mr. Sreenivasa RAO (Special Rapporteur) said that, as six months was too short a period in the case of difficult negotiations, he could accept the deletion of the phrase.

82. Mr. BROWNLIE said that he would like the phrase to be retained.

83. Mr. PELLET said that he was totally opposed to the inclusion of the phrase.

84. Mr. MIKULKA said that he had more serious problems with paragraph 3 as a whole, whose very position in the draft appeared erroneous. According to the logic of articles 11, 12 and 13 taken together, in cases where disputes had arisen as to the risk of transboundary harm, it appeared that States were being asked to take measures to minimize such risk before they had agreed that it existed. It would be more appropriate, therefore, to move paragraph 3 to article 11 and to re-examine its intent.

85. Mr. Sreenivasa RAO (Special Rapporteur) said that in cases where an activity had already started and States which thought themselves to be affected by it had asked the State of origin to enter into consultations, the State of origin could either dispute their understanding of the effects of the activity, or agree to enter into consultations with them, or explain to them that the activity in question was not to their detriment and that suspension of it was not the only method available to satisfy their concerns. If none of those alternatives proved satisfactory, the State of origin could then agree to suspend the activity for six months.

86. Mr. PELLET said that he wanted the commentary to reflect the Commission's lack of unanimity on paragraph 3 owing to the arbitrary nature of the phrase "for a period of six months" and the incompatibility of that phrase with the phrase "where appropriate".

87. Mr. MIKULKA asked why paragraph 3 had not been included in article 11 instead of in article 13 and why a State of origin was under no obligation to suspend a disputed activity if it had initiated consultations.

88. Mr. Sreenivasa RAO (Special Rapporteur) said that paragraph 3 would be out of place in article 11, which called for a State to consult with other States prior to initiating a potentially risky activity. Article 13, on the other hand, dealt with situations in which a State had reason to believe that a planned activity or an activity initiated earlier posed a risk of transboundary effects.

89. Mr. ROSENSTOCK said that, according to the logic intended, article 11 dealt with situations in which the State of origin was asked to refrain from an activity which it had not yet authorized or begun, while article 13 dealt with situations in which a State of origin had already initiated the activity.

90. Mr. SIMMA (Chairman of the Drafting Committee) said that providing for a six-month cooling-off period in article 11 would not really make sense, because at the stage envisaged by the article there was no activity yet to suspend.

91. Mr. MIKULKA said that he failed to see the justification for including paragraph 3 in article 13 in view of

the allusion in article 7, paragraph 2, to activities already in existence.

92. Mr. Sreenivasa RAO (Special Rapporteur) said that article 7 was not relevant because it dealt with a different situation. Once a State decided unilaterally to go ahead with an activity, a court of law could request the suspension of that activity.

*Article 13 was adopted.*

*The meeting rose at 1.20 p.m.*

## 2562nd MEETING

*Thursday, 13 August 1998, at 3.10 p.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Opertti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

### **International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (concluded) (A/CN.4/483, sect. D, A/CN.4/487 and Add.1,<sup>1</sup> A/CN.4/L.556, A/CN.4/L.568)**

[Agenda item 3]

CONSIDERATION OF DRAFT ARTICLES 1 TO 17 PROPOSED BY THE DRAFTING COMMITTEE AT THE FIFTIETH SESSION  
(concluded)

#### ARTICLE 14 (Exchange of information)

1. Mr. PELLET said that in the French version, the word *pertinentes* should be replaced by the word *disponibles*.

*Article 14, as amended, was adopted.*

#### ARTICLE 15 (National security and industrial secrets)

2. Mr. GOCO wondered whether it was not somewhat inconsistent to allow the State of origin not to provide

<sup>1</sup> Reproduced in *Yearbook* . . . 1998, vol. II (Part One).

data and information vital to its national security or to the protection of its industrial secrets, while requiring it to cooperate in good faith with the other States concerned in providing as much information as could be provided under the circumstances.

3. Mr. Sreenivasa RAO (Special Rapporteur) said that the idea was to encourage Member States to provide information, but that it was essential to leave them some room for manoeuvre.

*Article 15 was adopted.*

ARTICLE 16 (Non-discrimination)

*Article 16 was adopted.*

ARTICLE 17 (Settlement of disputes)

4. Mr. BENNOUNA, summarizing views which he had previously expressed in detail, said that the draft article was incomplete, as it neither stipulated the composition nor the operational modalities of the fact-finding commission. The article could be adopted, provided that it was completed at a later stage. The other solution would be to send it back to the Drafting Committee.

5. Mr. SIMMA (Chairman of the Drafting Committee) said he shared that view.

6. Mr. RODRÍGUEZ CEDEÑO, while recognizing that article 17 was weak, said he believed it could not be otherwise. The mechanism referred to in paragraph 2 could be described more precisely in an annex, on the model of the provisions contained in the Convention on the Law of the Non-navigational Uses of International Watercourses. In any case, the draft article was important and should be adopted. In the Spanish version of the document, the word *diferencia* should be deleted, as had been agreed in the Drafting Committee.

7. Mr. ELARABY said that he, too, deemed the draft article to be extremely weak; it restated Article 33 of the Charter of the United Nations without any additions thereto, glossed over the operational modalities of the fact-finding commission and committed the parties merely to act in good faith, which they were already presumed to do. The link between the first and second paragraphs also left something to be desired; it would have been better to conclude with the reference to judicial settlement. In spite of those reservations, he would not object to the adoption of the article; he hoped, however, that it would be revised as needed at the fifty-first session.

8. Mr. AL-KHASAWNEH said he believed that, in dealing with a draft whose operative provisions suffered from a lack of precision, the third-party dispute settlement mechanism should be described in greater detail. He hoped it would be stated in the commentary and in the report of the Commission to the General Assembly that the Commission would revert to that provision.

9. Mr. GALICKI said that he, too, recognized that article 17 was inadequate; he believed, however, that the text under consideration would be incomplete without the article. He was therefore prepared to adopt it, on condition

that it be made clear in the commentary that work on the draft article would continue at a later date.

10. Mr. ROSENSTOCK said that it was important not to confuse two tasks, each of which must be undertaken in due course: the adoption of a general provision on dispute settlement, and the definition of the operational modalities of the mechanism to be established. Those questions should be addressed in the commentary. Nevertheless, it would be completely illusory to think that in a very general and very broad text, a large number of States represented on the Sixth Committee would accept a provision of a more binding nature than one establishing a fact-finding commission.

11. Mr. ECONOMIDES said he recognized that article 17 was weak; he recalled, however, that the negotiations over the draft article had not enabled further progress to be made. It was therefore necessary to accept it in spite of its gaps. With regard to the modalities for establishing the fact-finding commission, about which the text was silent, the Commission could proceed as Mr. Rodríguez Cedeño had suggested, by explaining in the commentary that it would revert to the drafting of the text at the fifty-first session. Another solution, which would have the virtue of simplicity, would simply be to reproduce the annex to article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses, which the members of the Commission had agreed to take as their model.

12. Mr. SIMMA (Chairman of the Drafting Committee) conceded that article 17 did not go very far, as it merely restated the dispute settlement methods provided for in Article 33 of the Charter of the United Nations, with a minor addition, the establishment of a fact-finding commission, for which no procedure was stipulated. It would be very easy to fill that gap, but it would be a waste of time to do so at the current stage, inasmuch as there had been no decision on the legal form of the text in preparation. He urged the members of the Commission to adopt the text as drafted and to indicate to the Sixth Committee that the proposed article fundamentally provided, in addition to the methods referred to in Article 33 of the Charter, for a fact-finding procedure which could be spelled out in detail at the fifty-first session.

13. Mr. MELESCANU agreed that article 17 should be elaborated further; that was hardly possible, however, so long as there had been no decision on the final nature of the document. In view of the comments made by Mr. Rosenstock and Mr. Simma, he proposed that States should be consulted as to what form, in their view, the mechanism for the peaceful settlement of disputes in the framework of a convention should take; the question should be included in chapter III of the report of the Commission to the General Assembly, under heading 10, for example.

14. Mr. BROWNIE, while acknowledging the gaps in article 17, said he believed that its chief merit was its consistency with the remainder of the draft. Much thought was needed before its provisions could be finalized, as there was a risk that the question of precautionary measures might arise, and that the question of the nature of compulsory settlement might be raised again in relation to

the text as a whole. On the political level, moreover, such a move was apt to alarm Member States. It was therefore preferable to leave the text as it stood.

15. Mr. RODRÍGUEZ CEDEÑO said that negotiation had not been mentioned in paragraph 1 because the measures provided for in article 10 and the following, which were presumed to substitute for it, constituted the stage preceding mutual agreement. Negotiation was therefore implied. It was regrettable, however, that it had not been mentioned; it was the best way of defining the dispute, and a dispute existed at that stage. What was involved was by its nature a dispute settlement mechanism which could facilitate substantially the choice of methods referred to in paragraph 1.

16. The last sentence of paragraph 2 should be amended, as it had been decided not to retain the reference to the "recommendatory" nature of the report of the Commission to the General Assembly. It was understood, however, that the report was not binding.

17. Mr. PELLET said that he had no objections to paragraph 2. To provide for the establishment of an independent and impartial fact-finding commission meant progress, and it was impossible to go beyond that. Regarding paragraph 1, he associated himself with the objections raised by Mr. Bennouna, viewing the paragraph as an example of poor codification, which, while it could not harm the draft, harmed the very notion of codification of international law. In lieu of recalling obvious principles which were not specific to the draft, it would have been sufficient to begin paragraph 2 with the words "Failing an agreement between the parties on another dispute settlement method within a period of six months".

18. Mr. Sreenivasa RAO (Special Rapporteur) said that the drafting process would be facilitated once a decision had been taken on the final form of the text. At the current stage, the Drafting Committee must show that it had addressed the question of dispute settlement. The commentary would make it clear that the article was still incomplete and that the Commission would revert to drafting it at a later stage. He believed, moreover, that even if certain principles were obvious, it might be useful to recall them, especially since the political leaders who might have to apply them would not necessarily have in mind the content of Article 33 of the Charter of the United Nations. Paragraph 1 served as a backdrop for paragraph 2, which would have no likelihood of being adopted by itself.

19. Mr. SIMMA (Chairman of the Drafting Committee) asked whether it might not be possible to adopt Mr. Melescanu's proposal and to include in chapter III, under the heading "Precautions", the question of the nature of the dispute settlement mechanism. The purpose of question 9 was to determine whether Member States preferred a framework convention or a model law. In the second case, the question no longer arose, but if States opted for a framework convention, it would be useful to know their views as to what form third-party settlement should take and the degree to which the relevant provisions should be spelled out in detail.

20. The CHAIRMAN said that the question raised by Mr. Melescanu should be included in the report of the

Commission to the General Assembly. If he heard no objections, he would take it that the Commission wished to adopt article 17.

*It was so agreed.*

*Article 17, as amended, was adopted.*

21. The CHAIRMAN said that the Commission had concluded its consideration of agenda item 3.

### **Draft report of the Commission on the work of its fiftieth session (*continued*)\***

#### **CHAPTER IX. *Reservations to treaties (concluded)* (A/CN.4/L.562 and Corr.1 and Add.1 and 2 and A/CN.4/L.564)**

##### **C. *Texts of the draft guidelines on reservations to treaties provisionally adopted by the Commission on first reading* (A/CN.4/L.564)**

22. Mr. SIMMA (Chairman of the Drafting Committee) said that in the English version of the draft guidelines, the references to arbitration relating to the Mer d'Iroise case did not follow the accepted English terminology.

23. Mr. BROWNLIE suggested that "Mer d'Iroise" should be replaced by "English Channel". In footnote 8 on page 3 "Whitman" should read "Whiteman".

24. Mr. PELLET pointed out several citation errors in the document that would be corrected in the different language versions.

*Section C, as amended, was adopted.*

*Chapter IX, as a whole, as amended, was adopted.*

#### **CHAPTER VII. *State responsibility* (A/CN.4/L.561 and Add.1-6)**

##### **A. *Introduction* (A/CN.4/L.561)**

*Section A was adopted.*

##### **B. *Consideration of the topic at the present session* (A/CN.4/L.561/Add.1-6)**

Document A/CN.4/L.561/Add.2

25. Mr. PELLET having requested clarification of the third sentence of paragraph 5, "That proposal seemed valid, leaving aside any issues of *jus cogens*", Mr. CRAWFORD (Special Rapporteur) explained that what was needed was to make it clear that the general principle of *lex specialis* could not justify any derogation from the rules of *jus cogens*.

26. Mr. PELLET suggested, therefore, that the sentence should be amended to read as follows: "While that proposal seemed valid, it could not be applied to *jus cogens*". He also suggested that the meaning of the third sentence of paragraph 6 should be clarified by having the end of the sentence read "that were not necessarily designed as a convention or a declaration". Lastly, in paragraph 22,

\* Resumed from the 2559th meeting.

“imputability” should be replaced by “attribution”, in accordance with the agreed rule.

*Document A/CN.4/561/Add.2, as amended, was adopted.*

Document A/CN.4/L.561/Add.3

27. Mr. PELLET suggested that, in the French version of paragraph 2, the phrase *n'était pas fatal pour cette disposition*, which appeared in the penultimate sentence, should be replaced by *n'était pas une critique dirimante pour cette disposition*. He then proposed several minor drafting changes in the French version of paragraphs 4, 5 and 9. Lastly, he noted that the content of paragraph 7 did not correspond to the heading under which it appeared.

28. Mr. CANDIOTI said that the last sentence of paragraph 13, which read “to avoid serious damage to its standing in the Sixth Committee”, was very infelicitous; it would be better to delete it.

29. Mr. PELLET, drawing attention to the term “innocent State” in the penultimate sentence of paragraph 31, said that it reintroduced the notion of fault, which was precisely what the Commission was seeking to avoid. It might be possible to use the term “State not responsible for a wrongful act”, or, better yet, “injured State”. Moreover, the sentence in the middle of paragraph 38, which read “However, this did not mean that the two notions were coextensive in terms of their primary norms or their secondary consequences”, seemed to him to be rather opaque.

30. Mr. CRAWFORD (Special Rapporteur) explained that a breach of the rules of *jus cogens* did not necessarily entail an international crime, and that the consequences of a breach of the rules of *jus cogens* were not necessarily the same as the consequences of a crime.

31. Mr. ECONOMIDES felt that paragraph 29 would be difficult for the reader to understand. If the definition of aggression adopted by the General Assembly was “notoriously defective”, it might perhaps be desirable to show why, starting by providing the text of the definition.

32. Mr. PELLET suggested that in paragraph 43, the term “most apparent” should be replaced by “particularly apparent”. He noted, moreover, that in the second sentence of the paragraph, the term “material damage” had been translated into French as *dommage appréciable*. That suggested that the paragraph implied a scale of damage, whereas all that was really involved was the existence or the absence of damage, in a more concrete sense.

33. Mr. CRAWFORD (Special Rapporteur) suggested that the qualifier should be deleted.

34. Mr. PELLET, referring to paragraph 53, said it was surprising to find that the term “delict” was “described as a civil law term borrowed from Roman law”. It seemed to him, rather, that the notion of *delictum* stemmed from criminal law.

35. Mr. CRAWFORD (Special Rapporteur) proposed that the phrase “described as a civil law term borrowed from Roman law” should be deleted.

36. Mr. PELLET, referring to the French version of paragraph 61, suggested that in the last sentence, the phrase *faits qui étaient la cause de leur comparution* should be replaced by *faits qui rendaient possible leur comparution*. Moreover, the last sentence of paragraph 60 (*On a suggéré qu'en seconde lecture la Commission examine, article par article, la catégorie des 'règles primaires' auxquelles s'appliquait la règle secondaire énoncée dans chaque article.*) appeared to be unintelligible.

37. Mr. CRAWFORD (Special Rapporteur) explained that what was needed in connection with the concept of “State crimes” was to examine each specific definition of a crime in order to verify whether the consequences stipulated for each crime were appropriate to it.

38. Mr. PELLET said he did not think it was possible to refer to “the continual adoption of compromise solutions”, as was done in paragraph 83. It would be preferable to refer to “the continual search for compromise solutions”.

39. Mr. ECONOMIDES noted that paragraph 78 began with the words “Several members”, whereas the following paragraph, which was presumed to reflect the opposite view, used the expression “other members”. As the proponents of the two views had been nearly equal in number, it was necessary to find more balanced formulations.

40. Mr. PELLET and Mr. ROSENSTOCK said that the report under consideration appeared to provide an accurate reflection of the Commission’s deliberations and of the complexity of the topic under consideration.

41. Mr. CRAWFORD (Special Rapporteur) said that the two schools of thought referred to in the paragraphs in question had not been on a par with each other. Had a vote been taken, the concept of State criminal responsibility would have been rejected.

42. Mr. ECONOMIDES, referring to paragraphs 80 and 81, said it was his impression that the majority of members had sought to exclude the notion of crimes from the draft articles. After those two paragraphs, he had searched in vain for the presentation of the views of members who held the contrary opinion. The imbalance in the report was glaring from that standpoint.

43. Mr. CRAWFORD (Special Rapporteur) explained that the two paragraphs in question simply presented “possible approaches” to the notion of international crimes, as the title of the relevant section of the report made clear. The option outlined in the paragraphs about which Mr. Economides was concerned was “(vi) Exclusion of the notion from the draft articles”. For that reason, the paragraphs contained only the arguments against retaining the notion of crimes.

44. Mr. SIMMA (Chairman of the Drafting Committee) said that the views of those who had defended the notion of State criminal responsibility were well presented in paragraphs 67 and 79.

45. Mr. PELLET said that it was inadvisable to seek to discover what the majority and minority views had been. The Commission had always avoided that temptation.

46. Mr. ECONOMIDES suggested that paragraphs 80 and 81 should be placed after paragraph 78. Paragraph 79 would then be the final paragraph in that section of the report.
47. Mr. SIMMA said he was opposed to that solution, as it would ruin the structure of the passage.
48. Mr. CRAWFORD (Special Rapporteur) suggested that a new paragraph 81 (a) should be added, to read as follows: "Those members who believed that article 19 was useful were, of course, opposed."
49. Mr. ECONOMIDES suggested that the new paragraph should instead read as follows: "Several other members were opposed to the exclusion of the notion of draft articles for the reasons outlined in paragraph 79."
50. Mr. PELLET noted the statement in paragraph 85 that "there was dissatisfaction with the distinction between international crimes and international delicts". As he had, on the contrary, been satisfied with the distinction, he was surprised at that formulation. In the last sentence of paragraph 85, which stated: "The Commission appeared to be ready to envisage other ways of resolving the problem", it should be stated more explicitly that the Commission had not adopted any other way of resolving the problem and that it had not agreed on any other solution.
51. Mr. CRAWFORD (Special Rapporteur) said that that was indeed the meaning of the expression "ready to envisage". In any event, paragraphs 85 to 89 simply repeated the Special Rapporteur's comments. In order to meet Mr. Pellet's concern, it would be sufficient to begin the paragraph with the words "In the view of the Special Rapporteur".
52. He proposed that the subheading which preceded paragraphs 80 and 81 should be amended by substituting "Question of the exclusion of the notion from the draft articles" for "Exclusion of the notion from the draft articles".
53. Mr. KUSUMA-ATMADJA said that the report was balanced, that it faithfully reflected the views expressed and that there was no reason to redraft it, since the results were obviously provisional.
54. Mr. GOCO said that paragraphs 85 and 90 presented a valid summary of the five major points on which general agreement existed.
55. Mr. ECONOMIDES noted that section B.6 of the draft report, entitled "Concluding remarks of the Special Rapporteur . . .", was a summary of the debate prepared by the Special Rapporteur. Accordingly, the text did not bind the Commission per se and should not normally give rise to discussion. Nevertheless, as some members had commented on certain articles, he wished to state that, for his part, he had strong reservations about that section of the report, particularly paragraph 85. At the Geneva part of the session, a consensus had emerged on three approaches: (a) the distinction between "crimes" and "delicts" would be put aside for the time being; (b) an effort would be made to find a compromise solution by emphasizing the consequences of the most serious breaches; (c) failing such a compromise solution, the Commission would revert to the distinction between "crimes" and "delicts".
56. Mr. CRAWFORD (Special Rapporteur) said that he did not concur with the formulation that had just been given of the third point of agreement. If a compromise solution could not be found, it was not a matter of reverting to the distinction between "crimes" and "delicts", but of deciding whether to maintain that distinction.
57. Mr. PELLET said that the formulas expressing the consensus, as corrected, should be reproduced at the end of the document.
58. Mr. CRAWFORD (Special Rapporteur) said that he would prepare a text along those lines, based on the summary record of the current meeting.
59. Mr. FERRARI BRAVO said that it had been decided at the Geneva part of the session that the matter should be referred to the General Assembly. Nevertheless, in the chapter of the report on State responsibility, the Commission should avoid placing the question before the General Assembly with the implication that the Commission was on the point of reaching agreement.
60. Mr. SIMMA (Chairman of the Drafting Committee) said that caution would indicate that questions on article 19 should not be included in chapter III of the report of the Commission to the General Assembly while the Commission was still debating the matter.
61. Mr. CRAWFORD (Special Rapporteur) said that he shared that view. The Commission could, of course, invite States that had not yet done so to transmit their comments on the draft articles, but it should avoid drawing them into a debate on questions on which it was still undecided.
62. Mr. ROSENSTOCK said he did not believe that the three "Geneva consensus" points should be put in writing to be transmitted to the Sixth Committee for discussion. That did not mean, however, that they could not be the subject of an internal working paper.
63. Mr. PELLET reiterated his view that the "Geneva consensus" should be presented at the end of the report of the Commission to the General Assembly. That would have two advantages: (a) the text could serve as an aide-mémoire for members of the Commission, and (b) it could also initiate certain discussions in the Sixth Committee by showing that the Commission had agreed on an approach and should therefore be allowed to proceed.
64. Mr. DUGARD (Rapporteur) said that the text containing the "consensus" to be prepared by the Special Rapporteur should not be transmitted to the Sixth Committee in the form of detailed questions. States that had not yet done so should be invited to provide their comments on the articles that had been or were being considered by the Commission, including article 19.
65. Mr. BENNOUNA said that the Sixth Committee should not be asked to reopen a debate on article 19 that would not lead anywhere. The Commission was not required to wait for guidelines from the Sixth Committee; like the Sixth Committee, it needed to accomplish the tasks specifically entrusted to it.

66. Mr. ECONOMIDES read out paragraph 81 *bis* which had been proposed for inclusion in document A/CN.4/L.561/Add.3: “Several other members expressed opposition to the exclusion of the notion from the draft articles for the reasons already mentioned, particularly in paragraph 79.”

Document A/CN.4/L.561/Add.4

67. Mr. PELLET said that he was opposed to the term “innocent States”, which appeared in the penultimate sentence of paragraph 10, because it evoked the notion of fault. He proposed that the term should be replaced by “States which had not committed internationally wrongful acts”.

68. Mr. CRAWFORD (Special Rapporteur) suggested that the sentence reading “That would put the onus of showing damage on innocent States, which was unjustified” should simply be deleted.

69. Mr. ECONOMIDES said that in paragraph 28 in the French version, *en droit international* should be replaced by *d’après le droit international*.

*Document A/CN.4/L.561/Add.4, as amended, was adopted.*

**State responsibility<sup>2</sup> (concluded)\* (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,<sup>3</sup> A/CN.4/490 and Add.1-7,<sup>4</sup> A/CN.4/L.565, A/CN.4/L.569)**

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE  
ON SECOND READING

70. Mr. SIMMA (Chairman of the Drafting Committee), introducing the report of the Drafting Committee on the topic of State responsibility (A/CN.4/L.569), recalled that the Commission, in conformity with its general practice, should adopt the articles on second reading as a whole, in other words, once they had been discussed in plenary meeting and worked out by the Drafting Committee, solely on the basis of the text as it appeared in the document under consideration.

71. The Drafting Committee had examined all the articles referred to it at the current session, namely, those in part one, chapters I and II. It had not considered the question of the structure of the draft and the placement of the articles, which would have to be settled at a later stage, when most of the articles had been considered by the Drafting Committee. The original structure adopted on first reading had therefore been maintained. While the Drafting Committee had not proposed a title for part one, it had felt that the current title was not the most felicitous. The titles of chapters I and II had been maintained as

adopted on first reading, with the exception of the removal of the quotation marks from around the words “act of the State” in the title of chapter II.

72. The titles and texts of the draft articles adopted by the Drafting Committee at the fiftieth session read:

STATE RESPONSIBILITY

PART ONE

ORIGIN OF INTERNATIONAL RESPONSIBILITY

CHAPTER I

GENERAL PRINCIPLES

*Article 1. Responsibility of a State for its internationally wrongful acts*

Every internationally wrongful act of a State entails the international responsibility of that State.

[Article 2. Possibility that every State may be held to have committed an internationally wrongful act]

[deleted]

*Article 3. Elements of an internationally wrongful act of a State*

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) Is attributable to the State under international law; and

(b) Constitutes a breach of an international obligation of the State.

*Article 4. Characterization of an act of a State as internationally wrongful*

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II

THE ACT OF THE STATE UNDER INTERNATIONAL LAW

*Article 5. Attribution to the State of the conduct of its organs*

1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State.

[Article 6. Irrelevance of the position of the organ in the organization of the State]

[deleted]

\* Resumed from the 2558th meeting.

<sup>2</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

<sup>3</sup> See footnote 1 above.

<sup>4</sup> Ibid.

*Article 7. Attribution to the State of the conduct of entities exercising elements of the governmental authority*

The conduct of an entity which is not an organ of the State under article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question.

*Article 8. Attribution to the State of conduct in fact carried out on its instructions or under its direction or control*

The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

*Article 8 bis. Attribution to the State of certain conduct carried out in the absence of the official authorities*

The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

*Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State*

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it had been placed.

*Article 10. Attribution to the State of the conduct of organs acting outside their authority or contrary to instructions*

The conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, such organ or entity having acted in that capacity, shall be considered an act of the State under international law even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise.

*Articles 11 to 14*

[proposed deletion]

*Article 15. Conduct of an insurrectional or other movement*

1. The conduct of an insurrectional movement, which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles . . . 5 to . . . 10.

*Article 15 bis. Conduct which is acknowledged and adopted by the State as its own*

Conduct which is not attributable to a State under articles 5, 7, 8, 8 bis, 9 or 15 shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

*Article A. Responsibility of or for conduct of an international organization*

These draft articles shall not prejudice any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

73. With regard to article 1 (Responsibility of a State for its internationally wrongful acts), the Drafting Committee had followed the advice of the Special Rapporteur in his first report on State responsibility (A/CN.4/490 and Add.1-7) and maintained the text as adopted on first reading; it recognized, however, that the use of the word "act" was not an ideal solution, as it usually referred to an action rather than an omission, whereas the article referred to both. The Drafting Committee had not been able to find an equivalent for the French word *fait* or the Spanish word *hecho*, which were more appropriate. That point would be explained in the commentary, but in any event, article 2 dispelled any doubt by stating that an "act" could consist of "an action or omission". Moreover, also on the recommendation of the Special Rapporteur, the Drafting Committee had decided to delete article 2, entitled "Possibility that every State may be held to have committed an internationally wrongful act", on the belief that the notion that the principle of international responsibility applied to all States without exception was implicit in article 1. The relevant portions of the commentary on the deleted article would be included in the commentary on article 1. The other issues raised in the deleted article were outside the scope of the question of international responsibility as such.

74. As to article 3 (Elements of an internationally wrongful act of a State), the Drafting Committee had confined itself to moving the phrase "conduct consisting of an action or omission" into the *chapeau*, so as to avoid repeating the word "conduct". It had been agreed not to add any other requirement, such as the element of damage or fault, to the general rule in the article. In subparagraph (a), the Drafting Committee had preferred to retain the term "attributable", which implied a legal operation, rather than replace it with the term "imputable", which appeared to refer to a mere causal link. It had retained the emphasis in subparagraph (a) on the notion that the attribution of a certain conduct to a State was made "under international law". The Drafting Committee had not deemed it necessary to add a reference to international law also in subparagraph (b); the commentary would, however, make clear that the determination that a particular conduct constituted a breach of an international obligation was to be made under international law.

75. With regard to article 4 (Characterization of an act of a State as internationally wrongful), the Special Rapporteur had proposed no changes to the article in his first report, as it did not seem to pose difficulties for Governments. The article contained two elements. The first was the statement that the characterization of an act of a State as internationally wrongful was governed by international law. The second, by analogy with article 27 of the 1969 Vienna Convention, was the principle that a State should not invoke its internal law as a ground for avoiding international responsibility. There was yet a further concern, namely, to avoid language too similar to that of part one,

chapter V, on circumstances precluding wrongfulness. The Drafting Committee had redrafted the first sentence without affecting its substance, in order to clarify the meaning and, in particular, to make its drafting clearer in other languages. Instead of stating that an act of a State could be characterized as internationally wrongful only “under international law”, the sentence currently referred to the characterization of an act of a State as internationally wrongful being “governed by international law”. The second sentence remained as adopted on first reading, except that the word “cannot” had been replaced by “is not”.

76. With regard to article 5 (Attribution to the State of the conduct of its organs), the first article of chapter II, which set forth the principles governing the attribution of conduct to the State under international law, the opening clause of paragraph 1 (“For the purposes of the present articles”) indicated that chapter II dealt with attribution for the purposes of the law of State responsibility, in contrast to other areas of international law, such as the law of treaties. Article 5 combined the substance of former articles 5 and 6 and article 7, paragraph 1. It addressed the general principle that any conduct of any State organ acting as such was attributable to the State; the remainder of the paragraph confirmed the application of that principle irrespective of the function performed by the State organ in question, its position within the organizational structure of the State and its character as an organ of the central government or of a territorial unit of the State. The commentary would explain that the term “territorial unit” is used in a broad sense so as to apply to different legal systems.

77. Paragraph 2 recognized the significant role played by internal law in determining the status of a person or an entity within the structural framework of the State. That role was decisive when internal law affirmed that a person or an entity was an organ of the State. The commentary would explain that the term “internal law” was used in a broad sense to include practice and convention. The commentary would also explain the supplementary role of international law in situations in which internal law provided no classification or an incorrect classification of a person or an entity. The Special Rapporteur had proposed the deletion of paragraph 1 of article 7, in paragraph 284 of the first report, because the reference to territorial governmental entities was currently contained in new article 5. The Special Rapporteur had also suggested a redrafting of paragraph 2, which dealt with the conduct of other entities that were not part of the formal structure of the State in the sense of article 5. The Commission has supported that approach. The Drafting Committee had made only minor stylistic changes to the proposal by the Special Rapporteur, such as the deletion of the word “also” after the word “shall”, which had been deemed superfluous. The title of article 7 had been slightly redrafted to correspond to its content; it currently read “Attribution to the State of the conduct of entities exercising elements of the governmental authority”.

78. Article 8 as adopted on first reading contained two subparagraphs which dealt with two completely different situations. The Drafting Committee had therefore decided to divide it into two separate articles, article 8 and article 8 *bis*.

79. New article 8 was entitled “Attribution to the State of conduct in fact carried out on its instructions or under its direction or control” and dealt with the question addressed in subparagraph (a) of former article 8. The most important change which the Drafting Committee had made to the text had been the replacement of the phrase “acting on behalf of that State” with “acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”. As pointed out by the Special Rapporteur, the former concept was rather vague for the purposes of attribution. Obviously, that provision had been intended to cover the conduct of a person or group of persons acting “on the instructions” of a State. It would, however, have been unduly restrictive to limit the applicability of article 8 to that situation, since in practice it would be very difficult to demonstrate the existence of express instructions. It was therefore desirable to cover also situations where a person or group of persons was acting “under the direction or control” of a State. He drew attention to the fact that those were alternative requirements: the Drafting Committee did not believe that the scope of article 8 should be restricted through a cumulative requirement in that regard. For the purposes of attribution, however, it was not sufficient that such “direction or control” should be exercised at a general level; it must be linked to the specific conduct under consideration, as indicated by the addition of the words “in carrying out the conduct”. The commentary would make it clear that the term “State” was intended to refer to “an organ of a State” which would give the instructions or exercise control or direction over a certain conduct. The Drafting Committee, on the recommendation of the Special Rapporteur, had deleted the phrase “if it is established”, since that was a general requirement for attribution, and there was no reason to highlight it only in article 8.

80. Article 8 *bis* (Attribution to the State of certain conduct carried out in the absence of the official authorities) addressed the issue dealt with in subparagraph (b) of former article 8. The use of the word “certain” in the title already indicated that the circumstances envisaged in the article were of an exceptional nature, a point that would be further elaborated in the commentary. The Drafting Committee was of the view that the expression “in the absence of” was not wide enough, as it seemed to cover only the situation of a total collapse of the State, whereas the provision was also intended to apply to other cases where the official authorities were not exercising their functions, for instance, in the case of a partial breakdown of the State. The term *carence* in French best covered that point, but the Drafting Committee had been unable to find an exact equivalent in English other than by using two terms instead of one, namely, “in the absence or default of”.

81. A lengthy discussion had taken place in the Drafting Committee with respect to the expression “official authorities”; in the end, it had been decided not to change it. It would be explained in the commentary that the expression covered both organs of the State within the meaning of article 5 and entities exercising elements of the governmental authority within the meaning of article 7. It would be further pointed out that the article did not apply as long as there was some “official authority”, even

if said “authority” was not competent to exercise the particular functions under domestic law; the latter situation was actually dealt with in article 10.

82. On the advice of the Special Rapporteur, the Drafting Committee had introduced another change to the text of former article 8, subparagraph (b), adopted on first reading—the replacement of the verb “justified” by “called for”. It was felt that it might be misleading to use the term “justified” in connection with wrongful conduct. The term “called for” also better conveyed the idea that some exercise of governmental functions was called for under the circumstances, but not necessarily the conduct in question. Finally, as another indication of the exceptional nature of the circumstances in which article 8 *bis* would apply, the Drafting Committee had decided to use the phrase “in circumstances such as to call for” rather than “in circumstances which called for”.

83. Article 9 as adopted on first reading dealt both with organs of other States and of international organizations placed at the disposal of a State. The Special Rapporteur had, for good reasons, deleted the references to international organizations throughout the draft articles; the Commission had agreed with that approach and had worked on the revised text of article 9 (Attribution to the State of the conduct of organs placed at its disposal by another State) as proposed by the Special Rapporteur in paragraph 284 of the first report. Article 9 was an exception to article 5 and dealt with special situations. It was the view of the Drafting Committee that such special situations tended to occur more often than was reported and therefore it was useful to retain the article, at least for the time being. The article might need to be reconsidered in the light of the articles in chapter IV.

84. The words “at the disposal of” had been the subject of some discussion in the Commission. The Drafting Committee had, however, decided to retain those words for lack of a better substitute. The commentary would explain more clearly the meaning of those words. For example, when an organ of a State was placed at the disposal of another State, that organ must be acting for the benefit of the receiving State and, as such, would be reporting to that State. There were, of course, cases where an organ of a State was acting on behalf or for the benefit of another State. Those situations did not fulfil the requirement of being put at the disposal of that State and were not covered by article 9, but fell within the scope of articles 5 and 8. The Drafting Committee had noted, moreover, that the cases of joint representation of States should be addressed somewhere in the draft. Those were situations where a State would represent one or more States, for example, in the territory of another State. The Drafting Committee was also of the view that the issue should be addressed in connection with the consideration of the articles in chapter IV.

85. Article 10 (Attribution to the State of the conduct of organs acting outside their authority or contrary to instructions) dealt with the important question of unauthorized or *ultra vires* acts. In the comments by Governments no concern had been expressed regarding that text. The Special Rapporteur had suggested the retention of the text as adopted on first reading with the exception of a few minor drafting changes. The issue had been

raised as to whether the article should cover the conduct of an agency which overtly committed unlawful acts, but did so under the cover of its official status. The Drafting Committee was of the view that it was better to retain article 10 as proposed by the Special Rapporteur in paragraph 284 of the first report and to address that issue in the commentary.

86. Articles 11 to 14 having been deleted, article 15 (Conduct of an insurrectional or other movement) covered questions dealt with in former article 14, paragraph 2, and former article 15. Paragraphs 1 and 3 of article 14 had been deleted on the recommendation of the Special Rapporteur. Paragraph 3 had been considered to fall outside the scope of the draft articles on State responsibility since it dealt with the international responsibility of insurrectional movements as such. As for paragraph 1, it contained a so-called “negative attribution” clause, and it had been decided not to include such provisions. The commentary to article 15 would, however, make reference to the principle that the conduct of an insurrectional movement established in the territory of a State should not be considered as such an act of that State under international law. It was only in the circumstances set forth in article 15 that the conduct of an insurrectional or other movement was attributable to a State. The word “conduct” was used in article 15 instead of the word “act” for purposes of consistency. The expression “under international law” had been included for the same reason. The Drafting Committee had debated the issue whether reference should be made to “an organ” of an insurrectional movement, but had concluded that it was better not to do so, given the fact that some movements which should have been covered by the article might not be sufficiently structured so as to have “organs”. It would be explained in the commentary that article 15 applied in respect of the conduct of a movement as such, but not to individual acts of their members in their own capacity.

87. Paragraph 1 of article 15 corresponded to the first part of paragraph 1 of article 15 as adopted on first reading. The Drafting Committee had decided that it was preferable not to qualify the term “insurrectional movement” by the insertion of such a phrase as “established in opposition to a State or Government”, taking into account the wide variety of insurrectional movements existing in practice which should be covered by paragraph 1. The Drafting Committee also concluded that the phrase “which becomes the new Government” was the most appropriate in that context. The commentary would explain that in practice the result might not be as clear-cut. For instance, in some cases, the new government might include some members of the previous one. The second sentence in the previous version of paragraph 1 had been deleted since its content was subsumed under paragraph 3 of the new version.

88. In the context of paragraph 2, the Drafting Committee had felt that the concept of “insurrectional movement” might be too restrictive, as there was a greater variety of movements whose action might result in the formation of a new State. It had thus been decided to use the phrase “movement, insurrectional or other, . . .” to indicate that the intention was to cover *ejusdem generis* movements. Thus, as would be stated in the commentary, the actions of a group of citizens advocating separation carried out

within the framework of the legal system established in the State would not be covered by paragraph 2. The Drafting Committee had also replaced the phrase “whose actions result in the formation of” with “which succeeds in establishing”, as that phrase was considered to better express the underlying idea. The commentary would explain that, while paragraph 2 envisaged only the case of the formation of a new State, it would apply, *mutatis mutandis*, to the case where an entity of a State seceded and became part of another State.

89. A number of members had expressed the view that paragraph 2 of former article 14 should become part of article 15. The Drafting Committee had agreed with that suggestion since it made the article more complete. The paragraph provided that article 15 was without prejudice to the attribution to a State of any conduct by an insurrectional movement which was to be considered an act of that State by virtue of other articles. The paragraph had been modified to fit within the text of new article 15. The words “however related to that of the movement concerned” were intended to give a broader meaning to the word “related”.

90. The Drafting Committee had considered the Special Rapporteur’s proposal, in paragraph 284 of his first report, for a new article 15 *bis* intended to fill a significant lacuna in the draft articles, which had failed to cover such cases as that of the taking of hostages. Article 15 *bis* provided for the attribution to a State of conduct not attributable to it under the other articles contained in chapter II but that the State acknowledged and adopted as its own. Those two conditions, acknowledgement and adoption, were cumulative and their order indicated the normal sequence of events in such cases. It was not sufficient for the State to acknowledge the factual existence of the conduct; it must acknowledge and adopt the conduct “as its own”. The State in effect accepted responsibility for conduct that would not otherwise be attributable to it rather than merely giving its general approval thereof. The commentary would explain that the article covered cases in which a State accepted responsibility for conduct which it did not approve of or even regretted. At the same time, the article recognized a limited principle of attribution, as indicated by the phrase “to the extent that”. Other situations of complicity in which one State approved of and supported the conduct of another State would be addressed in chapter IV.

91. The Special Rapporteur had deleted the references to international organizations throughout the articles. To avoid any misunderstanding, the Special Rapporteur had proposed an article which was a saving clause (article A). It was modelled on article 73 of the 1969 Vienna Convention. The purpose of the article was to make clear that the articles were not intended to apply to questions involving the responsibility of international organizations or of any State for the conduct of an international organization. The expression “international organization” would be defined in the commentary; it would, however, include only such organizations as had separate legal personality. The placement of article A would need to be determined at a later stage.

92. Mr. CRAWFORD (Special Rapporteur) pointed out two errors in the French version. Article 8 should read *sous la direction ou le contrôle* instead of *sous la direc-*

*tion et le contrôle*; in article 15 *bis*, on the other hand, *entérine ou fait sien* should be replaced by *entérine et fait sien*.

93. Mr. CANDIOTI said that those corrections applied also to the Spanish version.

94. Mr. HAFNER said that he could agree to the Commission taking note of the draft article, with the understanding that in article 15, paragraph 1, the phrase “which becomes the new government” did not, in his view, correspond to the real meaning of the provision. Greater emphasis should be given to the power to appoint the members of the government than to its composition.

95. Mr. PELLET said it was regrettable that, owing to excessive formalism, the Commission believed that no article could be adopted until the draft as a whole had been completed. It was to be hoped that at the next session, part one of the draft, at least, could be adopted and transmitted to the Sixth Committee.

96. Mr. BENNOUNA said that, by tradition and logic, draft articles should be adopted merely on a provisional basis until the draft as a whole had been completed, especially since questions as important as the distinction between crimes and delicts remained to be resolved.

97. With regard to the articles under consideration, the term “or other” which appeared in the title of article 15 was hardly satisfactory, in that it denoted an inability to define the object in question. Moreover, paragraph 2 of that article could not refer to organs acting in the framework of the legal system. A State could not, for example, be responsible for the conduct of a political party occurring prior to the establishment of the State. The criterion of an insurrection was violence, in other words, the suspension of the rule of law.

98. Mr. PELLET said that article 15 *bis* was too rigid, especially if *entérine ou fait sien* was to be replaced by *entérine et fait sien*. That formulation was tantamount to providing States with a very broad loophole, for instance, in situations such as that involving the United States of America and the contras in Nicaragua. He also had strong reservations concerning article A. To begin with, questions involving the responsibility of an international organization did not belong in a draft on State responsibility. If international organizations were to be included, other subjects of international law should be included as well. The final words of the article, “for the conduct of an international organization”, introduced an aspect of responsibility law with which the Commission did not wish to concern itself, especially in the case of umbrella-type international organizations. It would be better, therefore, to send the text back to the Drafting Committee and to reconsider it at a later stage, together with other possible saving clauses.

99. Mr. CRAWFORD (Special Rapporteur) said that it was premature to adopt the draft articles under consideration, even on a provisional basis. It would be sufficient to take note of the report of the Drafting Committee, and at the next session, when he had completed part one of the draft and the commentaries relating thereto, that part could be adopted provisionally and transmitted to the Sixth Committee. The saving clause contained in article A would certainly be reconsidered at that time.

100. The CHAIRMAN suggested that the Commission should take note of the report of the Drafting Committee on articles 1, 3, 4, 5, 7, 8, 8 *bis*, 9, 10, 15, 15 *bis* and A and of the deletion of articles 2, 6 and 11 to 14, taking into account the comments made during the discussion.

*It was so agreed.*

*The meeting rose at 6.35 p.m.*

## 2563rd MEETING

*Friday, 14 August 1998, at 10.10 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Opertti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

### Draft report of the Commission on the work of its fiftieth session (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of its draft report on the work of its fiftieth session, with chapter III.

#### CHAPTER III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.570)

Paragraphs 1 to 6

*Paragraphs 1 to 6 were adopted.*

Paragraph 7

2. Mr. PELLET said that in the last sentence the term “sanctions” should be replaced by “consequences”.

*Paragraph 7, as amended, was adopted.*

Paragraph 8

3. Mr. BROWNLIE said that the Commission had decided to sever the link between prevention and State responsibility, thereby ending the need to discuss the topic of liability. Paragraph 8 seemed to imply, however, that it planned to resume its discussion of that topic, a course of action which he strongly opposed.

4. Mr. Sreenivasa RAO (Special Rapporteur) said that he had suggested the question of liability because States would undoubtedly raise it and the Commission would be forced to consider it eventually. However, he proposed that paragraph 8 should be deleted from the draft report.

5. Mr. SIMMA (Chairman of the Drafting Committee) said that, while he supported the proposal to delete the paragraph, the Commission should be clear that it would have to revert to the topic at some point.

6. Mr. PELLET, supported by Messrs CANDIOTI, CRAWFORD, GOCO, HAFNER, ROSENSTOCK and YAMADA, said that paragraph 8 should be deleted, but that the Commission should take note of reactions from States on the topic of liability and prepare to hold a final in-depth discussion on the matter at its next session.

*Paragraph 8 was deleted.*

Paragraphs 9 to 11

*Paragraphs 9 to 11 were adopted.*

New paragraph

7. Mr. CRAWFORD (Special Rapporteur) said that he had circulated to members a new paragraph to be inserted after paragraph 11. The list of issues it contained should not be seen as exclusive. He had also felt it important to draw attention to draft article 19 on State responsibility, even though no final conclusions were being presented as yet.

8. Mr. PELLET requested clarification of the phrase “multilateral obligations” in subparagraph (d).

9. Mr. CRAWFORD (Special Rapporteur) said that “obligations owed *erga omnes* or to a large number of States” would express the meaning more clearly.

10. Mr. GOCO asked how the request for comments would be transmitted to States.

11. Mr. CRAWFORD (Special Rapporteur) said that Governments had access to the draft articles and commentaries. The purpose of the new paragraph was simply to identify the six main issues on which a great deal of Government commentary had been received as a way to elicit more reactions from Governments without directly asking for guidance from the Sixth Committee.

*The new paragraph, as amended, was adopted.*

Paragraphs 12 to 15

*Paragraphs 12 to 15 were adopted.*

New section G and new paragraph

12. Mr. BROWNLIE suggested that, in the interest of consistency, the heading of section G should be “Protection of the environment”.

13. Mr. HAFNER said that the working group which had been asked to study issues relating to environmental law had come to the conclusion that it might be useful for the Chairman of the Commission to seek the views of

competent international organizations. A request to that effect should be inserted somewhere in the report.

14. Mr. LEE (Secretary to the Commission) said that it could be inserted in chapter X, which dealt with the future work programme of the Commission.

15. Mr. ROSENSTOCK said that “would” should be replaced by “might” in the last sentence of the new paragraph under section G.

*New section G and the new paragraph, as amended, were adopted.*

*Chapter III, as a whole, as amended, was adopted.*

16. The CHAIRMAN invited the Commission to consider chapter X of its draft report.

**CHAPTER X. Other decisions and conclusions of the Commission (A/CN.4/L.567)**

17. Mr. SIMMA believed that the first sentence of paragraph 1 should be reworded.

18. Mr. LEE (Secretary to the Commission), in response to a question by the CHAIRMAN relating to paragraph 21, drew attention to General Assembly resolution 44/35, paragraph 5, which authorized the special rapporteurs to attend the session of the Assembly during the discussion of the topics for which they were responsible.

19. The CHAIRMAN suggested that Mr. Pellet, Special Rapporteur, should represent the Commission at the fifty-third session of the General Assembly.

*It was so agreed.*

20. Mr. SIMMA (Chairman of the Drafting Committee), referring to paragraph 5, wondered whether some action was needed to name the Chairmen of the Commission and the Drafting Committee for the following session.

21. The CHAIRMAN, in reply to a question from Mr. SIMMA concerning paragraph 5, said that more time was needed to complete the nomination process.

22. Mr. Sreenivasa RAO said that in his opinion no action needed to be taken despite the wording of the paragraph.

*Chapter X was adopted.*

**CHAPTER VII. State responsibility (concluded) (A/CN.4/L.561 and Add.1-6)**

**B. Consideration of the topic at the present session (concluded) (A/CN.4/L.561/Add.1-6)**

23. The CHAIRMAN invited the Commission to continue its consideration of chapter VII starting with document A/CN.4/L.561/Add.1.

Document A/CN.4/L.561/Add.1

*Document A/CN.4/L.561/Add.1 was adopted.*

Document A/CN.4/L.561/Add.3 (concluded)

24. Mr. CRAWFORD (Special Rapporteur) explained that, as the Commission had requested, a new paragraph would be added at the end of the document under the heading “Interim conclusions of the Commission on draft article 19”.

*Document A/CN.4/L.561/Add.3 was adopted by the Commission on that understanding.*

Document A/CN.4/L.561/Add.5

25. Mr. PELLET said that, in the French text of paragraph 7, “act of State” should not be translated but should remain “act of State”. He also felt that paragraph 24 served no useful purpose and could be deleted.

26. Mr. LUKASHUK agreed that paragraph 24 should be deleted.

27. Mr. CRAWFORD (Special Rapporteur) said that, while he believed that paragraph 24 accurately reflected the discussion on the text, he had no objection to deleting it.

28. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to delete paragraph 24.

*It was so agreed.*

29. Mr. ECONOMIDES wondered why paragraph 25 referred to the Bantustans but not to the State in the north of Cyprus, which had also been discussed.

30. Mr. CRAWFORD (Special Rapporteur) said that the two cases were not parallel. The Bantustans had had their own internal law, although it had been disregarded by the former apartheid regime in South Africa. The situation in the Turkish entity in the north of Cyprus was quite different.

31. Mr. PELLET said that the words “and convention” at the end of paragraph 25 did not accurately reflect discussions on the term “internal law”.

32. Mr. CRAWFORD (Special Rapporteur) said that the words “and convention” should be deleted.

33. Mr. LUKASHUK said that in the second sentence of paragraph 25, the words “State responsibility” should read “international responsibility”.

34. Mr. PELLET suggested that, in paragraph 27, the word “However,” should be inserted at the beginning of the second sentence. He also suggested deleting or modifying paragraph 40 and adding the following explanatory sentence at the end of paragraph 34: “Conversely, it was pointed out that the replacement of the term ‘functions’ by ‘governmental authority’ could lead readers to believe that the draft articles concerned *acta jure gestionis*, which was not self-evident and should in any case be explained in the commentary.”

35. Mr. ROSENSTOCK agreed that either paragraph 40 should be deleted or something should be added to clarify its meaning.

36. Mr. CRAWFORD (Special Rapporteur) suggested adding a sentence at the end of paragraph 40 which would read: "On the other hand, it was pointed out that article 8, subparagraph (a), at least was concerned with cases of de facto authority and therefore the phrase was useful."

*Document A/CN.4/L.561/Add.5, as amended, was adopted.*

Document A/CN.4/L.561/Add.6

37. Mr. PELLET wondered whether the reservations expressed by some members concerning certain articles should not be reflected in the report of the Commission to the General Assembly.

38. Mr. HAFNER, supported by Mr. SIMMA (Chairman of the Drafting Committee) and Mr. ROSENSTOCK, said that it would not be appropriate to include those remarks in the report of the Commission to the General Assembly.

39. Mr. CRAWFORD (Special Rapporteur) said that the comments and reservations expressed (2562nd meeting) would be taken up at the next session. However, he would add a sentence if the Commission so desired to reflect its discussions.

40. Mr. PELLET suggested that an additional sentence should be inserted in paragraph 37, before the final sentence, reading: "Another opinion expressed was that, since the draft dealt solely with the responsibility of States, the specific exclusion of the responsibility of international organizations was inappropriate."

41. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt document A/CN.4/L.561/Add.6, as amended, with the addition of a sentence by the Special Rapporteur to reflect the previous day's discussions.

*Document A/CN.4/L.561/Add.6, as amended, was adopted on that understanding.*

*Section B, as amended, was adopted.*

*Chapter VII, as a whole, as amended, was adopted.*

*The meeting was suspended at 11.30 a.m. and resumed at 12.05 p.m.*

**CHAPTER VI. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (continued)\*** (A/CN.4/L.554 and Corr.1 and 2 and Add.1 and Add.1/Corr.1 and 2 and Add.2 and Add.2/Corr.1)

**B. Consideration of the topic at the present session (continued)\*** (A/CN.4/L.554 and Corr.1 and 2)

Document A/CN.4/L.554/Corr.1

42. Mr. Sreenivasa RAO (Special Rapporteur) said that A/CN.4/L.554 was a document giving details of the discussions that had followed the presentation of his report at the Geneva part of the session. The report was being

edited for submission to the General Assembly and, as the Commission had proceeded more rapidly than had originally been anticipated and was ready to adopt a full set of articles, some amendments were required. He drew attention to the pro forma addition to paragraph 5 contained in document A/CN.4/L.554/Corr.1.

*Document A/CN.4/L.554/Corr.1 was adopted.*

Document A/CN.4/L.554/Corr.2

43. Mr. Sreenivasa RAO (Special Rapporteur) drew the Commission's attention to the revisions in document A/CN.4/L.554/Corr.2 and said that he had doubts about the deletion of paragraphs 6 to 46 of document A/CN.4/L.554, because, if allowed to stand, they would provide useful background information to the General Assembly.

44. Mr. LEE (Secretary to the Commission) said that document A/CN.4/L.554/Corr.2 consisted of four paragraphs. The Special Rapporteur had been referring to paragraph 4, relating to the deletion of paragraphs 6 to 46 of the draft report. He understood that the first three paragraphs would remain.

45. The CHAIRMAN suggested that the Commission should adopt paragraphs 1 to 3 of document A/CN.4/L.554/Corr.2.

*It was so agreed.*

*Document A/CN.4/L.554/Corr.2, as amended, was adopted.*

46. The CHAIRMAN invited the Commission to consider the commentaries to the draft articles.

**C. Text of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage for hazardous activities) provisionally adopted by the Commission on first reading (A/CN.4/L.554/Add.1 and Add.1/Corr.1 and 2 and Add.2 and Add.2/Corr.1)**

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO

*General commentary (A/CN.4/L.554/Add.1)*

47. Mr. Sreenivasa RAO (Special Rapporteur) said that the general commentary was entirely new and took the place of the text at the forty-eighth session.<sup>1</sup> The earlier draft had combined the topics of prevention and liability, while the new text eliminated the topic of liability and emphasized the need to consider the principle of prevention in general and its importance in the current context.

48. Mr. HAFNER suggested that a reference to principle 2 of the Rio Declaration<sup>2</sup> should be inserted after the reference to principle 21 of the Stockholm Declaration<sup>3</sup> in paragraph (4), as the omission could give the reader of the paragraph a wrong impression.

49. Mr. Sreenivasa RAO (Special Rapporteur) referred Mr. Hafner to paragraph (3), which included a mention of principle 2 of the Rio Declaration.

<sup>1</sup> See 2527th meeting, footnote 16.

<sup>2</sup> Ibid., footnote 8.

<sup>3</sup> See 2529th meeting, footnote 7.

\* Resumed from the 2546th meeting.

50. Mr. HAFNER said that, although he was aware that principle 2 of the Rio Declaration was mentioned in paragraph (3), he believed it should also be included in paragraph (4), the third sentence of which would therefore read: “. . . not only in principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration, but also in . . .”.

51. Mr. Sreenivasa RAO (Special Rapporteur) said that he had no objection to the addition.

*The general commentary, as amended, was adopted.*

*Commentary to article 1*

52. Mr. Sreenivasa RAO (Special Rapporteur) said that the commentary to article 1 had been taken almost verbatim from the draft at the forty-eighth session.

*The commentary to article 1 was adopted.*

*Commentary to article 2*

53. Mr. Sreenivasa RAO (Special Rapporteur) said that the commentary followed the text used in the draft at the forty-eighth session except that it defined “harm” as including harm caused to persons, property or the environment.

*The commentary to article 2 was adopted.*

*Commentary to article 3 (A/CN.4/L.554/Add.1 and Add.1/Corr.1 and 2)*

54. Mr. Sreenivasa RAO (Special Rapporteur) drew attention to the additional text contained in documents A/CN.4/L.554/Add.1/Corr.1 and 2.

55. Mr. HAFNER, supported by Mr. ROSENSTOCK, suggested that the words “harm, which has a risk of causing” at the end of the second sentence of new paragraph (14) should be deleted. The text would therefore read: “. . . to avoid or prevent serious or irreversible damage”.

56. Mr. Sreenivasa RAO (Special Rapporteur) said that he had no objection to the change.

*The commentary to article 3, as amended, was adopted.*

*Commentary to article 4 (A/CN.4/L.554/Add.1)*

57. Mr. Sreenivasa RAO (Special Rapporteur) said that the commentary in the draft at the forty-eighth session which linked the principle of cooperation to the principle of prevention had been retained and recommended its adoption.

*The commentary to article 4 was adopted.*

*Commentary to article 5 (A/CN.4/L.554/Add.1 and Add.1/Corr.2)*

58. Mr. Sreenivasa RAO (Special Rapporteur) drew attention to new paragraph (1) *bis* contained in document A/CN.4/L.554/Add.1/Corr.2.

59. Mr. PELLET said he believed that new paragraph (1) *bis* was too general and failed to cite precedents. Moreover, article 5 referred to only one category of meas-

ure that States should take; therefore the words “some measures” should be replaced by “one measure”.

60. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt new paragraph (1) *bis*.

*It was so agreed.*

*The commentary to article 5 was adopted.*

*Commentary to article 6 (A/CN.4/L.554/Add.1)*

61. Mr. Sreenivasa RAO (Special Rapporteur) said that the commentary was substantially the same as that of the draft at the forty-eighth session.

62. Mr. HAFNER requested clarification of the phrase “including any other primary rule operating within the realm of the law of State responsibility” in the second sentence of paragraph (2).

63. Mr. Sreenivasa RAO (Special Rapporteur) said that the phrase meant that State responsibility rules applied whenever what was or was not prohibited was unclear.

64. Mr. HAFNER said that, since the Commission was proceeding on the assumption that State responsibility was only a secondary type of norm, there could be some confusion between what was primary and what was secondary. He therefore suggested that in the second sentence the words “operating within the realm of the law of State responsibility” should be deleted. It followed automatically from the primary rules that a breach of those rules entailed State responsibility.

65. Mr. Sreenivasa RAO (Special Rapporteur) said that he found Mr. Hafner’s thesis logical to a fault, but he accepted it.

*The commentary to article 6, as amended, was adopted.*

*Commentary to article 7 (A/CN.4/L.554/Add.1 and Add.1/Corr.2)*

66. Mr. Sreenivasa RAO (Special Rapporteur) said that the text of the commentary at the forty-eighth session had been used, but that he had added a paragraph (6) *bis* to take into account the recent comments of members of the Commission (A/CN.4/L.554/Add.1/Corr.2).

67. Mr. PELLET recalled that the title of the article had changed from “Prior authorization” to “Authorization”, a fact that should be reflected in the commentary. Moreover, he proposed that a paragraph should be added, after either (6) or (6) *bis*, reading: “According to one view, the obligation to retrospective authorization imposed an excessive burden on operators in the context of activities not prohibited by international law.”

68. Mr. Sreenivasa RAO (Special Rapporteur) said that Mr. Pellet’s point would be reflected in the commentary.

69. In reply to a question from Mr. BENNOUNA, he said that, although the commentary should reflect the opinions of the Commission as a whole, it was preferable to exercise greater flexibility on first reading and reflect some of the individual opinions.

*The commentary to article 7, as amended, was adopted.*

*Commentary to article 8 (A/CN.4/L.554/Add.1)*

70. Mr. Sreenivasa RAO (Special Rapporteur) said that the commentary had been updated since the forty-eighth session to reflect minor changes in the article, but the substance remained the same.

71. Mr. HAFNER said that, according to the first sentence of paragraph (1), States should ensure that environmental impact assessments of hazardous activities were carried out, whereas the article itself expressed not a recommendation but an obligation on States to carry out such assessments. The words "should ensure" should therefore be replaced by some form of words such as "are under an obligation to ensure".

72. Mr. Sreenivasa RAO (Special Rapporteur) said that from his reading on the subject, including a report by UNDP, he knew that many States had adopted or were adopting appropriate legislation. However, many other States were still seeking guidance because of the practical difficulties arising from the complexity of the environmental impact assessments required, and strengthening the obligation on them would not help to surmount their practical difficulties. The wording in question should be left in its form at the forty-eighth session because there had been little change in the situation since then.

73. Mr. HAFNER said that he reserved his position on the use of the words "should ensure".

74. Mr. PELLET said that it was important to reflect individual members' views, if not in commentaries to articles, then at least in the records of discussion. He proposed that the beginning of paragraph (6) should be amended to read: "It was noted with regret that article 8 was very perfunctory and lacked precision concerning environmental impact assessments. However, . . .".

75. Mr. ROSENSTOCK said that while it was true that, on first reading, the commentary often included dissenters' views, members had a duty to show restraint. In any case, the appropriate place for dissenting views or reservations to be reflected was after the expression of the majority view.

76. Mr. Sreenivasa RAO (Special Rapporteur) said that he was quite willing to accommodate the request for dissenting views to be reflected. However, in the specific case of the commentary to article 8, he again stressed the complexity of the issue and drew the Commission's attention to the footnote to paragraph (5), which listed the information to be included in the documentation pursuant to article 4 of the Convention on Environmental Impact Assessment in a Transboundary Context. Systematization work was not only complex but ongoing. Article 8 must provide guidelines for States without straitjacketing them, and he therefore believed that the words "regret", "perfunctory" and "lacked precision" were too strong.

77. Mr. CRAWFORD, supported by Mr. HAFNER, endorsed Mr. Pellet's proposal, as modified by what Mr. Rosenstock had said.

78. Mr. PELLET said that whether or not article 8 had changed since the forty-eighth session did not prevent some members regretting that it was very perfunctory. Nor was it too strong to say that the article lacked precision. He expressed surprise at the negative reaction to his proposal, given that his point of view was not an isolated one.

79. Mr. ECONOMIDES, after expressing support for Mr. Pellet's opinion on the question of dissenting views, pointed out that the practice of including such views in the commentaries had not always been followed at the forty-ninth session.

80. Mr. Sreenivasa RAO (Special Rapporteur) said that, although the Commission could have debated what the elements for an environmental assessment should be, he did not believe that it had. He had therefore been obliged to live with the draft article and commentary as they were. Where Mr. Pellet's proposal was concerned, his main problem was with the notion of "regret". He would willingly say that some members believed that the Commission should have provided States with more elaborate guidance on environmental impact assessments in the hope that some such wording would subsume Mr. Pellet's proposal.

81. Mr. PELLET repeated his view, which was that the article was very perfunctory and he regretted that it was very perfunctory.

82. Mr. Sreenivasa RAO (Special Rapporteur), at the request of the CHAIRMAN, undertook to provide wording that would reflect the views expressed at the meeting.

*Commentary to article 9*

83. Mr. Sreenivasa RAO (Special Rapporteur) recalled that the new wording of the article extended the provision of relevant information by a State, in which a given project was to take place, to the public likely to be affected by it, including the public beyond the State's borders. The commentary had consequently been amended.

*The commentary to article 9 was adopted.*

*Commentary to article 10*

84. Mr. Sreenivasa RAO (Special Rapporteur) said that the article and the commentary were of long standing, the only change being the replacement in paragraph 1 of the article of the notion of "without delay" by the concept of "timely notification" from the Rio Declaration, as reflected in paragraph (4) of the commentary.

*The commentary to article 10 was adopted.*

*Commentary to article 11 (A/CN.4/L.554/Add.1 and Add.1/Corr.2)*

85. Mr. Sreenivasa RAO (Special Rapporteur) recalled that the article had occasioned some discussion. He drew the Commission's attention to new paragraph (12) contained in document A/CN.4/L.554/Add.1/Corr.2, which reflected an important dissent by one member. In addition, the last sentence of paragraph (10) should be deleted.

*The commentary to article 11, as amended, was adopted.*

*Commentary to article 12 (A/CN.4/L.554/Add.1 and Add.1/Corr.1 and 2)*

86. Mr. Sreenivasa RAO (Special Rapporteur) recalled that there had been substantial discussion of the article, with a reprioritization and reordering of subparagraphs. He drew attention to the additional text contained in documents A/CN.4/L.554/Add.1/Corr.1 and 2, which reflected the discussions at the 2561st meeting and in the Drafting Committee.

*The commentary to article 12, as amended, was adopted.*

### Tribute to the Secretary to the Commission

87. The CHAIRMAN read out the following draft resolution:

*“The International Law Commission,*

*“Acknowledging the important contribution made by Mr. Roy Lee to the work of the International Law Commission and to the codification and the progress in the development of international law,*

*“1. Expresses its gratitude to him for the friendly and efficient manner in which he has guided and assisted the International Law Commission;*

*“2. Extends its very best wishes to him on the occasion of his retirement.”*

*The draft resolution was adopted.*

*The meeting rose at 1.10 p.m.*

## 2564th MEETING

*Friday, 14 August 1998, at 3.15 p.m.*

*Chairman: Mr. João BAENA SOARES*

*Present: Mr. Bennouna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Galicki, Mr. Goco, Mr. Illueca, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Yamada.*

### Draft report of the Commission on the work of its fiftieth session (concluded)

**CHAPTER VI. *International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)* (concluded) (A/CN.4/L.554 and Corr.1 and 2 and Add.1 and Add.1/Corr.1 and 2 and Add.2 and Add.2/Corr.1)**

**C. Text of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage for hazardous activities) provisionally adopted by the Commission on first reading (concluded) (A/CN.4/L.554/Add.1 and Add.1/Corr.1 and 2 and Add.2 and Add.2/Corr.1)**

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (concluded)

*Commentary to article 8 (concluded) (A/CN.4/L.554/Add.1)*

1. Mr. Sreenivasa RAO (Special Rapporteur), taking into account the concerns expressed by some members (2563rd meeting), proposed that the following sentence should be inserted after the first sentence of paragraph (6) of the commentary to article 8: “Some members, however, felt that it was desirable and necessary that the draft articles should have elaborated on the elements of the environment impact assessment for the guidance of States.”

*The commentary to article 8, as amended, was adopted.*

*Commentary to article 13 (A/CN.4/L.554/Add.2)*

2. Mr. Sreenivasa RAO (Special Rapporteur) explained that article 13 of the draft at the forty-eighth session<sup>1</sup> had been amended. The commentary summarized the discussions that had led to those changes. It should also be specified in the commentary that the phrase “within a reasonable time” had the same connotation in article 13, paragraph 2, as in article 10, paragraph 2.

*The commentary to article 13 was adopted.*

*Commentary to article 14*

*The commentary to article 14 was adopted.*

*Commentary to article 15*

3. Mr. Sreenivasa RAO (Special Rapporteur) proposed that the last sentence of paragraph (3) of the commentary to article 15 should be reformulated as follows: “Article 15 essentially encourages and relies on the good faith cooperation of the parties.”

*The commentary to article 15, as amended, was adopted.*

*Commentary to article 16*

*The commentary to article 16 was adopted.*

<sup>1</sup> See 2527th meeting, footnote 16.

*Commentary to article 17 (A/CN.4/L.554/Add.2 and Add.2/Corr.1)*

4. Mr. Sreenivasa RAO (Special Rapporteur) recalled that article 17 had been subjected to fairly lengthy consideration by the Commission, which had led to the proposed amendments to paragraphs (9) and (10) of the commentary contained in document A/CN.4/L.554/Add.2/Corr.1.

5. Mr. ROSENSTOCK questioned whether the proposed amendment to paragraph (10) of the commentary might not raise doubts concerning the compulsory character of the procedure set out in the article.

6. Mr. GALICKI noted that paragraph (3) of the commentary to article 17 outlined a range of dispute settlement methods that was broader than that contained in paragraph 1 of the article.

7. Mr. SIMMA proposed that paragraph (3) of the commentary should be brought into line with paragraph 1 of the article by deleting the reference, in the English version, to “good offices” in the first-mentioned paragraph.

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

*Section C.2, as amended, was adopted.*

1. TEXT OF THE DRAFT ARTICLES (A/CN.4/L.554/Add.1)

8. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the text of the draft articles.

*It was so agreed.*

*Section C.1 was adopted.*

**B. Consideration of the topic at the present session (concluded) (A/CN.4/L.554 and Corr.1 and 2)**

9. Mr. Sreenivasa RAO (Special Rapporteur) recalled that, at the time of the adoption of document A/CN.4/L.554, it had been decided to retain paragraphs 4 to 26 of the document. That decision was no longer justified, as the Commission had adopted a full set of articles together with commentaries. The practice of the Commission, which was to transmit the results of its work to the General Assembly as a collective endeavour, without the usual presentation of the views expressed during the debate, made it necessary to delete paragraphs 4 to 26.

*Section B, as amended, was adopted.*

10. Mr. PELLET proposed that a sentence should be inserted in the report expressing the Commission’s appreciation to the Special Rapporteur, who had completed his difficult task in record time.

*It was so agreed.*

*Chapter VI, as a whole, as amended, was adopted.*

**CHAPTER I. Organization of the session (A/CN.4/L.566)**

11. The CHAIRMAN said that the following names should be added to the list of members of the Working Group on unilateral acts of States contained in paragraph 8 (b) of the English version of the document: Mr. Nabil Elaraby, Mr. Gerhard Hafner, Mr. Qizhi He, Mr. Igor Lukashuk, Mr. Václav Mikulka, Mr. Didier Operti Badan and Mr. Christopher John Robert Dugard (ex officio).

*Chapter I, as amended, was adopted.*

**CHAPTER II. Summary of the work of the Commission at its fiftieth session (A/CN.4/L.571)**

12. Mr. PELLET proposed that it should be stated in paragraph 6, concerning the topic “Reservations to treaties”, that the Commission had adopted eight draft guidelines, not seven, thus also including the “umbrella” guideline.

*Chapter II, as amended, was adopted.*

*The draft report of the Commission on the work of its fiftieth session, as a whole, as amended, was adopted.*

### **Closure of the session**

13. The CHAIRMAN thanked his colleagues, particularly the members of the bureau and the Chairman of the Drafting Committee, for the patience, understanding and support they had shown throughout the session, thus enabling the Commission to maintain its tradition of efficiency and to achieve important results. He also expressed his appreciation to all the members of the secretariat who had assisted the Commission, both at Geneva and in New York.

14. Messrs BENNOUNA, GOCO, ILLUECA, KUSUMA-ATMADJA, MIKULKA and PELLET, speaking on behalf of their regional groups, paid tribute to the unwavering professionalism and personal qualities of the Chairman.

15. After the usual exchange of courtesies, the CHAIRMAN declared the fiftieth session of the International Law Commission closed.

*The meeting rose at 4 p.m.*



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